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JEFFERSON--33 GRATTAN.

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REPORTS OF CASES
DECIDED IN THE
SUPREME COURT OF APPEALS,
AND IN THE
GENERAL COURT,
OF
VIRGINIA.

BY PEACHY R. GRATAN.

VOLUME VII.

FROM APRIL 1, 1850, TO JULY 1, 1851.

Entered according to the Act of Congress, this thirteenth day of January,
one thousand eight hundred and fifty-two, for the

COMMONWEALTH OF VIRGINIA,

In the Clerk's Office of the District Court of the Eastern District of Virginia.

JUDGES
OF THE
COURT OF APPEALS
DURING THE TIME OF THESE REPORTS.

WILLIAM H. CABELL, PRESIDENT.
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BRISCOE G. BALDWIN. WILLIAM DANIEL.
RICHARD C. L. MONCURE.†

Attorney General: SIDNEY S. BAXTER.

*Judge Brooke died on the 3d of March 1851.

†Elected March 13th, 1851, to fill the vacancy occasioned by the death of Judge Brooke.

JUDGES
OF THE
GENERAL COURT
DURING THE TIME OF THESE REPORTS.

DANIEL SMITH.*	EDWARD JOHNSTON.
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DANIEL A. WILSON.	

*Judge Smith died on the 8th of November 1850.

†Judge Douglass died on the 1850.

‡Elected on the 6th of December 1850, to fill the vacancy occasioned by the death of Judge Smith.

§Elected on the 16th of January 1851, to fill the vacancy occasioned by the death of Judge Douglass.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Watson v. Fletcher.

Fletcher v. Watson.

April Term, 1850, Richmond.

1. **Equity Practice—Gambling Partnerships—Right of Partners to Contribution.**—A court of equity will not lend its aid for the settlement and adjustment of the transactions of a partnership for gambling. Nor will it give relief to either partner against the other, founded on transactions arising out of such partnership, whether for profits, losses, expenses, contribution or reimbursement.

2. **Same—Same—Failure of Pleadings to Show Nature of Proof—Case at Bar.**—Though the pleadings do not shew that the transactions sought to be settled and adjusted, arose out of a partnership for gambling; yet if this appears from the evidence taken before the commissioner who was directed to settle the accounts, it is proper for the Court to recommit the accounts, and direct an enquiry into the consideration on which the claims of the parties are founded.

3. **Gambling Partnership—Death of One Partner—Qualification of Survivor on Estate—Right to Question Title.**—One of the partners qualifies an administrator of the other, and there is personal property belonging to the partnership, which had been bought and used for the partnership purposes. The administrator cannot question the title of his intestate to his moiety of this property, on the ground that it was bought and used for gambling purposes.

2 *4. **Same—Same—How Personal Property Divided.**—The whole, and not a moiety, of the personal property belonging to the partnership must be sold, and the proceeds divided between the living partner and the estate of the deceased partner.

3. **Equity Practice—Settlement of Partnership Accounts—Case at Bar.**—Two partners own real estate jointly. One of them dies, having made a will subjecting his whole estate to the payment of his debts, and having, subsequent to making the will, conveyed real and personal estate of his own to his sole devisee and legatee. The surviving partner qualifies as administrator with the will annexed; and then files a bill against the devisee and legatee, charging that his testator was largely indebted to him, and seeking to set aside the conveyances as without consideration, and void as to creditors, and to have his claims established. He then offers for sale his testator's undivided moiety of the real estate owned by them jointly. **HELD:** That having by his bill invoked the jurisdiction of the Court to establish the validity of his claims as creditor, and the invalidity of the conveyances, he thereby placed his whole trust and authority under the control and direction of the Court; and

it was an abuse of his fiduciary relation to proceed to sell the said real estate before an adjudication of the matters in controversy between himself and the devisee and legatee; and the sale was properly restrained by injunction at the suit of the devisee and legatee.

On the 26th of February 1844, Thomas R. Comer made his will, by which, after directing that his debts should be paid, he gave the whole residue of his estate, real and personal, to Ellen Fletcher; and he appointed Samuel H. Myers his executor. On the 11th of April following, Comer, upon the consideration, as stated in the deed, of 1500 dollars, conveyed to Ellen Fletcher a house and lot on L street, near Bacon Quarter branch; and on the same day by another deed, on the consideration as stated therein, of 300 dollars, he conveyed to Ellen Fletcher all the personal property in said house. Comer died on the 23d of April 1844, and his will was duly admitted to probat in the County court of Henrico, when Samuel H. Myers having refused to qualify as executor, administration with the will annexed, was committed to Thomas D. Watson.

On the 6th of June 1844, Watson, in his own right, and as administrator with the will annexed of Comer, *filed his bill in the Superior court of chancery for the Richmond circuit, against Ellen Fletcher, in which, after stating the foregoing facts, he said that he was only induced to qualify as administrator with the will annexed upon the estate, because he was a large creditor of Comer. That Comer and himself had purchased jointly, a house and lot on 14th street, in the City of Richmond, for which they agreed to give 8000 dollars, of which the complainant had paid the whole amount; and a deed had been made to Comer and himself for the house and lot; so that complainant had a claim against Comer's estate for 4000 dollars, and an equitable lien on Comer's moiety of the said house and lot; and it was doubtful whether the said moiety would reimburse the complainant the advances made by him. That in addition to this debt, Comer was indebted to the complainant in the following sums, viz: 415 dollars, with interest from the 18th of April 1840; 2795 dollars 87 cents, with interest from the 15th of October 1842; and 1000 dollars for money loaned to him or paid for him, for which sums complainant had vouchers; thus making Comer's indebtedness to the complainant about 8000 dollars.

The plaintiff further charged that few, if any, debts were due to Comer; and that the whole means which could be relied on from this source, would not be more than 1000 dollars; and this, with the moiety of the house and lot aforesaid, would not exceed 5000 dollars of available means for the payment of Comer's debts. That at the time of making his will, he had sufficient capacity for executing such a paper; but between that period and the 11th of April, when the deeds aforesaid were executed, from constant excitement, his mind became greatly impaired, and he was on the 11th of April, totally incapable of discreetly disposing of his property, or entering into any contract; and for this reason, the said deeds

ought to be treated as nullities. That
4 moreover, *the said Ellen Fletcher, who was a free mulatto, and had been the mistress of Comer for some years, never paid one dollar for this property; that she never was worth 1800 dollars, but that she was at all times, dependent on Comer for the support of herself and her relations. That the property thus conveyed was worth at least 4000 dollars: that the conveyances were fraudulent, and were contrived and designed to defeat the payment of the debts of Comer. That the said Ellen Fletcher had entered upon and taken possession of the real and personal estate so conveyed to her, and the complainant apprehended that for the purpose of consummating the fraud, she would sell the personal property conveyed to her; which would then be wholly lost to the estate and creditors of Comer, as Ellen Fletcher had no means to make satisfaction for the value of the property. He therefore prayed for an injunction to restrain the said Ellen Fletcher from alienating the said house and lot; and that the Court would direct the sheriff to take possession of the personal property aforesaid, and hold the same subject to the future order of the Court, unless Ellen Fletcher should give bond with approved security to have the same forthcoming subject to the final decree of the Court. That the Court would set aside the deeds aforesaid, and subject the said property to the payment of Comer's debts; and grant to the plaintiff such other and further relief as might seem just and equitable.

The Court overruled the plaintiff's application for an injunction in his character of administrator with the will annexed of Thomas R. Comer; and also rejected his motion to enjoin the sale of the real property charged in the bill to have been fraudulently conveyed by Comer to the defendant, being of opinion that the lis pendens created by filing the bill, afforded adequate protection; but on the ground of the defendant's alleged insolvency, the Court
5 awarded to the plaintiff in his individual *character an injunction to restrain the defendant from selling the personal property conveyed in one of the deeds of the 11th of April 1844, until the further order of the Court.

On the 25th of June, Ellen Fletcher filed

her bill in the same Court against Thomas D. Watson in his own right, and as administrator with the will annexed of Thomas R. Comer. She stated the death of Thomas R. Comer, and the admission of his will to probat; and further stated that at the time of his death, he was the partner of Thomas D. Watson, and that they were the joint owners of a house and lot on 14th street in the city of Richmond; and that they were jointly and equally interested in numerous and large outstanding claims against various individuals; and that Watson was indebted to Comer for his share of numerous debts which were due to them jointly, and had been collected by Watson, some of which she mentioned, and among them a debt of 3000 dollars and upwards collected by Watson of James Garden of the county of Charlotte. This debt was secured by a deed of trust upon land and slaves, which were sold to satisfy it, and were purchased by Watson, and retained by him; thereby making him chargeable to Comer for one moiety of the debt.

She further charged that Watson had advertised the undivided moiety of the house and lot on 14th street, for sale at public auction, upon the pretence that Comer was largely indebted to him, which she charged, was not true if a fair settlement of accounts between the said Watson and Comer was had. That though Watson held a bond of Comer's for about 2500 dollars, the amount of that bond, and probably no part of it, was due, if a fair settlement was made, and the credits to which Comer was entitled, were allowed. That although Watson may have made the payments to Galt for the
6 house and lot on 14th street, the payments were *not made out of his own private funds; and that Comer made large payments for the repairs and improvement of said house, for which he was entitled to credit. That under these circumstances, even if Watson was entitled to sell the house and lot, which she was advised was at least questionable, yet it would be unjust and injurious to the complainant to permit him to sell an undivided moiety thereof before a settlement of his account with Comer was had, so as to ascertain whether a sale would be necessary. She therefore prayed that Watson might be required to render a full account of all moneys received by him, to any portion of which Comer was entitled; that he might exhibit all his claims against the estate of Comer, and fairly settle the account between himself and said estate; that he might be enjoined from selling the undivided moiety of the said house and lot until the further order of the Court; and for such other and further relief as her case might require, and to equity might seem meet.

The injunction was granted as prayed for in the bill.

In July 1844 Watson answered the bill. He denied that Comer was his partner at the time of his death. He alleged that he had paid the whole purchase money of the house and lot on 14th street, and that the

improvements and repairs thereon were paid for out of money furnished by him; and that Comer was not only indebted to him for his proportion of the purchase money and of the costs of the repairs and improvements made upon the house, but was indebted to him to a large amount in addition thereto. He denied that he was indebted to Comer for his share of numerous debts which were due to them jointly, and had been collected by him, or that he owed Comer one dollar on that account. He alleged, that on the 15th of October 1842 they had a settlement of all accounts between

7 them, (except the sum of 415 dollars, for which Comer *had previously executed to him his bond,) on which settlement Comer was found indebted to him in the sum of 2795 dollars 87 cents, for which he executed his bond. He denied he was indebted to Comer on account of the debt of Garden, in any form whatever. He said Garden was not jointly indebted to Comer and himself, but was indebted severally to each in different sums. He denied that Comer's estate was sufficient to pay his debts without a sale of the lot on 14th street, or that on L street, in which the plaintiff Ellen Fletcher lived.

Upon filing his answer Watson moved the court to dissolve the injunction; but the Court overruled the motion, and made a decree that he render before one of the commissioners of the court an account of his administration of the estate of Comer; and the commissioner was authorized to examine the defendant upon oath touching the subject matter of the accounts, if required by the plaintiff. On the 25th of February 1845 Ellen Fletcher filed her answer to Watson's bill. She admitted the execution of the conveyances by Comer, but denied he was incompetent at the time. She admitted, too, that she did not pay to Comer money for the property conveyed to her, and that he was prompted in a great measure by regard for her to make the conveyances. She denied that Watson was a creditor of Comer; or if he was, the estate of Comer was ample to pay him and all other of his creditors, without touching the property conveyed to her. If it was not she would make no question of that property being liable for the payment of Comer's debts. That she was, however, the devisee of the whole of Comer's estate, after the payment of his debts, and the plaintiff admitted that his will was valid.

8 In March 1845 the Court made a decree in the case of Watson v. Fletcher, that the plaintiff should render *before a commissioner of the Court, an account of his administration upon the estate of Thomas R. Comer, deceased, and of all debts due to or from the estate of said Comer, and from whom and to whom due; and that the same commissioner should take and state an account of the value of the personal estate held by the defendant, and conveyed to her by the deed of the 11th of April 1844.

In pursuance of this decree, the commis-

sioner reported in May 1845, that the personal property held by the defendant under the deed from Comer, was of the value of 308 dollars 33 cents. And he reported that by consent of parties, the other accounts directed by the decree, were reported in the case of Fletcher v. Watson.

In the case of Fletcher v. Watson, the commissioner reported a balance of 22 dollars 25 cents, due from Watson as administrator of Comer. In stating the private account between Watson and Comer, the commissioner assumed that the bond dated the 15th of October 1842, for 2795 dollars 87 cents, which was executed on a settlement of accounts between them, closed all their accounts up to that period. This bond was therefore charged as the first item in the account. There were then other credits to Watson for all payments made after the execution of the bond, for the house and lot on 14th street, and for taxes, and repairs done to the house, and moneys due to them jointly, which had been paid to Comer; and the credits to Comer were for payments made by him for repairs and moneys received by Watson. And the balance reported to be due to Watson on this account, on the 31st of December 1844, was 6911 dollars.

The plaintiff Fletcher excepted to the report of the commissioner; 1st. Because Watson was allowed a credit for payments made to Galt for the house and lot on 14th street, after the 15th of October 1842, whilst all credits to Comer prior to that period, as for instance, Garden's debt, were excluded.

9 *There were other exceptions to the omission of particular items of charge against Watson and credits to Comer, of the latter of which one was for failing to credit Comer for 1788 dollars 54 cents, paid by him for improvements and repairs to the house, and expenses of the establishment.

In June 1845, the Court recommitted the report with the exceptions to the same commissioner, with instructions to make a general and thorough re-settlement of the accounts between Watson and Comer; and that he should require Watson to state, and shew as far as practicable, the true consideration, and all the particulars which constituted the amount of Comer's bond to Watson, for 2795 dollars 87 cents, and to render an account of all partnership property, if any. And the commissioner was authorized to examine the defendant Watson upon oath touching the said accounts, if required by the plaintiff, or deemed necessary by himself.

The evidence taken when the accounts were before the commissioner, and which was in the record when the last order was made, throw suspicion over the accounts between Watson and Comer; and although it was not positively stated by any of the witnesses, that the connexion between them was for gambling purposes, yet both from the witnesses and their evidence, this was strongly to be inferred. It appeared too,

that on the 15th of September 1841, Watson had received from a sale of the property of James Garden, on account of a debt due from Garden to Comer, a sum of money which he afterwards admitted to be 1065 dollars 46 cents.

When the case went before the commissioner under the order last mentioned, the examination of Watson left no doubt at all, that a gambling establishment was conducted in the upper part of the house on 14th street, and that Watson and Comer were partners in that establishment. It

10 appeared, too, that certainly many of the items of account between them was connected with that business; and the doubt was, whether all of them were not. The Court below thought they were; this Court excepted the purchase of the house and lot, and Garden's debt.

The commissioner first reported an account to shew the consideration of the bond of 2795 dollars 87 cents, and according to his statement, after crediting Comer with Garden's debt at 1065 dollars 46 cents, and also crediting him with his payments for improvements and repairs upon the house on 14th street, and also for supplies furnished the gambling establishment; and excluding the bond of 415 dollars mentioned in the plaintiff's bill, he stated the amount due from Comer to Watson on the 15th of October 1842 at 2774 dollars 6 cents. The report stated Comer's indebtedness on the 31st December 1844, at 6909 dollars 55 cents of principal, and 872 dollars 46 cents of interest.

The plaintiff, Ellen Fletcher, excepted to this report, for every charge in the account for money paid as capital or expenses for the gaming establishment; to every charge not supported by testimony other than the oath of Watson; to the due bill for 415 dollars; to all credits on account of payments to Galt, on the ground that they were covered by the bond of the 15th of October 1842; and as against that bond, she claimed a credit for Garden's debt, and some other debts which she claimed that Watson had collected.

In April 1847, the Court made another decree in these causes, by which the accounts were recommitted, with directions to the commissioner to state an account of all sums paid by Comer in his lifetime, and by Watson respectively, on account of the purchase of the house and lot on 14th street, and for repairs, taxes and other expenses thereof, and also of all sums received, expended or advanced by either for the other, in or about any bona fide dealing or transaction; omitting, however, the

11 rents of the lower part of the said house to the period of Comer's death, and all bills paid the tenant by either of the said parties for clothing furnished the other during the same period.

Upon the account in relation to the house on 14th street, the report stated that there was due to Watson, on the 15th of October 1842, the sum of 2072 dollars 22 cents, and on the 20th January 1844, there was due the

sum of 5378 dollars 88 cents. And for other bona fide advances by Watson to Comer, there was due on the 1st of February 1844, 923 dollars 45 cents. There were exceptions to this report by Ellen Fletcher, but it is not necessary to state them.

In the progress of the cause, the Court, on the motion of the defendant Watson, made a decree, that, unless the plaintiff, Ellen Fletcher, should execute a bond with satisfactory security, with condition to account for the rents of the real estate conveyed to her by Comer, that the sheriff should take possession thereof as the receiver of the Court.

It is not deemed necessary to extend this statement by setting out more particularly, the items in these accounts. Those which are commented on by the Judge, are sufficiently explained in his opinion, and any further explanation of them is not necessary to a correct understanding of the principles involved in the cause.

The two causes came on to be heard together on the 30th of June 1847, when the Court decreed that the injunctions awarded the parties, should be dissolved; the order for the appointment of a receiver should be set aside; and the bills of the plaintiffs, respectively, should be dismissed without costs. From this decree, the plaintiffs in the causes, respectively, applied to this Court for an appeal which was allowed.

Stanard & Bouldin for Watson, and Lyons for Fletcher, submitted the causes.

12 *BALDWIN, J. In these causes it appears from the record that Watson and Comer, gamblers by profession, were associated several years in one or more co-partnerships for gaming purposes, during which others were connected with them, from time to time, as sub-partners. The particular partnership out of which this controversy has arisen existed early in the year 1841, and perhaps previously, and continued until Comer's death in the month of April 1844. The information which we have of the operations of this concern, is mainly in regard to an establishment on 14th street in Richmond, where a faro bank, with its appurtenances, was kept, in a house purchased by Watson & Comer from Galt, on the 1st of February 1841, at the price of \$8000, of which one third was to be paid in cash and the residue in two equal annual instalments. At the date of this contract the house and lot was conveyed by the vendor to the purchasers jointly, and the deferred instalments were secured by the joint bonds of the latter, and a deed of trust which they gave upon the property.

Of the terms of this gaming partnership we have but little reliable or distinct information. It does not appear that there was any written partnership agreement, or that there were any partnership books, or that any other means now accessible have been preserved, of ascertaining the capital stock invested in the business, or its expenses, profits and losses, or the advances made to or receipts from the concern, by the

respective partners, or to or from each other upon the faith of the partnership funds or resources. In short, there are no adequate materials for a settlement and adjustment of the partnership affairs for the purpose of ascertaining any supposed rights or interests of the parties litigant therein, or their respective claims against each other arising therefrom, if such settlement and adjustment were at all allowable in a court of justice.

13 *But it is clear that a Court of equity will not lend its aid for such a purpose, nor give relief to either partner against the other, founded upon transactions arising out of their immoral and unlawful partnership, whether for profits, losses, expenses, contribution or reimbursement. I am not aware of any reported case in relation to a gambling partnership; but the principle is a general one in reference to partnerships prohibited by law or for an unlawful purpose; and prevails at law as well as in equity. Coll. Part. 50, ed. of 1848; Gow. Part. 119; 1 Bac. Abr. 109, n. Assump. A, ed. of 1846; Aubert v. Maze, 2 Bos. & Pul. 371; Holman v. Johnson, Cowp. R. 343; Watson Part. 5, 7; Griswold v. Waddington, 16 John. R. 438, 486, 489; Mitchell v. Cockburn, 2 H. Bl. 379; Knowles v. Haughton, 11 Ves. R. 168. And it is applicable with peculiar force to such an association as the one developed in this controversy, the object of which was a tissue of offences, and a course of conduct denounced, restrained and severely punished by law; and moreover not only contrary to good morals, but highly prejudicial to the public interests. There is in the administration of justice but one rational and politic treatment of the mutual claims of such associates, thus springing out of their spoliations upon society, and that is, to refuse them all aid in the prosecution of their respective demands of that nature against each other. Of this the parties litigant and their counsel in the Court below were doubtless apprised, and accordingly we find that the true character of the association and of its operations is withheld from the pleadings; but it is sufficiently exposed by the evidence.

Comer, at his death, left a will, by which he gave all his estate, real and personal, to Ellen Fletcher, a woman who had lived with him a number of years in a state of illicit intercourse, charged, however, with the payment of his debts, and directing

14 that his other *property should be sold before the house and lot where he resided on L street. The will was admitted to probat, and the executor named therein declining to take upon himself the burthen thereof, Watson qualified as administrator with the will annexed, and took possession of the decedent's papers. The testator, however, after the making of his will, and shortly before his death, executed deeds to Fletcher, by which he conveyed to her the house and lot on L street, and his furniture therein.

Watson, soon after his qualification as

administrator, filed his bill in that character, and also in his individual right, against Fletcher, in which he alleged himself to be a creditor of his testator's estate to a large amount, specifying his claims to be, 1, Comer's moiety of the purchase money of the house and lot on 14th street, the whole of which he charged that he had himself paid, and for which moiety he represented that he had an equitable lien on Comer's undivided moiety of that property, the sufficiency of which for his reimbursement he considered very doubtful; 2, the sum of 415 dollars, with interest from the 18th of April 1840; 3, the sum of 2795 dollars 87 cents, with interest from the 15th of October 1842; 4, about 1090 dollars for money loaned to or paid for him. For all these claims he alleged that he had vouchers, but these were not exhibited with the will. He represented that, being the personal representative of Comer, he could not sue himself, and thus place his debts on the footing of judgments, as other creditors differently situated might do. He further represented the insufficiency of assets, and charged that Comer, at the time of executing the deeds above mentioned, was, from the disordered state of his mind, incapable of contracting, and that the deeds were without consideration and fraudulent. And he prayed an injunction to prevent the defendant from disposing of the property conveyed, and

15 that the deeds *might be declared null and void, and the property to belong to his testator's estate, and subject to the payment of his debts.

We need not consider whether the provision in Comer's will for the payment of debts was a mere charge upon his estate for that purpose, with a direction as to the order in which that charge should be enforced; or a devise of lands to be sold for the same purpose, to be executed under our statute, 1 Rev. Code, ch. 104, § 52, p. 388, by his personal representative. Watson himself seems to have thought, that as administrator, with the will annexed, he had authority to make sales of his testator's real estate, as well as personal, and he appears from the language of his bill to have only desired the aid of the Court to remove out of his way the deeds to Fletcher, which invested her with the title to the property thereby conveyed, and operated pro tanto as a revocation of the charge for payment of debts. And we find that a few days after filing his bill and obtaining his injunction, he advertised a sale of Comer's undivided moiety of the house on 14th street, and of the furniture therein. In this he acted improperly and oppressively. Having invoked the jurisdiction of the Court to establish the validity of his claims as creditor, and the invalidity of the conveyances to Fletcher, he thereby placed his whole trust and authority under the control and direction of the Court, and it was an abuse of his fiduciary relation to proceed to sell an important portion of the real estate, before an adjudication could be had of the matters in controversy between him and the only object

of his testator's bounty. To arrest the contemplated sale, Fletcher filed her bill, and the injunction which she prayed was granted. Her bill, and her answer subsequently filed to Watson's bill, put in issue the justice of his demands, and assert that nothing will be found due to him upon a fair settlement before a commissioner of the Court.

16 *Under interlocutory decrees for accounts, several settlements thereof were made by a commissioner of the Court, and numerous depositions and vouchers were returned and filed.

It appears from the evidence that the deeds to Fletcher were executed by Comer when he was in due possession of his mental faculties, and were not obtained from him by any fraud or duress, but were his own spontaneous acts. They were not made, it is true, for the pecuniary considerations expressed to have been paid by her, and therefore stand in relation to creditors, as she admits in her answer, merely upon the footing of voluntary conveyances. But they are not the less obligatory from that circumstance upon the representatives of the grantor, and are good against them both at law and in equity, notwithstanding the character of the cohabitation between the parties. A bond or other instrument for the consideration upon its face of future cohabitation is doubtless unlawful and void, but not where the consideration expressed is for past cohabitation, for that is not incompatible with a motive of honour and duty, Newl. Cont. 488, and serves only to place it upon the footing of a voluntary deed. And though equity has, on the ground of fraud, enquired into the consideration of, and given relief against, securities obtained by the arts of common prostitutes, yet a great Judge has held that the cases which have determined against securities given to common prostitutes, went upon the circumstance of the securities being given previous to the cohabitation, which being turpis in its nature, the Court had relieved against them; but that there was no principle of equity which says that a man may not give a voluntary bond to a common prostitute, and that it would be going but a little further to say he could not give her money without being liable to be called upon for it. Hill v. Spencer, Ambl. R. 641. In the present case,

17 however, *there is no proof, nor even allegation, that the grantee was a common strumpet, nor any reason to believe that the grantor was influenced by any other motive than a sentiment of attachment for her, and a desire in his last illness, and in view of approaching death, to secure to her some provision for her future maintenance. And, in fact, a successful impeachment of the deeds, upon any ground, could avail Watson nothing in this controversy; for if the deeds were null and void, the will devising the estate to Fletcher, and which has been admitted to probat, would still remain; and no one supposes that could ever have been impeached, what-

ever might have been the want or turpitude of consideration.

The most important of Watson's claims against his testator's estate, is that for contribution on account of the purchase money of the house and lot on 14th street. The evidence is satisfactory to shew that the whole amount of the purchase money has been paid by Watson, and there is no reason to believe that his payments thereof were not made out of his individual resources. On the contrary, the relative pecuniary condition of the two persons, and the cotemporary declarations of Comer, warrant the conclusion that he contributed nothing himself, directly or indirectly, on that score. Watson is therefore entitled to the reimbursement sought by him on this head, and to an equitable security therefor upon Comer's undivided moiety of the property, unless, indeed, his demand can be repelled, as falling within the influence of the unlawful gambling partnership which existed between them.

There is no proof that this property formed any part of the partnership funds, or that it was purchased for a gambling establishment, though the circumstances of the case seem to indicate it as probable that the parties, at the time of their purchase, contemplated the use of *it by themselves for gaming purposes. It was a joint purchase in fee by these persons, upon the strength of their individual resources and credit, of real estate, to be held by them and their representative in perpetuity, or until alienation; and the temporary abuse of it by gaming operations could stamp no permanent unlawful character upon the property. The contract with the vendor was perfectly lawful; each of the joint vendees was liable to him for the whole purchase money; from that liability Watson could not escape, and has fully discharged it; and his right to contribution is the legal and equitable consequence. It is not founded upon or derived through the unlawful partnership, but springs from a transaction collateral thereto, though it may have been connected therewith; and in such cases I take the true principle to be, that the claim to contribution or reimbursement cannot be repelled. See Gow. Part. 109; Toler v. Armstrong, 4 Wash. C. C. R. 297; 11 Wheat. R. 258.

Watson's claim to a debt, as due him from his testator, of 2795 dollars 87 cents, with interest from the 15th of October 1842, stands upon a different footing. His bill is silent as to the consideration and nature of that debt. But his answer to Fletcher's bill states it to be due by a bond, of the amount and date just mentioned, executed to him by Comer, on a settlement of all accounts between them, except 415 dollars, (mentioned in his bill,) for which Comer had previously to wit, on the 18th of October 1840, given him his obligation (a due bill under seal). By the interlocutory decree of June 1845, recommitting a report which had been returned by the commissioner, with the exceptions thereto, for a

general and thorough resettlement of the accounts between Watson and Comer, an enquiry was directed as to the consideration of the bond for 2795 dollars 87 cents, with authority for Watson's examination upon oath.

19 *The direction of this enquiry was perfectly proper, for obvious reasons. There was at least a *prima facie* repugnancy between the execution of that bond, upon a settlement between the parties of their accounts, on the 15th of October 1842, and Watson's claim for a moiety of the whole amount of the purchase money of the house and lot; it appearing from his vouchers that the cash payment was made by him in February 1841. There was, when the enquiry was directed, evidence in the record disclosing the gambling partnership, and in relation to its operations, and mutual claims of the parties litigant arising therefrom. It was a duty which the Court owed to itself and the public, to sift these transactions thoroughly, in order to repel all efforts to make it the instrument of enforcing or relieving against the *turpis contractus*, and its consequences, at the instance of either of the parties, standing as they did in *pari delicto*. This was emphatically so when the personal representative, with his decedent's papers in possession, was seeking to charge his estate with a heavy debt as due upon settlement, without any proof or even suggestion of the nature of the dealings upon which it was founded. The enquiry, therefore, was warranted by the evidence, and, under the circumstances, it would be idle to consider whether it was covered by the pleadings. A reference to them, however, will serve to shew that the substantial controversy between the parties was, whether Watson was a creditor (and of course a lawful creditor), of Comer, and if so, to what amount.

The result of the enquiry directed into the consideration of the bond was, that, according to Watson's own shewing before the commissioner, it embraced Comer's moiety of the cash payment for the house and lot on 14th street, and numerous items of account arising out of the operations of the gaming establishment. It was therefore disregarded in the resettlement by the commissioner, and also in his final report; and the accounts restated as if it had never been executed.

20 *The claim of Watson in his bill for a debt of about 1000 dollars, as due to him from his testator, "for money loaned to him or paid for him," falls into the consideration of the unliquidated matters of account, exclusive of the purchase money of the house and lot.

These unliquidated matters of account, it is obvious, have originated to a great extent, if not entirely, out of the relation between Watson and Comer as partners in the gambling concern; and the difficulty is in ascertaining how far, if at all, they can be treated as individual transactions between them, which would not properly belong to a

settlement of the partnership affairs, if that were allowable.

Such of them as consist of bills paid for supplies of provisions and liquors for the comfort and refreshment of gaming guests, or for furniture and other articles purchased for the concern, or of collections of debts due the partnership, are upon their face of such a nature as to condemn and expunge themselves from the controversy.

The debits and credits claimed for bills paid to mechanics for the fitting up, reparation and improvement of the house and lot while used as a gaming establishment; and for payments during the same period, of taxes, insurance and the like; and for collections of rents of a part of the building occupied by tenants, require more consideration. If these items could be referred exclusively to the joint ownership of the property in fee, and its permanent advantage—if the expenditures were such as would have been equally incurred by joint owners unconnected as gambling partners—if the payments were made out of their respective individual means, and not out of the capital, profits or funds of the partnership—if the rents were applied to their individual, and not to their partnership purposes; in a word, if their expenditures upon and receipts from the property appeared to be separate and distinct from their gambling op-

21 erations, *and, so, unaffected and untainted by the turpitude of their temporary association, I would think that such matters of account would be proper for adjustment by the Court. But I do not so understand the evidence. The house, though owned jointly, was devoted during the partnership to the purposes of the concern; the use of it for that period may be regarded as part of their stock in trade; and its revenues and charges were blended indiscriminately with the partnership affairs. It is impossible now to separate them; that could not be done, if at all, without a settlement of the gambling partnership, including its capital stocks, profits and disbursements; even if the Court could lend its authority for such a purpose.

The items for moneys loaned or advanced by one partner to the other, stand upon the like footing. It does not appear from any distinct or reliable evidence, that the sums reported by the commissioner on this score were derived from individual funds, or designed for other than partnership objects. Indeed, it appears from Watson's examination before the commissioner, that a sum corresponding with that claimed by Watson, in his bill, "as loaned to Comer, or paid for him," was sent to Comer by a servant, to pay mechanics' bills, and buy furniture; and that the 500 dollars per check, claimed before the commissioner, was furnished for the same purpose. The further sum, it is true, reported by the commissioner per note for 600 dollars to Tate, is stated by Watson, in his examination, to have been a loan to Comer for his own purposes; and the answers of a party to interrogatories upon such an examination are doubtless evidence

for him, to the same effect as a responsive answer to a bill, but liable to discredit in like manner; and no one can read the examination before the commissioner, without agreeing with the Chancellor, that its statements in support of Watson's pretensions, are entitled to but little weight.

22 It is to be remarked, also, *that the form of the transaction as stated, a blank endorsement for raising money, left by the absent with the resident partner, indicates an advance to the firm rather than a loan to the individual. And that such was the fact, is shewn by Watson's own statement of the items of the settlement of the 15th of October 1842, when Comer's bond for 2795 dollars 87 cents was executed; in which Comer is debited with only a moiety on account of the note to Tate, and with a moiety only of the 1000 dollars per servant, and of the 500 dollars per check; and credited with a moiety of a large amount of disbursements in payment of mechanics' and other bills.

Of the unliquidated matters of account between the parties, there remains only to be noticed, the credit to Comer, reported by the commissioner, of 1065 dollars 46 cents, on account of the debt from Garden. That debt appears from the evidence, and is admitted by Watson, to have been due to Comer individually, and the sum credited was furnished by Watson, as the true amount for which he was accountable. It may be doubted whether the credit is not short of the proper sum; but the materials for correcting it, if wrong, are not in the record, and there appears no sufficient reason for disturbing it.

The claim of Watson in his bill for a debt of 415 dollars, as due him from Comer, with interest from the 18th of April 1840, without explanation of its consideration or nature, appears from the voucher subsequently filed, to be evidenced by the due bill under seal of that amount and date. It is therefore not embraced by the period for which the accounts between the partners have been reported by the commissioner, commencing in February 1841. And yet, there is evidence that they were gambling partners during several years previous to that date, and of course, at and before the date of the due bill; and of outstand-

23 ing gaming debts due them, *and collections on account of them, made by the partners respectively in the year 1839. And there is no evidence of any legitimate business transactions between them prior to the execution of the due bill. The presumption of law from a due bill under seal, is that it was given for a true and lawful consideration; but in this case, the presumption of fact, under the circumstances, is the other way. And the claim, with others, proved to have sprung *ex turpe causa*, is preferred in a Court of equity, by a fiduciary, in possession of his decedent's papers, and seeking to subject the estate which he represents, without evidence, or even suggestion, of the consideration upon which it is founded. I think it ought not to be sustained.

The foregoing views dispose of all the matters of controversy between the parties down to the time of Comer's death; and the result of them, if correct, is to reject all the items of debit and credit reported by the commissioner, until that period, except the debits in favour of Watson, on account of his payments of the purchase money of the house and lot on 14th street, and the credit in favour of Comer, on account of Garden's debt.

I think, therefore, that the decree of the Chancellor ought to be reversed, and the injunctions which had been granted to the parties respectively, and the order for the appointment of a receiver, reinstated; that the accounts between the parties down to the time of Comer's death, should be recommitted and reformed as above designated; that the administration account ought also to be recommitted and reformed, and continued so as to exclude all credits to the administrator for costs and counsel fees in these suits, and add all proper debits against him for debts due the estate which he has collected, or ought to have collected; and on account of the rents of the house and lot on 14th street, which have accrued since Comer's death, with the proper

24 *deductions for repairs, taxes, insurance and the like; that the whole of the furniture in the house on 14th street, ought to be sold under the direction of the Court, and a moiety of the nett proceeds paid to Watson, and the other moiety carried into the administration account to the credit of the estate. That furniture was no doubt purchased for the gambling establishment; but it does not fall within the principles above indicated; for Comer's undivided moiety thereof having come to the hands of Watson as his personal representative, it would not be competent for the latter to deny, on any such ground, the title of his testator; and in fact, he has not done so, but has held and treated the same as belonging to the estate. He was wrong, however, in the attempt to sell Comer's undivided moiety of the furniture, the proper course in such cases of joint ownership of such property being to sell the whole, and divide the proceeds.

I am further of opinion that the creditors of Comer's estate ought to be convened before the commissioner, by a public notice to come in and assert and prove their demands. This is proper in order to close the administration, and to the due disposition and application of the assets legal and equitable. After the balance of principal money and interest due to Watson, shall have been ascertained, as also the sums due to other creditors, the Court should proceed according to the rules of equity, observing due priorities, to charge the same upon the assets legal and equitable, and to a final decree according to the rights of the parties.

The other judges concurred in the opinion of Judge Baldwin.

The following was the decree of the Court:

The Court is of opinion, that the decree is erroneous, and ought to be reversed and annulled, and the injunctions
25 *which had been granted to the parties respectively, and the order of the 27th of June 1846, for the appointment of a receiver, reinstated; that the accounts between the parties down to the time of Comer's death, should be recommitted and reformed, by rejecting all the items of debit and credit reported by the commissioner until that period, except the debits in favour of Watson on account of his payments of the purchase money of the house and lot on 14th street, and the credit in favour of Comer on account of Garden's debt; that the administration account ought also to be recommitted and reformed, and continued, so as to exclude all credits to the administrator for costs and counsel fees in these suits; and add all proper debits against him for debts due the estate which he has collected, or ought to have collected, and on account of the rents of the house and lot on 14th street, which have accrued since Comer's death, with the proper deductions for repairs, taxes, insurance and the like; that the whole of the furniture in the house on 14th street, ought to be sold under the direction of the Court, and a moiety of the net proceeds paid to Watson, and the other moiety carried into the administration account to the credit of the estate; that the creditors of Comer's estate ought to be convened before the commissioner, by a public notice, to come in and assert, and prove their demands; and that after the balance of principal money and interest to Watson, shall have been ascertained, as also the sums due to other creditors, the Court should proceed, according to the rules of equity, and observing due priorities, to charge the same upon the assets, legal and equitable, and to a final decree, according to the rights of the parties. It is, therefore, adjudged, ordered and decreed that the said decree of the Chancery court be reversed and annulled, with costs to the appellants respectively; and that these causes be remanded to the Chancery court, to be proceeded in according to the principles above declared.

26 *Clough & c. v. Thompson.

April Term, 1850, Richmond.

(Absent, CABELL, P.)

1. **Oath of Insolvency—Property Vests in Sheriff—Right of Sheriff.***—Upon taking the oath of insolvency all the property and rights of the insolvent debtor are vested in the sheriff, who, as representing the creditor, is entitled to assert the legal and equitable rights of the creditor, and to set aside fraudulent conveyances of the insolvent, and recover the property for the benefit of the creditor.
2. **Same—Property in Possession of Third Person.—The**

***Oath of Insolvency—Property Vests in Sheriff—Right of Sheriff to Sue for.**—For the proposition that, upon taking the oath of insolvency all the property

law does not permit a sale of the goods, chattels or estates of an insolvent debtor in the possession of a third person, until the same shall have been recovered in the mode prescribed by the statute.

3. **Same—Sale of Property by Sheriff—Incumbrances.—**

The sheriff, who is a trustee for all who are interested in the estate of an insolvent debtor, is not justified in selling the interest of the debtor in the estate surrendered by the schedule or vested by law in the sheriff, when, owing to alleged incumbrances, the validity of which is controverted, or the extent thereof is unascertained and uncertain, the property is not in a condition to be disposed of for its fair value.

4. **Same—Real Estate—In Whom Title Vests.—**

The real estate of an insolvent debtor vests in the sheriff of the counties in which it lies; and a sale thereof by the sheriff of the county in which the oath of insolvency is taken by the debtor, is without authority and void.

5. **Same—Property Not in Possession of Sheriff—Sale—**

Purchaser.—Debts due to the insolvent debtor, and slaves and other personal property not in the possession of the sheriff, or which is in such a condition that he cannot take possession without any process, cannot be sold by him so as to vest the legal title in the purchaser.

6. **Same—Sale of Property in Schedule—Effect upon**

Purchaser.†—Where a variety of property is embraced in a schedule, a sale, not of the property specifically, but of the schedule itself, is a violation of duty on the part of the sheriff; and the purchaser at such a sale, if he acquired the legal title, would, in a Court of equity, be treated as a trustee for the benefit of those interested.

7. **Fraudulent Conveyances—Bill to Set Aside—Parties.‡**

—To a bill to set aside fraudulent conveyances made by an insolvent debtor, the trustees and *cestuis que trust* in the deeds, the sheriffs of the counties in which the lands lie, and the execution creditors interested in the property, should be parties.

and rights of the insolvent debtor are vested in the sheriff, who, as representing the creditor, is entitled to assert the legal and equitable rights of the creditor, and to set aside fraudulent conveyances of the insolvent, and recover the property for the benefit of the creditor, the principal case is cited and approved in *Staton v. Pittman*, 11 Gratt. 103; *Billingsley v. Clelland*, 41 W. Va. 258, 23 S. E. Rep. 821, where the doctrine is extended to any assignee. See also, 2 Minor's Inst. (4th Ed) 690. See, in accord, *Shirley v. Long*, 6 Rand. 735. See monographic *note* on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348.

†**Same—Sale of Property in Schedule—Liability of**

Purchaser.—For the proposition that where the sheriff sells the property of the insolvent embraced in the schedule and not specifically, the purchaser will be liable as trustee for the benefit of those interested, the principal case is cited and followed in *Penn v. Spencer*, 17 Gratt. 94.

‡**Fraudulent Conveyances—Bill to Set Aside—Parties.**

—For the proposition that, in a bill to set aside a fraudulent conveyance the trustee in the deed is a necessary party, the principal case is cited and approved in *Fisher v. Dickenson*, 84 Va. 329, 4 S. E. Rep. 737; *foot-note* to *Norton v. Bond*, 28 Gratt. 815. See monographic *note* on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348.

27 *By deed bearing date the 7th day of November 1842, John C. Dickinson and Martha A. H. his wife, reciting that Dickinson was indebted to George N. Clough in the sum of 10,175 dollars 25 cents, by single bill of that date, payable on demand, which he was desirous to secure, conveyed to William T. Dickinson, Burwell B. Dickinson, and Leonard J. Clough, a tract of land in the county of Hanover, a tract lying partly in Caroline and partly in Spotsylvania, a moiety of a tract in the county of Caroline, a number of slaves by name, with their future increase; horses, mules, cattle, sheep, hogs, wagons, carts, all his plantation utensils of every description; all his household and kitchen furniture, including a clock; his whole crop of tobacco, corn, fodder, shucks, straw and hay; also five shares of Louisa railroad stock; blacksmith tools, two stills, a carriage, his interest in the life estate of Mrs. Sarah Ashley in a tract of land called Ashley's, and all debts then due, or which might thereafter become due to him, either by bond, bill, note or account, in trust that said Dickinson and wife should be permitted to remain in possession of the property until default should be made in the payment of the said sum of 10,175 dollars 25 cents, with the interest thereon accruing, in whole or in part; and then upon the further trust that the trustees, or either of them, should, whenever they or either of them might think best for the interest of the parties, or the said George N. Clough, his heirs or assigns, might direct, proceed to sell the said property, or so much thereof as might be necessary to pay off the said sum of 10,175 dollars 25 cents, and interest, for cash, upon thirty days notice in one of the newspapers in Richmond and in the neighbourhood of such sale; and out of the proceeds of such sale should, after paying the expenses thereof, pay to the said George N. Clough the aforesaid sum of 10,175 dollars 25 cents, with the interest thereon accruing; and the balance, if any, *should pay to the said

28 Dickinson, his heirs or assigns. This deed was signed by Dickinson and wife and the trustees, and was duly admitted to record in the clerk's office of the County court of Hanover, as to Dickinson and wife, on the 15th of November 1842. On a part of the property embraced in this deed a previous deed of trust had been executed to secure a debt due to William Hancock.

On the 10th of December 1842 Dickinson confessed judgments in six several actions at law depending against him in the Circuit court of Hanover county, and being prayed in custody he took the benefit of the act for the relief of insolvent debtors, and was discharged. His schedule then delivered referred to his interest in two deeds of trust from John Clough, sr., dated in November 1819 and September 1822; and also all the property mentioned in two deeds of trust from himself and wife, one for the benefit of William Hancock and the other for the benefit of George N. Clough, subject to any liens created by said deeds; and he

said that he had no other property, real or personal.

In February 1843 the sheriff of Hanover offered the said schedule at public auction for cash, when it was purchased by Charles Thompson for 300 dollars; and the sheriff executed a paper bearing date the 28th of February, which was intended to be a deed, and was acknowledged and admitted to record as a deed, conveying the said schedule to Thompson: the paper was, however, without a seal.

About the time of the sale of the schedule by the sheriff, the trustees in the deed of the 7th of November 1842, advertised the property thereby conveyed to them for sale; and then Charles Thompson filed a bill in the Circuit court of Hanover to enjoin the sale. In his bill, after stating the foregoing facts, he charged that the deed executed to secure the sum of 10,175

29 *dollars 25 cents to George N. Clough was fraudulent and void, and intended exclusively to cheat the creditors of Dickinson, by putting his property beyond their reach, as he supposed, until he could first take the oath of insolvency, and then obtain the benefit of the bankrupt law, for which he was, at the time of the filing of the plaintiff's bill, an applicant. That the plaintiff would be able to prove from the admissions of Clough, that Dickinson owed him nothing, and that in fact Clough never did lend, and never was able to lend, to Dickinson, or otherwise fairly become his creditor for, ten thousand dollars. That Dickinson, who was the brother-in-law of Clough, had been permitted to use and consume the perishable property conveyed in the deed, and to remove the tobacco to Richmond, and sell it as his own and for his own use and benefit.

Clough, Dickinson and the trustees were made defendants, and Clough and Dickinson were called upon to disclose how, when and where the pretended debt of 10,175 dollars 25 cents was contracted; whether it was by a loan of money, or for the purchase of property; if a loan of money, whether it was lent at one time or at different times; if at one time when and where, and in what kind of money and in whose presence; if at different times to exhibit the account of it; and that Clough should be required to exhibit the evidence, if he had any, of the said debt, and especially the single bill recited in the conveyance.

The prayer of the bill was, that the trustees should be enjoined from selling the property, or any part thereof, without the order of the Court; and that the sheriff should be directed to take possession of the personal property conveyed by the deed and in the possession of Dickinson, and to sell the perishable part thereof, unless the defendants, or one of them, would enter into bond in an adequate sum, to be fixed by the

30 Court, with ample security, with condition to have *the property forthcoming to answer the decree of the Court, and to account for the hires and increase thereof. That the conveyance of the

7th of November 1842, might be declared null and void, and the property thereby conveyed delivered up to the plaintiff; and for general relief.

The injunction was granted; and it was ordered that unless the defendants, or some one or more of them, should execute a bond with sufficient security payable to the plaintiff, in the penalty of 4000 dollars, with condition to have all the personal property, or the proceeds thereof, forthcoming to answer the future order of the Court, the officer who might execute the process was directed to take all said personal property into his possession, to hire out the slaves for the balance of the year, and to make sale of the residue of said personal property on a credit of nine months, taking from the purchasers bonds, with good security; and to make report of his proceedings under the order. If the defendants should execute the bond required of them, they were to be at liberty to sell the said personal property, and the officer was authorized to take and to judge of the sufficiency of the security.

Under this order, the defendants having declined to execute the bond thereby required, the sheriff took possession of the personal property as directed, and hired out the slaves and sold the remainder.

Clough and Dickinson filed their separate answers to the bill. They both deny that the deed was fraudulent; and allege that it was executed to secure a bona fide debt due from Dickinson to Clough. Clough said that the debt secured by the deed was for money lent by Clough to Dickinson, not at one time but at various times, commencing as far back as 1822; that when such loans were made acknowledgments thereof were taken, in which the interest reserved was added. That these loans were repeated from time to time, *down to

31 the date of the deed of trust and single bill therein mentioned. That the evidences of the dealings between the parties, except the single bill, were not in his possession, but were surrendered from time to time to Dickinson. That he kept no account of the several sums lent, and of the interest thereon, and could exhibit none. He denied that he had ever admitted since 1822, that Dickinson was not indebted to him, or that Dickinson had been suffered to waste any of the property conveyed by said deed, and said that some wheat and tobacco sold by Dickinson after the trust was made, was sold on account of Clough, and for which he was ready to account.

Dickinson's answer was substantially the same.

The testimony in the cause related to the admission by Clough that Dickinson was not indebted to him; to the declarations by Dickinson after the making of the deed, and in the absence of Clough, that he was not indebted to Clough; but especially to the ability of Clough to make advances as to Dickinson to the amount of 10,000 dollars. On this point several witnesses expressed the opinion that he could not have made

the advances unless he was possessed of resources of which they had not heard. To the evidence of the declarations of Dickinson, and to the opinions of the other witnesses, Clough excepted, and introduced testimony to shew his ability to make the advances.

When the cause came on to be heard, the Court below overruled the exceptions to the depositions, and made a decree wholly setting aside the deed of the 7th of November 1842, as fraudulent and void, and confirming the plaintiff's title to the property thereby conveyed, under his purchase of the schedule and conveyance to him by the sheriff, subject, however, to Mrs. Dickinson's right of dower in the land; and the sheriff was directed to transfer to him the personal property in his possession, and account

32 with him for the proceeds *of such as had been sold, and for the net hires of the slaves. From this decree Clough and Dickinson applied to this Court for an appeal, which was allowed.

R. T. Daniel and Patton, for the appellants.

Lyons and Scott, for the appellee.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that the deed of trust executed by John C. Dickinson and Martha his wife, on the 7th day of November 1842, to William T. Dickinson, Burwell B. Dickinson and Leonard J. Clough, for the benefit of George N. Clough, was made with intent to defraud the creditors of said John C. Dickinson, and as against such creditors is fraudulent and void; but that the same was good as between the parties thereto; and therefore, the decree of the Circuit court was erroneous in wholly setting aside and vacating the said deed. The Court is further of opinion, that under the act of assembly concerning executions, and for the relief of insolvent debtors, 1 Rev. Code, p. 524, all the property and rights of the insolvent debtor are vested in the sheriff, who as representing the creditor, is entitled to assert the legal and equitable rights of the creditor, and to set aside fraudulent conveyances of the insolvent, and recover the property for the benefit of the creditor.

The Court is therefore of opinion, that although the said John C. Dickinson, in the schedule subscribed and delivered by him, surrendered his equity of redemption only, in the real and personal estate described in the deeds of trust in the schedule referred to, subject to any lien created by said deeds, the sheriff claiming under the law, which for the benefit of the creditor vested in him all the property of the insolvent, had the right in a proper proceeding, to impeach said deeds or either of them, and set them aside as against the creditor, if made with intent to defraud the creditor.

33 *The Court is further of opinion, that as the law does not permit a sale of the goods, chattels or estates belonging

to the debtor, and in the possession of any other person, until the same shall have been recovered in the mode prescribed; so neither is the sheriff, who is a trustee for all interested in the estate, justified in selling the interest of the debtor in the estate surrendered by the schedule or vested by law in the sheriff, when owing to alleged incumbrances, the validity of which is controverted, or the extent thereof unascertained and uncertain, the property is not in a condition to be disposed of for its fair value. The Court is further of opinion, that as by the deed of trust of the 7th November 1842, for the benefit of said George N. Clough, portions of the property thereby conveyed, are described as being situated in the counties of Caroline and Spotsylvania, the interest of the debtor in such property vested in the sheriffs of those counties respectively; and a sale made thereof by the sheriff of Hanover, was without authority and void; and as by the said deed all the personal estate of said debtor was conveyed, including amongst other things, all debts then due, or which might become due to him, such choses in action were not the proper subjects of sale; and as it does not appear that the sheriff was in possession of the slaves or other personal property, or that the same was in such a condition that he could have taken possession thereof, without any process, it would not have been competent for the sheriff to have made a valid sale thereof so as to vest in the purchaser the legal title.

The Court is further of opinion, that where, as in this case, a variety of property was embraced in the schedule; a sale, not of the property specifically, but of the schedule itself, would be a violation of duty on the part of the sheriff; and the purchaser at such a sale, if he acquired the legal title, would, in a Court of equity,
 34 *be treated as a trustee for the benefit of those interested.

But it appearing in this case, that no regular conveyance has been made by the sheriff, the paper executed by him dated the 28th February 1843, not being under seal, no title to the real estate contained in the schedule has passed to the purchaser, and the title of the insolvent is still vested in the sheriffs of the counties where such property shall lie or be found. The Court is therefore of opinion, that the decree of the Circuit court was also erroneous in holding that all the title of the said John C. Dickinson to the property conveyed by the deed of trust of the 7th of November 1842, passed to the appellee, Charles Thompson, and in directing his title to be quieted, and declaring the same to be complete; and in decreeing that the sheriff should deliver over to him, the slaves and other personal property, and pay over to him the net amount of all hires of the slaves, and all money rising from the sale of the perishable property.

The Court is further of opinion, that said Circuit court, instead of proceeding to render any decree, should have required the appel-

lee to amend his bill and make, as defendants to the suit, the sheriffs of Hanover, Caroline and Spotsylvania counties, the creditors of said John C. Dickinson and the persons interested in the deeds of trust in the schedule referred to. And the parties being regularly before the Court, there should have been a decree for the sale of the property belonging to the debtor, and vested in the sheriffs aforesaid; and from the proceeds arising from the sale of the property embraced in the deed for the benefit of William Hancock, the amount of his debt should have been discharged; the validity of the deed for his benefit not being impeached; and the balance, if any, arising from the sale of the property in said deed described, together with the proceeds

35 *described in the deed for the benefit of said George N. Clough, or arising from the hires, rents or profits thereof, should have been applied to the repayment of the sum of 300 dollars paid by the appellee to the sheriff at the sale of the schedule, with interest from the time of such payment, in the first place, then payment of the creditors of the said John C. Dickinson according to their legal priorities; and after satisfying the claims aforesaid, the residue, if any, should have been decreed to be paid over to the said George N. Clough.

It is therefore ordered and adjudged, that said decree be wholly reversed and annulled—that the injunction be reinstated, with costs to the appellants, and the cause remanded, with instructions to direct new parties to be made, and for further proceedings, according to the principles above declared, in order to a final decree.

36 *Fairfax v. Fairfax's Ex'or.

April Term, 1850. Richmond.

1. **Executors—Qualification—Refusal to Permit—Appeal as of Right.**—To the judgment of a County court refusing to permit a person named as executor in a will, to qualify as such without giving security, an appeal demandable as of right, lies to the Circuit court.
2. **Same—Bond—Necessity for—Case at Bar.**—A testator appointed his wife and son executrix and executor of his will; and expressing his confidence in them, directed that they should be permitted to qualify without giving security. Some years afterwards, he added a codicil, by which he says: I further appoint J. H. ex'or to the within will, with my wife and son. **HELD:** J. H. is not entitled to qualify without giving security.*
3. **Same—Same—Intention of Testator—Parol Evidence.**—**QUÆRE:** If in such case parol testimony is admissible to shew the intention of the testator.

The principal case is cited in *Amliss v. Williamson*, 17 W. Va. 679. See generally, monographic *note* on "Executors and Administrators."

*Supp. Rev. Code, ch. 158, § 2, p. 216. "But where any testator or testatrix shall leave visible estate, more than sufficient to pay all his or her debts, and by his will shall direct, that his or her executors shall not be obliged to give security, in that case, no

Henry Fairfax, of Prince William county, made his will, by which, after giving small legacies to several of his children, he gave the residue of his estate to his wife for her life, and at her death, to his son John Walter and his daughter Martha Lindsay, for their lives, with remainder to their children, and cross remainders over. Among the legacies given, was one to his daughter Sarah Ann, the wife of Dr. James Hunter, of Fairfax county, of 300 dollars per annum, for her own private
 37 *use during her life, and a negro girl, Mary; and after her death, the negro girl with her increase, was to go to Mrs. Hunter's children, if she had any, and if she died without children, to the children of the testator's daughter Elizabeth.

The last clause of his will was as follows:

"I hereby nominate and appoint my wife Elizabeth and my son John Walter executrix and executor; John to qualify at the age of twenty-one years. And I appoint Benjamin Johnson my trustee; and in case of the death of the said Benjamin Johnson, I appoint John P. Philips of Fauquier county, in his place, trustee of this my last will and testament. And I hereby desire that as I have implicit confidence in them, and in their prudence, and in my trustee's honesty, and the estate owing nothing more than there is ample provision made by me to pay off, and for all legacies that I have given, by interest on stocks that will be coming in every year, to pay them off, that no security shall be required from them; but if my said wife shall marry again, then I direct that she shall give sufficient security for the true performance of the trusts appertaining thereto according."

This will bears date the 21st of September 1840; and there was added to it the following codicil:

"I further appoint Dr. James Hunter, of Fairfax county, executor to the within will, with my wife and son John." This codicil bears date the 22d of September 1846.

This paper was offered for probat in the County court of Prince William, in November 1847; and there being no subscribing witnesses thereto, it was admitted to probat upon proof that it was wholly in the handwriting of the testator.

At the June term 1848, of the County court of Prince William, James Hunter, one of the executors named in the codicil of the will, moved the Court to
 38 *permit him to qualify as executor of the said will without giving security.

security shall be required, unless the Court shall see cause, from their own knowledge, or the suggestions of creditors or legatees, to suspect the executors of fraud; or that the personal, as well as the real estate, by the said will devised to be sold, when the same may be subjected to the payment of debts, will not be sufficient to discharge all the debts, and shall require security, when the same shall be given before a certificate shall be granted, notwithstanding any directions to the contrary in the will."

This motion was opposed by John W. Fairfax, by his guardian ad litem, and by Martha L. Fairfax, and Benjamin Johnson the trustee; and the Court being of opinion that the said James Hunter ought not to be permitted to qualify as executor as aforesaid without giving bond and security conditioned as the law directs, overruled and rejected the motion, and refused to permit him to qualify unless he would give bond with sufficient security according to law. And from this opinion and judgment of the Court, Hunter took an appeal to the Circuit court of Prince William.

The case came on to be heard in the Circuit court of Prince William in October 1848, when in addition to the transcript of the record of the cause from the County court, the appellant Hunter introduced several witnesses, by whom the following facts were proved, viz: The testator's estate was estimated at one hundred and seventy-five or two hundred thousand dollars, of which the personal estate amounted to 120,000 dollars; and he owed few or no debts. His wife had been suffering from an attack of paralysis for three or four years before his death, and died about a month after he did, between fifty and sixty years of age. The testator's son John was, at the death of his father, a minor, but would attain twenty-one years of age in June 1849. Dr. Hunter married the testator's daughter, Sarah Ann, in 1838. When the will was written in September 1840, he and the testator were not on friendly terms, and they did not visit. Afterwards, on the illness of John Walter Fairfax, Dr. Hunter was sent for, and attended him; and subsequently, attended the daughter Martha and Mrs. Fairfax. John, after his recovery, studied medicine with Hunter, and lived in his family. Dr. Hunter was represented by the witnesses, as highly respectable, and much esteemed in
 39 the county of Fairfax, where he *resided; and prudent in the management of his affairs. His circumstances were limited; his property being estimated at between five and seven thousand dollars; but he was entirely unembarrassed in his circumstances. The witnesses expressed the opinion, that he would not be able to give the security necessary to be given by an executor of the testator.

The Circuit court held, that by the true construction of the will and codicil of the testator, taken in connexion with the facts proved by the witnesses, the testator intended that the appellant, Hunter, should act as his executor in like manner, and on like terms as his wife and son, who were appointed executor and executrix, and were to qualify as such without giving security. The judgment of the County court was, therefore, reversed and annulled with costs; and the cause was remanded to said Court with instructions to permit Hunter to qualify as executor upon his executing his bond without sureties, in such sum as should be fixed by the Court, with the usual condition. From this judgment,

John W. Fairfax applied for, and obtained an appeal to this Court.

John M. Patton, jr., for the appellant.

The act Supp. Rev. Code, ch. 158, § 1, p. 215, in relation to the qualification of executors, directs that they shall give bond and security with condition for the faithful performance of their duties. To this general provision, the statute makes but one exception; and that is where the testator directs that the executor shall qualify without giving security, and the security of creditors and legatees does not, in the opinion of the Court, render security necessary. This act, too, provides that in determining whether security is necessary, the court may act on its own knowledge. The act thus gives the rule and the exception; and the party who claims the benefit of the exception must bring himself clearly within it.

40 *Let us look, then, first to the will, to see whether the appellee, Hunter, is within the exception. The will provides distinctly, that the testator's wife and son shall qualify as executrix and executor without giving security; and states the grounds on which he makes that provision; his confidence in them. The codicil certainly does not in terms, direct that Hunter shall qualify without giving security. The whole foundation of the argument in his favour, is the single word "with." The testator appoints Hunter executor of his will with his wife and son. The word is in common use, and invariably means "together," "in company." Give it that meaning here, and there is no want of sense in the sentence; nor is it inoperative. Hunter will be a joint executor with the wife and son. But to give the codicil the effect of dispensing with security on the part of Hunter, the sense of the word is not to be changed, but other words must be interpolated; and the codicil must be read as if the words "on the same terms" preceded "with." It is true that, to give meaning to a sentence which has none, or to effectuate the obvious intent of the testator as manifested by other parts of his will, words will be interpolated; yet I submit, that no authority can be found for thus amending a sentence, which, of itself, expresses a plain, sensible, operative meaning, for the purpose of giving to the testator an intent which is nowhere else discoverable in his will. And this is still less excusable when, as we see, the testator was fully informed of the necessity of expressing the intention if he entertained it, and knew well how to do it.

If, then, the will and codicil do not sustain the pretension of the appellee, is it aided by the parol evidence? I shall not enter into any minute examination of that evidence. It certainly has no direct bearing upon the question in issue; and the only use which can be made of it is as a foundation for the inferences that

41 *the testator must have known that Hunter could not give the necessary

security; and that he was deserving of the testator's confidence. But the last inference conflicts with the first. If he was entitled to the confidence of the testator, the testator might well believe that he so possessed the confidence of others that he would find no difficulty in giving the necessary security. But I submit that such inferences are much too vague and unsatisfactory to be adopted as the basis of the Court's action; especially on a subject which the legislature has guarded with so much anxious care.

But if the parol testimony was as strong in favour of the pretension of the appellee as he could desire, I submit it could have no influence upon the judgment of the court; because it was improperly admitted in evidence. The principle is too well settled upon authority to be now a subject of discussion, that parol evidence is only admissible to explain a latent ambiguity, such as the person or thing intended, or the circumstances of the testator at the time the will was made. Here, there is no latent ambiguity in this codicil; and the testimony has no relation to the circumstances of the testator when the codicil was written. I refer the court for the law on this subject, to Jarm. on Wills 349, 382; 1 Greenl. Evi. 410, note 415, 418, 419; Puller's ex'or v. Puller, 3 Rand. 88; Miars v. Bedgood, 9 Leigh 361, 368, 373; 2 Lomax Ex'ors 11.

I submit, in conclusion, that the Circuit court had no authority to revise the judgment of the county court. The act which has been before cited, provides that the probat court may act upon its own knowledge in refusing to permit an executor to qualify without giving security, where the testator has dispensed with it. Therefore, even if the testator had directed that Hunter should be permitted to qualify without giving security, it was competent for the County court to refuse the permission; and that upon grounds derived from

42 their own *knowledge. In this case, the ground of the refusal is not stated upon the record; and as it is the judgment of a Court having jurisdiction of the subject, that judgment will be presumed to be right.

Robinson, for the appellee.

The statute gives the absolute right of appeal in such cases as this from the County to the Circuit court. The case goes up precisely as it was in the County court; and the Circuit court may pass upon all matters of law and fact involved in the cause. It is against all the analogies of the law, to suppose that it is intended the judgment of the County court shall be final. At least in such cases, the record should shew that the grounds of the judgment were such as cannot be reviewed by the appellate tribunal.

There is no question that the statute does authorize a testator to direct that his executor shall qualify without giving security. And if this testator has so directed, then there is just as little question that under the facts of this case, the executor should

have been permitted to qualify without security: the estate is ample; the executor, Hunter, is a man of high character, and no fraud in him, or danger to creditors or legatees, is suggested on the record.

There is no doubt either, that the testator directs that his widow and son shall be permitted to qualify without giving security. Now the statute obviously contemplates a general authority by the testator to his executors to qualify without security. The testator may possibly make a distinction between the executors; but this is not to be presumed, and is not probable.

The office of a codicil is not to set aside the will, but to vary or explain it; and the will is not to be disturbed further than is absolutely necessary to carry into effect the provisions of the codicil. Jarm. on Wills

160. When the will of Henry Fairfax
43 was made, his wife *and son were appointed executrix and executor thereof.

Afterwards, by a codicil, the testator appointed Hunter an executor with his wife and son. This provision of the codicil is to be read as if it was introduced in the clause of the will appointing executors. Read the two clauses thus together, and without adding or taking away a word, it is obvious that the provision, as to the security, applies to all the executors.

No case precisely like this in its facts, is to be found in the English books; but it is easy to find cases which are similar in principle. Thus, in Jarm. on Wills 161, the case is given of a devise to A, subject to a rent charged to B; and a revocation by a codicil, of the devise to A, and the devise thereof to another without noticing the rent charge: And it was held that the second devisee took the land subject to the rent charge. There, though nothing was said in the codicil about the rent charge, yet it was held to exist as to the new devise. So here, the appointment of a new executor by the codicil, is to be considered as made in pursuance of the provisions of the will. So where a legacy was given upon certain contingencies, and by a codicil a legacy was given "in addition," it was held to be subject to the same contingencies. Jarm. on Wills 165.

In the case before the Court the word "further" is used, which is in effect the same as the words "in addition;" and if "further" had been substituted for these words in the case referred to, the construction of the clause would have been the same. But the words "with my wife and son" must necessarily be construed to mean on the same terms.

So where, by a codicil, a trustee was appointed in place of one named in the will who had a legacy fixed on land, it was held that the substituted trustee took in the same way. Jarm. on Wills 168. Suppose Hunter

44 had been appointed in the place of the testator's wife and son; under the principle of this last case, the *provision as to security would certainly apply; and is a distinction to be made because he is appointed with them?

This construction of the codicil is sustained by the parol evidence, which goes strongly to shew that the testator intended Hunter to qualify without giving security. With this intention he wrote the codicil, and did not doubt, plain man as he was, when he directed that Hunter should qualify with his wife and son, that he would be understood to say that he should qualify in the same way. We see that when he wanted to provide that his wife should give security in the event of her marriage, he directed it in explicit terms.

The parol testimony introduced in this case is not liable to the objection made to its competency. It is not offered to contradict the will, but to shew the circumstances, situation and relations of the parties, so as to explain what the testator meant by the words which he used; and for this purpose it was admissible. Kennon v. M'Roberts, 1 Wash. 96; Shelton v. Shelton, Id. 53; Hamletts v. Hamlett's ex'or, 12 Leigh 350; Trent v. Trent, Gilm. 174; Powell on Dev. 488-9.

Whatever may be the result in this case, the appellee should not be subjected to costs; they should be paid out of the estate. Grant v. Leslie, 1 Eng. Eccl. R. 373; Dean v. Russel, Id. 411, in note.

John M. Patton, sr., in reply.

As to the costs of this Court there can be no question, as the statute allows no discretion. This, too, is the case as to the costs of the Circuit court; and as to those of the County court they are de minimis.

The question in this case is, whether the executor shall be permitted to qualify without giving security. This is a mere personal privilege. The whole object is to get the commissions; for the wife was dead; the whole estate is given to the son and
45 daughter; the son *would be of age within six months, and qualified as executor about the time the appeal in the case was allowed. It is therefore a personal matter entirely; and if the appellee shall fail in his object, it is entirely proper that he shall pay the costs of the proceeding.

But let us come to the consideration of the case. First, then, Was the judgment of the County court open to revision by the Circuit court. This is not a question about the probat of a will, or the right of an executor to qualify; the will has been admitted to probat without question, and nobody disputes the right of Hunter to qualify as executor. If, therefore, the Court had stated the ground of its judgment, it is questionable whether, under the statute, there was an absolute right of appeal. But however that be, it is clear that where a case is submitted to the discretion of the justices upon grounds peculiar to themselves, there can be no appeal from their judgment; especially when the ground of their judgment is not stated on the record. By the act Supp. Rev. Code, p. 216, § 2, the Court is authorized, when the testator directs it, to allow an executor to qualify without giving security, unless they shall

see cause from their own knowledge or the suggestion of creditors or legatees to suspect fraud. Suppose the order of the Court had said, that from their own knowledge, or from the suggestion of creditors or legatees, they suspected fraud; would that be a matter, either of law or fact, that an appellate Court could review? Not as a matter of law, certainly; for the act authorizes it; not of fact, because, from the nature of the case, it is impossible to review it. Could you interrogate the Judge of the probat Court as to the ground of his suspicions; and then consider whether the ground is sufficient to warrant the suspicion?

If such a judgment, thus stating the grounds on which it is made, is not examinable by an appellate Court, then is not

46 this general judgment equally beyond *the review of such a Court? Every

Court having jurisdiction of a subject must be presumed to have acted correctly. This has been lately decided by this Court in a very strong case. *Carpenter v. Utz*, 4 Gratt. 270. Then the judgment of the County court in this case must be presumed to be correct, if there be any ground out of the will, and resting in the knowledge of that Court, upon which it may be sustained. It is said that there is no suggestion of fraud. Why was there not a suggestion that there was no fraud? Here is a judgment; and there is a ground not negatived which will sustain the judgment; and therefore it must be sustained.

Our law has carefully provided against the dilapidation of the estates of cestuis que trust by trustees. The act Supp. Rev. Code, p. 115, § 1, requires all executors to give security. The second section authorizes an exemption where the testator directs it, provided creditors and legatees are not thereby endangered. The counsel on the other side suggests that the law does not provide for exempting some of the executors without the others; but he admits the testator may do this. He seems to infer that where some are exempted, the others will be considered as exempted, unless it clearly appears that the testator did not so intend. I have referred to our statute to shew that such exemption should be made by clear provision of the will, and not left as a matter of inference or doubt. Here we are considering a case on a will which appoints Hunter executor, without exempting him from the obligation to give security, and it is argued that he is exempted because others are exempted. But, on the contrary, does not the maxim apply, *expressio unius est exclusio alterius*?

Counsel seems to suppose that great aid to his case is derived from the fact that the appointment of Hunter is by a codicil, and that of the other executors is by

47 *the will. I concur in the principle which he has stated: a codicil is only to add to or vary the will. When it adds to the will, each is to be construed separately. When it varies the will, they are to be construed together, so as to give full effect to the codicil; but it is not to disturb the will

further than is necessary to give it full effect. Then what is the effect of this codicil? It does not disturb the appointment of executors made by the will, but only adds another. The first are exempted by the will from the obligation to give security; the codicil does not exempt the last from this obligation.

It is said that the testator was a plain man, and wrote the codicil. That is true; and he wrote the will too; and that was before him at the moment when he wrote the codicil; and this Court is asked to say, that though he has not used a word that is not natural on our construction, yet he meant something else; and to make out this something, other words are to be added.

It is said the word "further" is an important word in this codicil. Why, the will had been made by the testator; and if he was to do any thing more he must go further; and he uses exactly the language which would have been proper if he had made this codicil the last clause of his will, where it must be considered to be, if it is read with the will. So, too, the words, "with my wife and son," are relied on to sustain the pretension of the appellee. The testator had before appointed them, and did not intend to revoke their appointment, but to appoint Hunter to be an executor with them. The argument is just as strong to prove that the testator revoked the exemption as to the wife and son, as it is to prove that he exempted Hunter.

There is no doubt that the testator might have exempted Hunter from the obligation to give security; nobody questions that;

48 and if he had written the codicil *as the counsel for the appellee reads it, it would have had that effect. The

counsel assumes the testator intended to exempt the appellee, and then reads to effect it; though the provision as to the wife and son is founded on the expressed confidence of the testator in them, and though no such confidence in Hunter is expressed. And indeed the reading of the counsel would effect the same object, though the words "further" and "with my wife and son," had been omitted.

It is said that the reasoning of the counsel is sustained by cases very analogous in principle to this; and we are referred to *Jarm. on Wills* 161, 165, 168. These authorities only carry out the principle that the will is not revoked further than is necessary to give full effect to the codicil. If the question before us was, whether the exemption in favour of the wife and son had been revoked, these cases would have been apposite to repel such a conclusion; but an examination of them will shew that they have no bearing upon the question before the Court.

But there are other analogies, which I submit are much more apposite to this case. On the question, whether legacies substituted by codicil for legacies in a will, were to be free from legacy duties, because the first were, it is held that it must clearly appear that such was the intention of the

testator. Jarm. on Wills 167. May I not say that here are cases apposite and a fortiori? We have not merely substituted legacies, but a provision for a third person; not a case in which we are to look for the intention of the testator, but in which we have the statute which expressly declares that the executor shall give security, unless he is expressly exempted.

There is no case in which parol evidence has been admitted to prove what the testator intended, where there was no ambiguity in what was said, or as to the person or thing spoken of. Some dicta may have gone further, but no respectable authority does. The strongest case is *Miars v. Bedgood*, 9 Leigh 361; and yet there the evidence was excluded. The dissenting Judges rested on the ground that there was an ambiguity, and on that ground were for admitting the evidence. In *Puller v. Puller*, 3 Rand. 88, all the Judges said that the testimony was inadmissible to shew what the testator meant by the phrase "used," except to shew what was the condition of the estate. These cases are in entire accordance with the third proposition of *Wigram on Wills*, p. 14. In conclusion, I refer to this same work, p. 29, 30, 31, 32, 43, 44, 48, 50, 51.

DANIEL, J., delivered the opinion of the Court.

By the 30th section of the act establishing the Circuit Superior courts of law and chancery, it is declared that appeals to the said Courts shall be demandable as of right from sentences or orders of the County courts, in controversies concerning the probat of wills and letters of administration. And by the second section of the act, entitled "An act to amend the act, entitled 'an act reducing into one the several acts concerning wills, the distribution of intestates' estates, and the duty of executors and administrators.'" Supp. Rev. Code, p. 216, it is declared that when any testator or testatrix shall leave visible estate more than sufficient to pay all his or her debts, and by will shall direct that his or her executors shall not be obliged to give security, in that case no security shall be required, unless the Court shall see cause, from their own knowledge or the suggestions of creditors or legatees, to suspect the executors of fraud. The controversy in this case is one concerning "letters of administration;" and the terms in which the right of appeal from the orders or sentences of the County courts in such controversies is given, are general.

No exception is made of the case wherein the controversy turns on the question, whether an executor shall be permitted to qualify without giving security; and it would seem, therefore, incumbent on those who deny the right of appeal in such case, to shew, either that the law, as to such case, is repealed by some other, or that the question involved in the controversy is of such a nature as to preclude the possibility of its being properly re-examined by the Superior court.

There is no suggestion that the law in relation to the right of appeal has been expressly repealed in the particular above mentioned, by any other statute; but it is urged by the counsel of the appellant in argument here, that the County court may have acted on its own knowledge or the suggestions of creditors; that such grounds of decision are from their very nature incapable of a review by the Superior court; and that the Superior court was bound to presume, in the absence of record evidence to the contrary, if so to presume was necessary in order to sustain the sentence of the County court, that the said last mentioned Court did act, either on its own knowledge or the suggestion of creditors.

This Court is, however, of opinion, that, even supposing the decision of a County court in such case, based on its own knowledge or the suggestions of creditors, were incapable of review by the Superior court, in order to deprive said Court of a right to re-examine the question involved in the controversy, it must appear from the record that the County court did proceed on such grounds. The party complaining of a sentence of the County court from which the law has given an appeal, demandable as of right, is not bound to shew to the Superior court that such sentence was erroneous, in order to entitle him to a review of it by the latter. It is enough for him to shew that he is interested in and a party to the controversy, and that he has complied with the condition of the statute providing for a faithful prosecution of his appeal. He cannot be deprived of the right to have his case reheard by the Superior court, by the suggestion that the sentence or order of which he complains may have been based on grounds which, if they had been made to appear on the record, it would be seen did not admit of re-examination.

The Court is, however, further of opinion, that there is nothing in such grounds of decision rendering them incapable of review by the Superior court, when properly brought before it; that the Circuit court properly took cognizance of the appeal in this case, and was bound, upon a full view of all the questions of law and of fact bearing on it, to decide whether the executor should be permitted to qualify without giving security.

It is manifest from the record of the proceedings of the Circuit court, that the whole controversy in that Court turned simply on the question, whether the testator had by his will directed that his executor, the appellee Hunter, should not be required to give security. A question has been raised, whether the parol testimony offered on the trial of the case in the Superior Court was properly admitted. This Court does not deem it at all necessary to enquire under what circumstances and to what extent such evidence may be resorted to for the purpose of explaining the intentions of a testator; inasmuch as, whether the will and codicil be consulted alone, or read in

connexion with the other evidence offered, the meaning and purpose of the testator in this case are equally manifest. The Court is of opinion that the testator did not intend that the appellee should be permitted to qualify without giving security; and therefore that the Circuit court erred in reversing the sentence of the County court refusing to permit him to qualify, except on the condition of giving bond and security. The Court is therefore
52 of *opinion to reverse the sentence of the Circuit court with costs, and to affirm that of the county court.

BROOKE and BALDWIN, Js., said they thought the whole merits of the case were before the Circuit court de novo, and that the judgment of that Court was right.

Armstead v. Hundley.

April Term, 1850, Richmond.

(Absent DANIEL,* J.)

Equity Practice—Sale of Land by Agent—Suit to Set Aside—Laches†—Measure of Relief—Case at Bar.—A and others owning lands jointly, in the State of M-I, employ an agent with power to sell and convey them. A sells to H a certain number of acres of these lands, equal to his interest therein, but does not make a conveyance. H goes to M-I, and on his return, informs A that the agent had sold all the lands; and thereupon they rescind their contract, and make another, by which A assigns to H his interest in the proceeds of the sales, for the purpose of paying H what he owed him, and for the damages which H claimed for his failure to get the land; and he gives H an order on the agent for the amount. And to enable H to settle up the business, A executes to him a deed for his interest in the land. When H goes again to M-I, he learns that the contract which the agent had made for the sale of a part of the lands had failed; and he conceals this fact from A, whilst he conceals from the agent, the rescission of his first contract with A, and the making of the second: and he receives from the agent, A's proportion of the proceeds of the land sold; and he purchases all the lands remaining unsold, and settles with the agent, receiving credit for the price of the quantity of land sold to him by A by their first contract; that being considerably more than he was to have given A for it. Some years after this, A files a bill against H to set aside the conveyance by the agent to H, as to the quantity of land to which A was entitled. HELD: A is entitled to have
53 relief. But *as the agent had power to sell and convey, and the lands were sold at their value; and as the lands of all the parties were sold together, and had been conveyed to H, and had been improved by him: and as A had been guilty of *laches* in failing to make enquiries, and in the prompt assertion of his claim; and the lands lay in another state, the proper measure of relief is compensation for the injury, instead of a rescission of the contract.

*He had been counsel in the Court below.
†See monographic *note* on "Laches" appended to Peers v. Barnett, 12 Gratt. 410.

By an act of the Congress of the United States, the heirs of General Joseph Martin, of Virginia, were authorized to locate five thousand acres of land in the states of Alabama or Mississippi, of land which had been offered for sale but had not been sold, and in tracts not less than one hundred and thirty acres. These heirs, of whom there were seventeen, employed Col. William Martin, of Tennessee, one of their number, as their agent to locate the lands; and they also gave him authority to sell them after they were located. The locations seem to have been made about the year 1826, in the state of Mississippi.

Among the heirs of General Martin was Sarah, the wife of Samuel Armstead, of the county of Campbell, who died in the lifetime of her husband, leaving three sons, her heirs at law. In 1828 Samuel Armstead had become possessed of an interest in the lands aforesaid equal to three hundred acres; and he then sold this interest to Thomas Hundley; and having afterwards acquired another interest, equal to four hundred and fifty acres, he, in 1831, sold this interest to Hundley; the price of the whole seven hundred and fifty acres amounting to 1412 dollars 62 cents. At this time Armstead had not himself obtained a conveyance of these interests, and he executed to Hundley a bond to secure the conveyance to him.

In 1832 Hundley went to the state of Mississippi; and on his return to Virginia in 1833, he informed Armstead that all the lands had been sold by Col. Martin to Elias P. Kent, so that Hundley could not
54 obtain *his seven hundred and fifty acres. He stated further, that the lands were then worth more than he had given Armstead for them, and insisted that Armstead should make up to him the difference. Armstead seems to have acquiesced in this demand; and on the 25th of September 1833 they had a settlement, and entered into an agreement under seal. To this agreement Armstead's sons were parties. It appears from the statement of the account between Hundley and Armstead, that Armstead was indebted to Hundley on other transactions to the amount of . . \$ 693 54

There was to this added supposed cost on 1400 acres of land, . .	250 00
Due me for land traded some time ago,	2000 00
	<hr/> 2943 54
By order on William Martin for proceeds of 1400 acres of land, .	2800 00
	<hr/> 143 54
Cash paid in full in presence of Dr. Ro. Smith,	143 54
	<hr/> <hr/>

Immediately following this statement was the agreement, by which the Armsteads, in consideration of the sum of 2800 dollars, as above stated, relinquished to Hundley the proceeds of fourteen hundred acres, (that being the amount of the interest of Armstead and his sons in said lands, including

the seven hundred and fifty acres before mentioned,) it being part of the five thousand acres aforesaid, "lately sold by Col. William Martin or his agent." The agreement then proceeds to state from whom the Armsteads acquired the fourteen hundred acres, and that they had given Hundley an order on Col. William Martin, the agent, when the proceeds should fall into his hands.

The agreement further provided, that the lands had been or should be legally

55 *relinquished; and that for so much of the sum of 2800 dollars as Colonel Martin should pay or accept to pay out of the interests of the Armsteads in the said lands, they were to be released; and so much thereof as might not be due to them out of the said claims, they were to pay to Hundley, after it was ascertained how much Col. Martin owed them. And if there should be due to the Armsteads more than 2800 dollars, Hundley was to pay it to them; and he was to settle with Col. Martin for the cost attending the location, sale, &c., of said land, before he settled finally with the Armsteads; and the title bond before that time executed to Hundley by Samuel Armstead was declared to be null and void. And it was lastly provided, that if Hundley failed to collect the sum of 2800 dollars from Col. Martin, or the person who had lately purchased the lands, after legal recourse on them, then that the Armsteads were bound to Hundley to pay him so much as he failed to collect.

In pursuance of this agreement, the Armsteads, on the same day, addressed a letter to Col. William Martin, in which they say:

"We are informed that you or your agent has sold the Mississippi land belonging to the estate of Gen. Joseph Martin, deceased, for a little upwards of two dollars per acre, at one and two years. We have purchased the interest of," &c., which "will probably amount to fourteen hundred acres or upwards; and have sold the same to Capt. Thomas Hundley. You will be pleased to pay him the net proceeds of the same, when collected, with interest from the time it becomes due. We presume it will amount to 2550 dollars, after expenses are paid. Should these interests amount to more, pay or accept to pay it to Captain Thomas Hundley. Should it amount to less, accept to pay for what may be due us, when we exhibit our title as conveyed from these legatees as before stated."

56 *Although it was true, that when Hundley was in Mississippi in 1832, Col. Martin was negotiating with Kent for the sale of the lands belonging to Gen. Joseph Martin, and it is probable both parties thought that the sale was made, yet in fact the negotiation failed. As early as August 1833, Martin seems to have considered the contract ended, though it was not until July 1834 that it was finally broken off. In the meantime Hundley returned to Mississippi in the fall of 1833. On the 21st of November 1833, he wrote to Armstead as follows:

"According to promise, I now drop you a few lines on the subject of the land that I

purchased of you. I have seen Mr. Kent and M'Craven; I find that M'Craven has become a partner with Kent in the purchase, and they have executed their notes for the money. The purchase appears to have been made the 29th of March last, at which time the payment will fall due in two annual payments. I have purchased Kent's interest giving him 800 dollars on his interest in the purchase, telling him that I had an interest of fourteen hundred acres, and that I should contend for the land, and was not willing to receive the proceeds of sale as made by Col. Martin. He says that Col. Martin made the sale without reserve, and that he shewed him sixteen powers of attorney; but that is neither here nor there about the matter, as I have purchased Kent's interest."

"I hope you have not written to Martin that I am to take the proceeds of the sale; and don't do so, as I shall arrange every thing with Col. Martin so soon as you can forward me the title legally made. You will only say to Col. Martin in your letters to him, that I am entitled to fourteen hundred acres of the land, or so many interests, and I will settle with him without incommoding him in respect to the sale of the land. I wish you to write to me immediately on the receipt of *this.

57 I want the titles; and I want you to write a different letter to the one you have given me to Col. Martin; that is, don't shew in it to him that I am in any way bound to take the proceeds of sale. You know I told you I would give you 50 dollars in case I could become interested in the purchase. I shall do so; therefore write to Col. Martin in the manner that I have informed you."

On the 9th of March 1834, Hundley wrote to Col. William Martin from Clinton in Hind's county, Mississippi, and stated to him that he had purchased of Samuel Armstead fourteen hundred acres of the land belonging to the estate of Gen. Joseph Martin; and that since that purchase he had purchased of Kent sixteen hundred acres of the thirty-two hundred sold to him. He said further, that he had written to Col. Martin from Louisville, Kentucky, some six weeks before, by a Mr. Hancock, and had sent by him Mr. Armstead's letter to Colonel Martin, amounting to an order on him for the land; and telling him that he (Hundley) would settle with him all expenses; and that having heard that Hancock was sick in Kentucky, he feared that Hancock would not see Col. Martin before Kent did. And he said his object in writing was to propose to set off the amount due from Kent for the sixteen hundred acres, by his own interest in the land, as far as it would go, say fourteen hundred acres; and also to give to Col. Martin any security he might ask for the delivery and the correctness of the titles from Armstead and the legatees from whom he purchased; and that he would call on Col. Martin the next fall with the titles.

This letter Col. Martin answered on the 5th of April following; and after acknowledging the receipt of Hundley's letter, he

proceeded to state to him how much of the land had been sold to meet the expenses of locating and selling, what amount of the proceeds of the sales of other lands was on hand for distribution among the parties interested; and that there remained unsold about three thousand acres. He also stated to Hundley the circumstances in relation to the contract with Kent. That he had from the 31st of the previous December considered the contract at an end; but that Kent had been to see him a few days before the time he was then writing, and insisted that the agent of Col. Martin had misunderstood M'Craven when he understood him to decline the purchase; and claiming to have the contract executed. That Colonel Martin had agreed to wait for four months; and if in that time he was satisfied that his agent had been mistaken he would carry out the contract; otherwise he should consider it, as he then did, void.

In December 1834, Brice A. Martin and Lucy C. his wife, from whom Samuel Armstead had purchased some of the interests in these lands, executed a deed, whereby they conveyed to Thomas Hundley the entire interest that the said Brice A. Martin and Lucy C. his wife, were entitled to in the lands aforesaid; and the children of Samuel Armstead executed at the same time to Hundley a similar deed.

On the 27th of January 1835, Hundley applied to Col. Martin for a settlement, and then, as it seems, for the first time, presented to Colonel Martin the letter of the 25th of September 1833, from Samuel Armstead and his sons, hereinbefore given, and the conveyances aforesaid; and upon the authority of these papers, Col. Martin paid to him the proportion of the proceeds of the previous sales of the lands to which, according to them, he was entitled. He at the same time sold to Hundley all the lands then remaining unsold, amounting to three thousand and sixty-nine acres, at three dollars per acre, after deducting eight hundred and twelve and a quarter acres, which was the proportion of the three thousand

and sixty-nine acres to which he was entitled under the conveyances to him from Brice A. Martin and the Armsteads. After this sale Kent returned to Hundley the amount he had received under their contract.

In 1838, Samuel Armstead instituted a suit against Thomas Hundley on the chancery side of the Circuit court of Campbell county. In his bill he stated the title to the land in the heirs of Gen. Joseph Martin, the location thereof by Col. Martin, and his authority to sell; the first sale of three hundred acres by Armstead to Hundley; the second sale of four hundred and fifty acres; the visit of Hundley to Mississippi, and his return with the information that all the land was sold, so that he could not obtain his seven hundred and fifty acres; that he alleged the land was worth much more than he had given for it to Armstead, and that he would hold Armstead accountable to him for the difference. That the

complainant, supposing this information to be correct, and being unwilling to engage in a law suit with Hundley, was induced to enter into another agreement, whereby, among other things, all the former contracts between them in relation to the sale and purchase of these lands were rescinded, and the complainant agreed to pay him 575 dollars, for the supposed injuries sustained by him in not getting the land. The bill sets out the agreement of the 25th of September 1833, and states that the 250 dollars appearing in the statement which preceded the agreement, was the supposed cost of locating, &c. 1400 acres of land; and that the charge of 2000 dollars appearing in that statement, included the 575 dollars before mentioned, agreed to be paid by Armstead to Hundley upon the cancelment of the former contracts.

The bill further stated, that immediately after the execution of this agreement Hundley went again to Mississippi, when complainant gave him a letter to Col.

Martin, explanatory of his object in giving the order upon him, and the nature and character of the several rights and transfers held by himself and his sons; which letter was suppressed by Hundley. That Hundley, after remaining some time in Mississippi upon this visit, again returned, and informed the complainant that Col. Martin declined paying the said order, or any part thereof, until the relinquishments which, by the last agreement, Armstead had bound himself to obtain, were procured, and that he then became quite clamorous on the subject, and urged, with much apparent earnestness, the propriety of immediately procuring them; giving, however, no other reason for his solicitude on the subject, than that they were essential to enable him to collect the proceeds of the sales, and that Col. Martin would not pay the order without them. That the complainant, having the utmost confidence in Hundley, and believing that what he stated was true, immediately procured the relinquishments to be made. And it being suggested that it would probably be more convenient to all concerned that Hundley, who was going to Mississippi, should have the legal title, it was agreed that conveyances should be made directly to him; and for the purpose of enabling Hundley to collect the proceeds of the land in the hands of Col. Martin or in the hands of the purchasers from him, and for no other whatsoever, the conveyances were, by the directions of the complainant, made directly to Hundley. These conveyances, duly authenticated, were delivered by the complainant to Hundley, and with these conveyances in his possession he went to Mississippi and returned again in 1835.

The bill further stated, that upon Hundley's return on this occasion, he pretended that he had been successful in obtaining from Colonel Martin the proceeds of said land, in pursuance of the order of the 25th of September 1833; but insisted that com-

61 plainant should pay interest upon the order from its date until the time *of his settlement with Colonel Martin, which the complainant, in order to avoid a law suit, agreed to do, and did pay him the sum of 200 dollars at different times, on account thereof.

The bill charged, that from the commencement to the conclusion of his transactions aforesaid with Hundley, the complainant was entirely ignorant of the true character of his rights, or the real condition of the land aforesaid. He knew he was interested in several shares therein, but as to its value, or whether it had been sold, he was wholly uninformed, except as he had received information from Hundley, who he supposed was familiar with it. That thinking the demand of interest as aforesaid unreasonable, and believing from some circumstances that had come to his knowledge that there was some mistake about the matter, he wrote to Colonel Martin for information on the subject, whose letter in reply gave him the first information that but a small portion of said land had been really sold.

The bill further charges that Hundley had made an improper use of the conveyances made to him; that when he received said conveyances he knew that the whole of the land had not been sold. That by suppressing complainant's letter to Col. Martin he had deceived him; and had thus obtained from him, not only the proportion of money in Martin's hands due to complainant, but also 857 acres of land, as Armstead's proportion of the land which remained unsold.

The prayer of the bill was, that Hundley might be compelled to reconvey to the complainant the 857 acres of land, and deliver him possession thereof, or that the value thereof might be ascertained and the same decreed to him; and for general relief.

Hundley answered the bill. The points on which the parties were at issue were, that Hundley insisted that by the contract of September 1833, it was the intention *of the parties that there should
62 be an absolute sale of the whole of Armstead's interest in the land; and that the form of the contract was adopted because, as Hundley had actually purchased of Kent sixteen hundred acres of land, and had given for the purchase money (except 800 dollars,) his bonds, at one and two years, the order of Armstead on Colonel Martin would enable Hundley to pay pro tanto the purchase money; and that being paid, he would receive a deed from Kent, his grantor, Kent receiving a deed from Col. Martin. That the precise interest of Armstead could not then be ascertained, because the cost of location, &c., was uncertain, and the intentions of the several legatees were unknown; and therefore the agreement was, that a deficiency under 2800 dollars, or an excess over that sum, should be the subject of an after settlement.

Hundley further stated, that on his return to Virginia in the fall of 1834, he called

on Armstead, and shewed him Col. Martin's letter of the 5th of April 1834, and informed him, that before leaving Mississippi he had seen M'Craven, who would not take the land; and that the probability was, that Kent's contract, spoken of in Col. Martin's letter, would not be confirmed; and that in that event he, Hundley, would, on his next visit to Mississippi, buy all the remaining lands from Col. Martin. And that he then disclosed to Armstead the real condition of said land, so far as he knew it himself.

He further stated, that it then being pretty well ascertained that Kent and M'Craven would not take the lands, so that Kent could not convey to him the sixteen hundred acres for which he had contracted, he requested Armstead to carry out the true meaning and intent of the contract of the 25th of September 1833, by causing deeds in fee simple to be made to him for the
63 fourteen hundred acres of land; to which Armstead *readily consented, and procured the conveyances to be made.

He further stated, that he settled with Col. Martin, and received the money and land to which he was entitled under his contract with Armstead. That he then made a statement of his transactions with complainant, charging him according to the principles of the statement of the 25th of September 1833, on which account there was a balance in his favour of about 275 dollars, of which complainant had paid at different times about 200 dollars.

He denied that it was his purpose to surrender his rights under the contracts made in 1828 and 1831, for the seven hundred and fifty acres of land as such; but said that these contracts became part of the large contract for fourteen hundred acres of the 25th of September 1833; but were in no otherwise rescinded or intended to be rescinded. He denied that the deeds were made for the sole purpose of enabling him to collect more readily the proceeds of the land from Col. Martin or the purchasers, or for any other such purpose, but that they were made for the sole purpose of giving to him a fee simple absolute title to the land. And he said that the imputation that he had suppressed any letter delivered to him by the complainant for Col. Martin, was a wilful and malicious slander.

Evidence was introduced by the defendant to prove repeated declarations of Armstead that he had sold his Mississippi lands to Hundley. Armstead also introduced a witness, who stated that he was present when the contract of the 25th of September 1833 was made; that a compromise of the previous contracts between Armstead and Hundley was made, by which Armstead bought back all the titles he had before sold to Hundley, for which he gave him upwards of 500 dollars profit; and that Hundley agreed to take an order on Col. Martin for the amount, or so much as would pay the claim Hundley had against Armstead.

64 *The witness further stated that he

understood from the parties, that the deeds were to be made to Hundley to enable him to collect the purchase money from Col. Martin.

There was no proof that Hundley had informed Armstead in the fall of 1834, that the sale to Kent would probably be rescinded; nor was there any evidence that Armstead had any information as to the condition of the lands, or the settlement with or sale to Hundley by Martin, until he received it from Col. Martin, by a letter bearing date the 15th of March 1837, in reply to one from Armstead written in the preceding January; and from that letter the probable inference is, that it gave to Armstead the first information he received on the subject.

In April 1842 the cause came on to be finally heard, when the Court below dismissed the bill, with costs. Whereupon Armstead applied to this Court for an appeal, which was allowed.

Garland, for the appellant.

Cooke, for the appellee.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that the contract between the parties dated the 25th of September 1833, and made an exhibit in the cause, was entered into under a mutual mistake, produced by the belief of the appellee that Col. William Martin, the agent of the legatees of Gen. Joseph Martin, had sold the lands in Mississippi to a certain Elias D. Kent, and therefore that it was not in the power of the appellant to comply with the agreements previously made with the appellee to convey to him the 750 acres which had theretofore been sold to him.

That under the influence of said mistake, produced by the representations of the
65 appellee, who then believed *the same to be true, the appellant was induced to enter into the arrangement of the 25th September 1833, whereby compensation was to be allowed for the supposed loss of the land previously sold; and the appellee was invested with the power to settle with and receive from said Col. William Martin the proceeds arising from the sale of so much of said land as the appellant was entitled to.

That in entering into said arrangement, it appears from the terms of the agreement and of the order in favour of the appellee upon the said Col. William Martin, the parties did not contemplate a sale of the land. They both then supposed the land had been disposed of; and there would have been no motive on the part of the appellant to enter into the arrangement whereby compensation was made for the loss of the land, if at the time he had been apprised of the fact that there remained unsold a sufficient quantity of the land to which he was entitled to satisfy his original contract of sale.

The deeds subsequently executed by the appellant and others at his instance, vesting the legal title to the land in the appellee, were made by the appellant and others at

his instance, to enable the appellee more easily to settle with and receive the proceeds of the sale from the agent, and on the part of the appellant to carry out and fulfil the arrangement of the 25th September 1833.

The appellee, when he received information that the contract alleged to have been entered into between Elias D. Kent and the agent, for the purchase of all the lands, had not been consummated, and that there remained a sufficient quantity of land unsold to which the appellant was entitled to satisfy his original purchase, was bound in good faith to communicate the fact to the appellant; but the suppression of that fact, and his treating the contract of

66 the 25th September *1833 as an absolute sale by the Armsteads to the appellee of their whole interest in the lands, was a fraud against which the appellant is entitled to be relieved.

The Court is further of opinion, that as the power of the agent at the time of the sale of the lands to the appellee was unrevoked, and his sale therefore valid; and as it furthermore appears that the lands were sold at their fair value and were purchased in connection with other lands of legatees, no partition having been made, and, as it is alleged, have been improved by the appellee; and the contract having moreover been fully executed by absolute conveyances to the appellee; and the appellant himself having been guilty of laches in failing to make proper enquiries, and in the prompt assertion of his claim; and the lands being situated in another State, the proper measure of relief under the circumstances of this case, will be compensation for the injury instead of a rescission of the contract.

In ascertaining the amount of such compensation, the appellant should be debited with the original price of the 750 acres of land, 1412 dollars 62 cents, (with interest thereon from the times of his sales to the appellee up to the date of the settlement made by the appellee with the agent,) and also with 693 dollars 54 cents, the amount of the debts in the account, with interest on the principal to the same period.

And the appellee should be debited with the sum received of the agent, Col. William Martin, on account of the lands previously sold; also with the price agreed upon between him and said agent for the proportion of the appellant in his own right, and in right of other legatees to which he was entitled, in the lands not previously sold by the agent, and then purchased of the agent by the appellee; also with 143 dollars 54 cents cash, paid on the 25th September 1833, the balance then ascertained, with interest to the date of the settlement with

the agent, and also with the sum of
67 200 *dollars, alleged in the bill and admitted in the answer to have been paid to the appellee by the appellant, for interest on the amount of the order upon the agent, from the date thereof to the time of settlement with the agent, and deducting the amount so debited to the appellant from

the amount so debited to the appellee, the balance so ascertained to be due from the appellee will be the sum for which, with interest, the appellant should have a decree. And leave should be reserved to the appellant to apply to the Court for a rescission of the contract, and a decree for the reconveyance of the land conveyed to the appellee, over and above the 750 acres, in the event of the personal decree for the balance, ascertained as aforesaid, proving unavailing.

The Court is therefore of opinion that the decree dismissing the bill is erroneous; and the same is reversed with costs; and the cause is remanded, to be proceeded in according to the principles of this opinion, in order to a final decree.

68 *M'Laughlin v. The Bank of Potomac & als.

April Term, 1850, Richmond.

Retrocession of County of Alexandria to Virginia*—Appeal Pending in Supreme Court of the United States from Circuit Court of District of Alexandria—Effect—Case at Bar.—A cause, on appeal from the decision of the Circuit court of the district of Alexandria, pending in the Supreme court of the United States at the time of the retrocession of the county of Alexandria to the State of Virginia, was properly heard and decided by that Court after the retrocession; and its decision was properly sent down to the Circuit Superior court of law and chancery for the county of Alexandria established by the Legislature of Virginia; and is to be enforced by that Court.

At the June term 1845, of the Circuit court of the United States for the District of Columbia, holden in and for the county of Alexandria, a decree was rendered in a cause therein depending, in which the Bank of Potomac and others were plaintiffs, and Bridget M'Laughlin and others were defendants, by which certain real estate in the possession of Bridget M'Laughlin was subjected to satisfy the claims of the plaintiffs against Edward M'Laughlin; and commissioners were appointed to make sale thereof. From this decree, Bridget M'Laughlin took an appeal to the Supreme court of the United States. Whilst the appeal was pending in the Supreme court, the county of Alexandria was retroceded by the government of the United States, to the State of Virginia, and the retrocession was accepted by the Legislature of Virginia. The acts of the General Assembly of Virginia and of Congress by which this was accomplished, are referred to in the opinion of the Court.

In December 1848, the decree of the Circuit court of Alexandria was affirmed by the Supreme court; and the decree was remanded in the usual form to the Judge of the Circuit Superior court of law and
69 chancery for *the county of Alexan-

dria in the Commonwealth of Virginia. At the November term of the Circuit court, the mandate of the Supreme court was produced in Court by the plaintiffs, who moved the Court to receive and file the same, which motion was resisted by the defendants; but the Court sustained the motion, and ordered that the said mandate should be filed among the records of the Court, and obeyed. From this order, Bridget M'Laughlin applied to this Court for a supersedeas, which was awarded.

The cause was argued in this Court by John Y. Mason and Heath, for the appellant, and by Davis of Baltimore, and Macfarland, for the appellees.

BALDWIN, J., delivered the opinion of the Court.

The constitution of the United States gives to Congress exclusive legislation over such district, not exceeding ten miles square, as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States. This provision recognizes the authority of States to make the cession, and of Congress to receive it; and carries with it the incidental powers of reciprocal legislation, adapted to the accomplishment of the purpose. And it thus became the duty of ceding States on the one hand, and of Congress on the other, so to provide, in the transfer of sovereignty and jurisdiction, that the rights of individuals and the incidental remedies, existing at the time, should receive no detriment.

Accordingly, we find that by the act of cession of the Virginia Legislature of December 1789, it was provided, that the jurisdiction of the laws of the State, over the persons and property of individuals residing within the limits of the cession, should not cease or determine, until Congress, having accepted the cession, should, by law, provide for the government thereof,

70 *under their jurisdiction. The act of cession of the Maryland Legislature contains the like provision in identical words. And the acts of acceptance of Congress, of July 1790, and March 1791, embrace a provision, that the operation of the laws of the ceding States, within such district, should not be affected by the acceptance until the time fixed for the removal of the seat of government. And the act of Congress of February 1801, for the government of the district, makes provision for obtaining executions on judgments and decrees which had been, or should be, obtained in the Courts of Maryland or Virginia, by filing exemplifications of the proceedings in the Court of the district.

In the case of Van Ness, &c. v. The Bank of the United States, 13 Peters' R. 17, a question arose as to the validity of a title to certain lots in the City of Washington, derived from a decree of the Chancery court of Maryland, rendered in October 1801, after Congress had assumed jurisdiction over the territory, though in a cause pending before. And it was held by the Supreme

*The principal case is cited in Bull v. Read, 12 Gratt 92.

court of the United States, that it was not the intention of the parties to the cession, that suits pending at the time, should abate; and that without stopping to enquire what, upon general principles of law, would be the effect of a cession upon suits then pending in the ceding sovereignty, it was evident that the State and the United States both intended that the suits then pending in the Maryland tribunals, should be proceeded in, until the rights of the parties should be finally decided, and that the judgments and decrees there made, should be as valid and conclusive as if the sovereignty had not been transferred.

It is admitted on all hands, that Congress had the constitutional power of retroceding, and Virginia of accepting the retrocession of territory, ceded by the latter to the former as above mentioned; and it follows that *these parties had the like incidental powers of legislation, to give effect to the retrocession, as they possessed in regard to the original cession, and incurred the like obligations of duty in regard to the rights and remedies of individuals existing at the time of the retrocession.

The retrocession was accomplished by a series of legislative acts, beginning with the act of the Virginia Legislature of February 1846, which provided that, so soon as the Congress of the United States should recede to the Commonwealth of Virginia, the county of Alexandria, and relinquish their exclusive jurisdiction, as well of territory as of persons residing, or to reside therein, the same should be re-annexed to this Commonwealth, and constitute a portion thereof; and which declared that the jurisdiction and laws of the United States, as well as the rights and privileges of the citizens of said county, and bodies politic and corporate thereof, should continue in force and be exercised, in like manner, and to the same extent, as they then existed, until the General Assembly of Virginia should, by law, provide for the government of said county, under the constitution and laws of this Commonwealth.

The next step was taken by the Congress of the United States, by the act of July 1846; by which, when the assent of the people of the county and town of Alexandria should be ascertained as therein prescribed, all that portion of the District of Columbia ceded to the United States by the State of Virginia, and all the rights and jurisdiction therewith ceded over the same, were retroceded and forever relinquished to the State of Virginia, in full and absolute jurisdiction, as well of soil as of persons residing or to reside therein. But that the jurisdiction and laws then existing in the said territory, over the persons and property of individuals therein residing, should not cease or determine, until the State of Virginia should thereafter provide by law for the extension of her jurisdiction and judicial system over the territory so retroceded.

72 *This was followed by the act of

the General Assembly of Virginia of March 1847, by which the laws and jurisdiction of this Commonwealth were extended over the retroceded territory, with certain exceptions for the preservation and protection of the rights and remedies of individuals. It was never contemplated by the high contracting parties to continue in existence for these purposes the Circuit and inferior courts of the District for Alexandria county; and therefore provision was made for the transfer to the appropriate Courts established by the act, of all original and record muniments of title, and of all judgments, decrees and orders in actions and suits which had been determined, and of all actions and suits depending. In regard to actions and suits on the docket of the Circuit court of the District for Alexandria county, which had been carried by appeal into the Supreme court of the United States, (which Congress had constituted the appellate Court of the District,) these were not in a condition to be transferred to the Superior court of law and chancery established by the act, without a transfer also of the pending appeals therein to an appellate forum in Virginia. The latter would have been inconvenient and inexpedient, for obvious reasons; and there was no necessity for the measure, inasmuch as the tribunal in which the appeals were pending continued in existence, with complete jurisdiction over them; unless, indeed, it should be deprived thereof by legislation or the want of legislation on the subject. The act, therefore, recognized the continued jurisdiction of the Supreme court in regard to the pending appeals; and inasmuch as its adjudications could not be transmitted to the Circuit court of the District for the county of Alexandria, by reason of the abrogation of the latter Court, provision was made for the transmission of them to, and the carrying of them into effect by, the Circuit Superior court of Virginia established by the act. The prescribed form of *such transmission, by mandate from the Supreme court, was a mere matter of form, inasmuch as the subsequent proceedings were to be had in, and by force of the jurisdiction of, the new tribunal, and subject to the jurisdiction of the Supreme court of appeals of Virginia.

In conformity with this last act of the Legislature of Virginia, the supplemental act of Congress of July 1848, was passed, by which provision was made for the continued jurisdiction of the Supreme court of the United States, in causes pending therein from the Circuit court of the District for the county of Alexandria, at the time when the jurisdiction and laws of Virginia had been extended over the same; and for the transmission of its adjudications, in such appellate causes, to the proper tribunal in Virginia invested by her laws with jurisdiction to carry the same into effect.

We need not enter into any criticisms upon the phraseology of these several acts of Congress and of the General Assembly.

They must be treated, one and all, as parts of one entire legislative compact between the high contracting parties, upon the subject with which they dealt, and over which they had unquestioned constitutional power. That subject was, the retrocession of sovereignty and jurisdiction, and the provisions by which it was to be accomplished were matters of sound discretion and enlightened expediency. The very sovereignty and jurisdiction of which they treated, enabled the parties to reserve, temporarily, a portion thereof, for the more perfect and beneficial transfer of the whole. It was essential to provide for the disposal of the existing litigation in the Courts of the retroceded territory, and that could be done, in relation to actions and suits pending in the appellate Court, only by allowing them to be adjudicated in that forum, or by transferring them for adjudication to some other tribunal. The wild and mischievous result, if that could have

74 followed from naked *retrocession, of suffering the pending appeals to fall from the jurisdiction of the Supreme court, without care as to their future fate, or that of the judgments and decrees from which they sprang, was surely, at no period of the legislative treaty, for a moment contemplated. The wise and beneficent expedient has been adopted of retaining the jurisdiction of the Supreme court over such appeals; and we have no difficulty upon the question, whether this was done in due time and by competent authority.

As to the time. The compact was not to be evidenced by a deed to be signed and sealed by the high contracting parties or their agents; but by reciprocal acts of legislation, to be passed from time to time as the occasion should require, and resulting in their mutual consent to the several provisions, as expressed by both of the parties, or by either with the acquiescence of the other. The proper time for Virginia to introduce her stipulation for adjudication by the Supreme court, of the appeals depending at the time of the retrocession, was when she was accomplishing that retrocession, in conformity with the previous act of Congress, by extending her laws and jurisdiction over the retroceded territory. It was a modification of that extension of her jurisdiction, in order to render it more perfect and beneficial; to which the General Government could have had no possible objection, and which might have been regarded as tacitly assented to by Congress, in the absence of any further legislation by that party; but which was expressly concurred in and provided for by the subsequent act of Congress. And even if any blunder had occurred, of omission or commission, in the progress of the legislative treaty; what well founded objection could there have been to a return to the subject by the parties to the compact, at any time when the occasion should require it, for the purpose of supplying the defect or

75 correcting the mistake? *The high contracting parties had full constitu-

tional power over the subject, without limitation as to time; and that power could not be exhausted, until the retrocession, with its incidents, was rendered complete and perfect.

As to the competency of the authority. There could hardly be a cavil as to the competency of Congress to permit, or even prescribe, especially with the consent and for the benefit of Virginia, the exercise by the appellate Court of the district of that jurisdiction over causes pending therein, which that tribunal had lawfully acquired. And as to Virginia: when the judicial department of her government is called upon to pronounce that the legislative department has transcended its constitutional powers, the usurpation must be made manifest; and not the less so, when the question occurs in relation to a compact with another sovereignty, made under the authority of the federal constitution, and the effect of the adjudication is to be, if not an entire abrogation of the compact, a breach of good faith on the part of the State in regard to the other contracting party.

It is true that our State constitution declares the judicial power of Virginia shall be vested in certain tribunals of her own, whose jurisdiction is to be regulated by law. And if we could suppose that the Legislature of Virginia would ever undertake to submit the administration of her laws, between her own citizens and on her own soil, to the authority and control of foreign tribunals, we would imagine an invasion, not only of the constitutional province of her judiciary, but an act of treason against the sovereignty of her people. But in this case there has been no delegation of jurisdiction to the judicial department of another government. No Court of Virginia has ever had jurisdiction of the appeals depending in the Supreme court of the United States, at the time

76 of the retrocession of the territory *formerly ceded to the General Government. The jurisdiction over those appeals was reserved in the compact of retrocession to the tribunal which had intermediately acquired the same; and now to expunge those remedies would be an act of judicial violence scarcely less flagrant than the extirpation of the rights which they involve.

The Court is therefore of opinion that there is no error in the decretal order of the Circuit Superior court; and it is ordered and decreed that the same be affirmed, with costs to the appellee.

Reid's Adm'r v. Strider's Adm'r.

April Term, 1850, Richmond.

1. Court of Appeals—Writ of Error *Coram Vobis*. *—A writ of error *coram vobis* does not lie in the Supreme court of appeals.

*Court of Appeals—Decree—Finality of.—It is now the well-settled law of this state, that the court of appeals cannot review the decision rendered at a

2. Same—Cause Pending in—Death of Party—Effect.†—

Where a party to a cause pending in the Supreme court of appeals dies pending the appeal, it is not necessary to revive the cause in the name of his representative; but the case may be revived when it goes back to the Court below.

This was a motion upon notice by Hunter, administrator of Reid, to set aside a decree of this Court made at the April term 1845. The case is reported in 2 Grattan 34. The ground of the motion was, that before the case was argued or decided, the appellee Strider had died. It appeared that Strider died in March 1845; and that the cause was argued in April and decided in May of that year, without a revival of the suit against his administrator, or a suggestion of his death upon the record.

77 *G. N. Johnson, for the motion.

The proceeding by notice, on motion, has in practice been substituted for a writ of error coram vobis. *Eubank v. Ralls*, 4 Leigh 308. But if the Court shall be of opinion that the proceeding should be by the writ, then this motion may be considered as an application for the writ.

On the merits. Strider and Reid's adm'r were the only parties to the appeal. Both were therefore necessary parties; because at common law the death of either party abates the suit. 3 Bl. Com. 302; and this law is only so far modified by statute as to authorize a revival by scire facias; but not to authorize a Court to make a decree when there are no parties. The statutes which authorize a revival of a suit, shew that the revival is necessary. Indeed, so necessary is it that there shall be the proper parties before the Court when the cause is decided, that if the Court has proceeded to decide the cause after the death of a party, this is an error of fact for which the common law gives the writ of error coram vobis. *Bank of Alexandria v. Patton*, 1 Rob. R. 499; *May v. State Bank of North Carolina*, 2 Rob. R. 56. And our act of 1819, Sess. Acts 1819-20, p. 24, gives this writ.

former term. After its term has closed, its adjudications, right or wrong, must stand irreversible and final, and the controversies between the parties whose rights have been adjudicated are closed forever. This doctrine has been firmly established by this court, in the case of *Reid v. Strider*, 7 Gratt. 76; *Griffin v. Cunningham*, 20 Gratt. 50, 105. See, in accord, citing the principal case, *Stuart v. Peyton*, 97 Va. 813, 34 S. E. Rep. 696; *Hall v. Bank of Va.*, 15 W. Va. 330; *Campbell v. Hughes*, 12 W. Va. 211, approving the principal case to somewhat the same point. See monographic note on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615; also, note to principal case in 54 Am. Dec. 120.

†Pleading—Parties—Death Pending Appeal.—If a party dies during the pendency of an appeal or writ of error, the court may proceed to judgment or decree, in certain cases under section 3307 of the Code, as if such death had not occurred. *Booth v. Dotson*, 93 Va. 237, 24 S. E. Rep. 935, citing the principal case. See also, *Buckner v. Blair*, 2 Munf. 836; *Bank of Alexandria v. Patton*, 1 Rob. 499. But see *Rider v. Union Factory*, 7 Leigh 154.

The counsel on the other side may attempt to distinguish between cases in the inferior Courts and cases in this Court. But our statute gives the writ to this Court as well as to the inferior Courts. And as there is no restriction upon it in the statute, the extent of its use must be determined by the common law.

This writ is used by the Court of King's bench, which is an appellate Court; and that Court uses it in cases of appeal. Why then should it not be used in this Court? The same evil exists here. Parties in this Court die as in other Courts. If it is said they are represented by counsel here, the same may be said of parties in other Courts. But there can be no counsel

78 *of a dead man; and his representative is entitled to choose his own counsel.

Although there is no decision of this Court sustaining the use of the writ here, yet there are opinions of the Judges in favour of it. *Stanard's* opinion in the *Bank of Alexandria v. Patton*, 1 Rob. R. 499; *Baldwin's* opinion in *May v. State Bank of North Carolina*, 2 Rob. R. 56. The practice in this Court is not to hear a cause where a death in suggested until it is revived. And if the revival is not necessary, why has the statute given the writ of error coram vobis?

It may be said that although the administrator of the deceased party may ask to set aside the decree, that the party who was alive at the hearing and was represented by counsel cannot. But we do not ask to set aside the decree as a matter of convenience but of law. And was it ever heard of that there could be a judgment which bound one party but did not bind the other. On this point, however, the authority is express and decisive. *Bac. Abr.* title Error, letter J. § 6. And in *Daniel v. Robinson*, 1 Wash. 154, it was held that where one party is dead, the other party may consider the cause not ready for a hearing until there has been a scire facias to revive it.

Cooke, for Strider's adm'r.

We are willing to meet the case hypothetically as a petition for a writ of error coram vobis. This writ we say is inconsistent with the constitution of this Court. The fact that there is no precedent for it here, is conclusive against it. A writ in an inferior Court is intended not only to revive the case but to have it tried over again. The petitioner expects to be benefited by the new trial on which he may introduce new evidence. But no new evidence can be introduced in this Court.

Look to the class of cases in which this Court refuses to alter a decree once made though erroneous on its face. *Campbell v. Price*, 3 Munf. 227; *Towner v. Lane*, 9 Leigh 262. In this last case there had been a vacation of but eight days, and yet this Court refused to alter the decree.

The counsel on the other side asks why may not this Court issue the writ as well

as the Court of King's bench, which is a Court of appeals. It is not feasible for this Supreme court to modify its rules of practice to accord with the practice of the King's bench, which though an appellate is an inferior Court. It is dangerous to take up one point of practice and conform to it without considering the antecedents and succedents.

It is supposed by the counsel on the other side, that the act of 1819, Sess. Acts 1819-20, p. 24, gives this Court authority to use the writ of error coram vobis. The intent of that act was to facilitate the obtaining the writ where it was legally obtainable before. The draftsman of the act seems to have supposed that this Court might issue the writ. In that he was mistaken, and the act does not authorize it.

BALDWIN, J. The case presented for our consideration is briefly this: Reid, the owner of a negro boy, on which he had given a deed of trust, agreed with Strider to place him in his possession till the 1st of January 1834, when Reid was to refund the money secured by the trust deed, (which Strider undertook to discharge,) and take back the boy, or receive the balance he should then be worth at a fair valuation, and make a good title for him. Reid failed to perform the condition, and afterwards his administrator brought a suit in equity to redeem the slave, upon the allegation that the transaction was a mortgage; and it was so held by the Circuit court. Reid's administrator was therefore charged with the money advanced, with interest from the 1st of January 1834, and credited by the

80 hires: and a small balance being found in his favour, Strider *was decreed to pay it, and to deliver the slave. From this decree Strider appealed, and this Court, in May 1845, held the contract to be not a mortgage, but a conditional sale, and the sale not having been abrogated, by performance of the condition, that he became Strider's property, without accountability for hires. The decree of the Circuit court was therefore reversed, and Strider decreed to pay the balance of the value of the boy on the 1st of January 1834, after deducting the money advanced, with interest from that date. See Reid's adm'r v. Strider, 2 Gratt. 34. And now, nearly five years after the decree of this Court, a motion is made here, either to set it aside, or to award a writ of error coram vobis; on the ground that at the time of its rendition, Strider had died, to wit, in the month of March previously, and consequently, that the case was prematurely and irregularly heard, inasmuch as Strider's death ought to have been suggested, and the appeal revived against his representative.

I need not consider how far this Court may amend its judgments and decrees, at a subsequent term, by correcting clerical misprisions in the entries thereof, the question here being of a quite different nature. We are called upon not to amend, but to reverse, annul, or set aside the decree, in order

that the appeal may be replaced upon our docket, and heard de novo upon its merits, after a revival thereof against Strider's representative; and this, too, upon the application of the adverse party, who might have had the death suggested, and process of revival issued, before the hearing was had in this Court.

It is not the province of this Court to exercise appellate jurisdiction over its own adjudication, and it has no process adapted to such a purpose. It has no power to award writs of error to its own judgments, or allow appeals from, or bills of review to, its own decrees, for any error of law or of fact appearing upon the face of 81 *its records. Nor can it, for errors of fact not apparent upon its records, grant writs of error coram vobis, or entertain bills of review. It is the appellate forum in the last resort, for the revisal of the judgments and decrees of subordinate tribunals, which it may affirm or reverse, with power in case of reversal, to render such adjudication as the inferior Court ought to have rendered. During the same term, its decisions, like those of other Courts of record, are within its own breast, and may be modified or rescinded as a more matured consideration may dictate; but after the end of the term, the merits of its adjudications have passed beyond its control. This finality and irreversibility of the judgments and decrees of this Court is inherent in the very nature and constitution of the tribunal, and cannot be disturbed without deranging the administration of justice, and the introduction of intolerable evils in practice.

This Court occupies the like supreme and ultimate position in our judicial system that the House of Lords does in that of England. And in the House of Lords a writ of error coram vobis does not lie for error in fact; for which two reasons are assigned, one technical, and the other politic: the first is that the record itself is not removed thither, but only the transcript thereof, as with us: the other is, that it is below the dignity of the House of Lords, that being the supreme judicature, to examine matters of fact; the substantial meaning of which I take to be, that to do so, would be foreign to the nature and purposes of that tribunal. See 2 Tidd's Pract. 1057.

It is true, in relation to writs of error coram vobis, that by the act of the 24th of February 1820, Sess. Acts of 1819-20, it is provided, "that writs of error coram vobis, and all other writs of error, may be awarded in vacation, by any Judge of the Court of 82 appeals, or General court, or any Superior court of law, or by any *two justices of a County or Corporation court, in the same manner and upon the same conditions, as may be awarded by the same Courts respectively in term time; and that every such writ issued in pursuance of this act shall operate as a supersedeas." But this act was not designed to enlarge the powers of the Courts therein mentioned,

but only to extend certain then existing powers thereof in term time to Judges thereof respectively in vacation; and must be construed *rendendo singula singulis*, by referring the comprehensive terms, which in the aggregate embrace writs of error of every description, distributively to the appropriate writs of error, of which the respective Courts already had cognizance.

The remedy therefore, for the supposed error or irregularity, by writ of error *coram vobis*, would be wholly unwarranted, and moreover utterly inappropriate, it being merely a common law writ, and unheard of in chancery proceedings.

And if we look to a bill of review, it is obvious that in a Supreme court merely appellate, there is no room for its cognizance, the only tribunal in which such a proceeding can originate, being the subordinate Court where the original decree was rendered: and even there jurisdiction of it is taken away by an appellate decree of this Court, after which a bill of review lies only on the ground of the discovery of new matter affecting the merits of the controversy. *Campbell v. Price, &c.*, 3 Munf. 227. And matter of abatement is not capable of being shewn by bill of review, as error to reverse a decree. 3 Dan. Chan. Pract. 1728, n; Story's Eq. Plead. § 411; Mitf. Eq. Pl. by Jery. 85.

If this Court has no process by which to reverse or annul its judgments and decrees of former terms upon the merits, still less can it do so for mere irregularities, and far less by the informal and summary proceeding by motion. Indeed, a final judgment or decree of any

83 cannot, without the authority of some statute, be rescinded or amended after the expiration of the term at which it was rendered. 3 Chit. Bl. 407; *Bank of Virginia v. Craig*, 6 Leigh 399. In the case just cited, this Court unanimously overruled a motion for a rehearing, on the ground, "that it could not set aside its decree entered at a former term, whether it was prematurely decided, or whether it was objectionable on the merits or not."

With that decision, the case of *Wynn v. Wyatt's adm'r*, 11 Leigh 584, cannot be regarded as in conflict. There, it is true, a judgment of this Court of one term was, at the next term thereafter, set aside and a rehearing directed; but the reporter suggests that the motion for it had been made at the previous term, and held under advisement. That this was so, may be inferred from the fact, that no question seems to have been made as to the power of the Court to re-examine its judgment of a former term; a question too grave to have been disregarded, especially after the solemn decision upon that point in the *Bank of Virginia v. Craig*. And this inference is strengthened by an order of the Court after the allowance of the rehearing, stating that before it was granted, the transcript of the judgment had been improvidently certified to the Court below, and therefore recalling the same.

What I have said is based upon the hypothesis, that there is error or irregularity in fact in the failure to suggest the death of the appellant Strider, and proceeding to the appellate hearing and decree, without a revival of the appeal against his representative; but I am far from entertaining that opinion.

At common law, actions abated by the death of the plaintiff or defendant, and were incapable of revival, though originally maintainable for or against the representative of the deceased. A suit in equity also

abated by the death of either party; 84 but, if originally maintainable *for or against the representative of the deceased, could always be revived by bill of revivor, and now by statute may be revived by *scire facias*, 1 Rev. Code p. 497. The English statutes, and ours conforming to them, and extended to suits in equity, which authorize revival by *scire facias*, have no application to writs of error or appeals. These never abated by the death of either party, (with one exception,) for the reason, I presume, that there is no abatement of the original judgment or decree, and the reversal or affirmance thereof is the only matter involved in the appellate cause. The exception is in the case of the death of the plaintiff in error, before his assignment of errors, which probably rests upon the ground that the proceeding has not been perfected, and there must be a new writ of error. This exception prevails in the English practice, the assignment of errors being made there after the writ of error has been sued out, and is in the nature of a declaration, upon which an issue is made up usually by the plea of *in nullo est erratum*, which is in the nature of a demurrer. It is unknown, however, in our practice, where there are no pleadings in error, unless of a release or the like, and the death of the plaintiff cannot occur before the assignment of errors, which is always made in the petition for the writ.

According to the English practice, if the plaintiff in error dies after the assignment of errors, or the defendant in error dies, whether before or after such assignment, the case proceeds in the names of the original parties to hearing and judgment, and the original judgment, if affirmed, is revived in the Court below by *scire facias*. 2 Tidd's Pract. 1094. In equity, an appeal to the House of Lords is prayed for by petition to the House, and allowed by its order; to which petition an answer is put in, denying error in the decree and praying its affirmance; upon which issue, or an

order of the House in case of default, 85 the appeal is appointed *to be heard.

If either party dies before hearing, the appeal is revived, upon petition, in the name of the representative of the deceased. 3 Daniel's Ch. Pract. 1634, &c.

With us, writs of error or supersedeas and appeals, allowed by this Court, or a Judge thereof in vacation, are prayed for by petition, in which the errors complained of are assigned or set forth; and process is issued

and served upon the adverse party, and a hearing is had after appearance by counsel, or in case of default; without appellate pleadings unless of some extrinsic matter in bar.

And though there is no abatement of appellate causes in this Court, whether of law or equity, and our statutes for revival of actions or suits have no application to them; yet a practice prevails here, probably borrowed in substance from that of the English House of Lords, in equity, requiring in case of the death of either party a revival of the appeal or writ of error by consent or by scire facias. *Bank of Alexandria v. Patton*, 1 Rob. R. 499. It is, however, a general rule of convenience and policy, applicable only where the death of the party is made known to the Court and suggested on its record; and there may be circumstances under which the suggestion itself will not be permitted by the Court. And if the appellate cause passes through this Court without such suggestion, there is no ground for the imputation of error or irregularity in the proceedings here; and the judgment or decree of this Court is remitted to the Court below, and entered upon the record there, and a revival then had there of the original judgment or decree in case of affirmance, or of that of this Court in case of reversal.

I think the motion made by Reid's adm'r ought to be overruled. To sustain it would introduce a practice fraught with incalculable mischief. Hundreds of causes pass through this Court without information on the *part of the Court, or of the counsel concerned, of deaths of parties; and much of our time would be most unprofitably employed, and to the great detriment of suitors, in setting aside our own adjudications, rendered upon mature consideration of the merits, for supposed irregularity in the proceedings.

CABELL, P., and ALLEN and DANIEL, Js., concurred in the opinion of Baldwin, J.

BROOKE, J., concurred in the judgment.

Motion overruled with costs.

Ross's Ex'or v. M'Lauchlan's Adm'r & als.

Same v. Haden's Adm'r.

April Term, 1850, Richmond.

(Absent BROOKE, J.)

1. **Equity Practice—Partnerships—Final Settlement—Errors on Face—Partners.**—Under the circumstances of the case, and after the time which had elapsed, the Court refused to enquire into errors which were alleged to appear upon the face of a final settlement of a partnership between the former partners.

2. **Same—Same—Same—Case at Bar.**—In a suit by the ex'or of one partner against the ex'or and his

The principal case is cited in *Harner v. Price*, 17 W. Va. 548, upon the subject of mistake.

sureties of the other partner, under the circumstances, the sureties not allowed to set up a credit, which had been set up by the partner and again by his ex'or, and had been disallowed by the Court in both instances.

3. **Compromise—Ignorance of Facts—Effect.**—A party to a compromise entered into in ignorance of important facts connected therewith, not held bound by it.

4. **Same—Same—Payment of More Than Bound to Pay—Recovery.**—A party to a compromise entered into, in ignorance of important facts connected therewith, binds himself to pay, and does pay, more than he was originally bound to pay. He is entitled to recover back the amount he has overpaid, with interest thereon from the time of payment.

87 *5. **Equity Practice—Bonds—Application of Payments.***—A debtor by four bonds payable at successive periods, makes payments to his creditor, which upon a settlement after the death of the debtor, are ascertained to amount to more than is sufficient to discharge the first bond. The creditor will not be permitted to apply the amount remaining after discharging the first bond as a credit upon the fourth; but the Court will apply it to the second bond in relief of a party bound as surety for the amount of the second bond.

6. **Same—Same—Same—Case at Bar.**—A creditor by two judgments and a bond files a bill against the ex'or of his debtor, and obtains a personal decree against the ex'or for the whole amount. Upon an execution which issued upon this decree a part of the money is made. The judgments being debts of highest dignity, the money so made is to be applied as a credit upon them, in relief of a party who is bound as a surety for the judgments.

7. **Same—Same—Same—Judgments.**—In this case the ex'or sells lands of his testator, and pays the proceeds to the creditor. As the judgments were liens upon the lands, the payments are to be applied as credits upon the judgments.

In 1783 a partnership was entered into by David Ross and Duncan M'Lauchlan, for carrying on a country store at the Point of Forks, now Columbia, in the county of Fluvanna. In this partnership David Ross was to be interested two thirds, and M'Lauchlan one third; and M'Lauchlan was the acting partner in conducting the business. This partnership was renewed and continued until 1794, when it was finally dissolved. M'Lauchlan continued to carry on business at the same place on his own account, and was employed in winding up the affairs of the partnership.

In 1802, the partners not having had a final settlement, an accountant was employed by them to settle up the books, and when he had finished his task Ross sent up an agent for the purpose of finally adjusting the business; and he submitted in writing a scheme of settlement, which was accepted by M'Lauchlan, in June 1802. The only provisions of this scheme which it is necessary to state, are, that M'Lauchlan was

***Equity Practice—Application of Payments.**—Upon this question, see *foot-note* to *Howard v. McCall*, 21 Gratt. 205; *Chapman v. Com.*, 25 Gratt. 721. The principal case is cited and followed in *Norris v. Beaty*, 6 W. Va. 484.

to take all the debts of the concern, and was to be allowed $7\frac{1}{2}$ per cent. upon Ross's two thirds of the *good debts for the expense and trouble of collection. And having had the slaves belonging to the concern in his possession since the dissolution of the partnership in 1794, he was to be charged with two thirds of the hires, with interest upon them; and he was to take the slaves and to be charged with two thirds of their value. In March 1803, Ross and M'Lauchlan met in Columbia for the purpose of executing the agreement of June 1802, when a statement of the account was made. In this account the good debts are set down at £ 1098. 0. 6., and the interest up to the 1st of April 1802, at £ 467. 15. 9. = £ 1566. 1. 9.: but it does not appear on the face of the account, that the deduction of $7\frac{1}{2}$ per cent. on two thirds thereof was made, but M'Lauchlan is charged with the whole two thirds. In the same account the valuation of the slaves is stated at £ 1085.; the hires are stated at £ 590., and the interest thereon at £ 128. 0. 8.; and M'Lauchlan is credited with £ 30. for expenses of young negroes, and £ 558. 6. 8. for one third of the slaves, their hires and interest thereon.

Upon this account the amount for which M'Lauchlan was to be responsible to Ross was £ 2413. 18. 9., for which he executed to Ross his four bonds bearing date the 3d of March 1803, payable the 1st of April 1803, 1804, 1805 and 1806, each for the sum of £ 603. 9. $8\frac{1}{2}$., with interest from the 1st of April 1802. And at the foot of the statement of the account the parties agreed that if there was any error the same should be rectified on both sides.

In May 1806, Ross recovered judgments against M'Lauchlan in the County court of Fluvanna, on the two bonds due in 1804 and 1805; whereupon M'Lauchlan obtained from that Court an injunction to these judgments, and executed an injunction bond with John Quarles and Joseph Haden as his sureties. The grounds on which the injunction was asked, were first that there was an error in the settlement of 1803, made *by charging him with a large sum as cash on hand, when the books shewed that at a previous period there was a much larger balance in his favour which had not been carried forward; and second, that various credits to which M'Lauchlan was entitled had not been allowed him on that settlement; and he claimed to have them set off against the judgments. These credits are stated in an account annexed to the bill.

Ross answered the bill, and replied specially to the claims set up. Those which existed before the settlement he objected to as concluded by that settlement; and as to the most important of them, that they had either been passed upon in the settlement or were without any foundation of evidence or justice. He admitted certain credits arising out of payments made and claims bought up since the settlement, and said that to meet these he had held up the bond

first due, upon which these credits would be allowed: And he admitted one payment of 200 dollars through Forbes, which had been directed to be applied to the second bond; and which he had so directed to be so applied before the judgment thereon was recovered.

M'Lauchlan having died soon after the injunction was obtained, John Quarles qualified as his executor; and the injunction was dissolved early in the year 1807.

In March 1807 Ross revived his judgments against Quarles as the executor of M'Lauchlan, but the executions thereon were returned "no effects;" and he, in February 1808, instituted a suit in the late Chancery court of the Richmond district against Quarles the executor, to have a settlement of his administration account, and the payment, not only of his judgments, but of the fourth bond.

In this suit Quarles set up the same offsets to the plaintiff's claims that were set up in the injunction suit in Fluvanna County court; but they were rejected; and when the bill was afterwards amended and his *sureties in his official bond were made parties, they also set up these offsets; and they also insisted that there was error in the settlement of March 1803, in not allowing M'Lauchlan credit for a commission of seven and a half per cent. upon the two thirds of the good debts, for collection, according to Ross' proposition in March 1802, which was accepted by M'Lauchlan, and which was the basis of the settlement of March 1803; and that there was error also in not allowing M'Lauchlan his full one third of the price, hires and interest thereon, of the slaves.

In 1808 the defendant was directed to settle his administration account; and in June 1810 there was a decree against him for £ 1509. 12. $7\frac{1}{2}$., with interest on £ 1206. 19. 5. from the 1st of February 1810 until paid; and he was allowed to go before the commissioner to establish his set-offs to the residue of the plaintiff's demand. In June 1812 there was another decree in the cause, in which the Court, approving so much of the report as rejected the defendant's discounts, decreed against him, in favour of the plaintiff, for the further sum of £ 302. 16. $9\frac{1}{4}$., with interest from the 8th day of May 1810 until paid. And in 1815 there was a further decree, recommitting the commissioner's reports previously made in the cause, on the grounds that they were made before the sureties of Quarles had been brought before the Court; and that these sureties should have an opportunity to shew that they were erroneous. Accordingly, two reports were subsequently made: one by commissioner Parsons and the other by commissioner Shore; but it is unnecessary to give the details of either.

The cause lingered on the docket until March 1842, when it was transferred to the Circuit court of Fluvanna: It having been in the meantime revived, first in the name of Thomas T. Bouldin, executor of Ross, and on his death, in the name of

91 Frederick A. Ross, as *executor of Ross, and Thomas Shores, late sheriff of Fluvanna county, and as such administrator de bonis non of M'Lauchlan, and Basil M. Jones, administrator of Quarles.

Whilst this cause was pending in the Chancery court at Richmond, David Ross, in 1815, instituted an action in the Circuit court of Fluvanna against Joseph Haden, upon the injunction bond executed by M'Lauchlan, with Quarles and Haden as his sureties, upon obtaining the injunction above mentioned in the County court of Fluvanna in 1806. Whilst this action was pending, Ross and Haden had a meeting in the City of Richmond, when Ross made a statement of the debt for which Haden was bound, making the amount due on the 23d of December 1815, £ 1888. 12. 4., after credit in the claim with £ 600. the price of a tract of land purchased from the executor Quarles by Jacob Myers, and settled with Ross; and they entered into an agreement under seal, by which Haden agreed to pay Ross this sum in two equal payments, the first on the 23d of December 1815, and the second on the 23d of December 1816. And to facilitate the payments, Ross agreed to take young negroes at valuation.

In February 1816 Haden paid to Ross in negroes 3800 dollars. Between that time and the fall of 1818 Ross died; and Haden not having paid the balance appearing due upon the settlement of 1815, the suit in the Circuit court of Fluvanna was revived in the name of Thomas T. Bouldin, the executor of Ross; and at the fall term of the Court a judgment was rendered against Haden for the whole amount of the two judgments enjoined, with interest and damages; but the judgment was to be subject to any equitable credits which the defendant might have against it. In November 1818 Haden obtained an injunction to this judgment. In his bill he stated the pendency of the suit of Ross against Quarles the executor of

92 M'Lauchlan, and that it was then believed *that there was but an inconsiderable amount due from M'Lauchlan to Ross. He insisted that he should not be subjected to pay the judgment recovered against him until the real balance due to Ross was ascertained. That he had probably overpaid Ross, and was entitled to have such overpayment refunded. That Ross, in one of his amended bills, admitted he had made upon the execution which issued on the decree of 1810 against Quarles, near 500 dollars; that there were other payments which appeared from the commissioner's reports; that Ross had received through Myers 2000 dollars, and that he himself had paid 3800 dollars; both of which sums should be credits upon the judgment. He does not allude at all in his bill to the settlement made by Ross and himself in 1815.

Bouldin, in his answer, stated that he had heard of the payment by Haden in slaves before the judgment was recovered, but was not informed of the amount; and expected that the defendant in the action

would produce the receipt on the trial, which, however, he had not done; but that he could at any time have obtained the credit by applying either to the respondent or his counsel. He stated that Ross and M'Lauchlan had a full settlement of their accounts in 1803. That Haden and Ross had a final settlement in 1815 of the amount which Haden was to pay, after giving him credit for £ 600. paid by Myers; which amount was £ 1888. 12. 4.: And he exhibited that settlement and agreement with his answer.

This cause also slept upon the docket until March 1842, when it was transferred to the Circuit court of Fluvanna. In that Court the two causes came on to be heard together, and the Court set aside the report of commissioner Shore, and directed a special statement to be made according to the views of the Court. Of this statement A is intended to shew the state of the accounts as

93 between Ross's executor and the administrators *of M'Lauchlan and Quarles; and statement B is intended to shew the state of the accounts as between Ross's executor and Haden. In both these statements there is a credit to M'Lauchlan for 7½ per cent. upon the amount of two thirds of the good debts belonging to Duncan M'Lauchlan & Co. at the time of the settlement in March 1803; which by Ross's proposition was to be allowed M'Lauchlan for collecting them. This amounted to £ 78. 6. 1. There was also a credit on account of charges for slaves £ 42. 13. 6½.; it appearing on the face of the account stated in 1803, that the credit allowed M'Lauchlan was that much less than one third of the charge for the price and hires of slaves and interest thereon. These two sums amounting to £ 120. 19. 7½. deducted equally from the four bonds executed at the time of the settlement, reduced them from £ 603. 9. 8½. to £ 573. 4. 9¼. There was also a credit to M'Lauchlan for certain tobacco and wheat amounting to £ 84. 6. 5. This tobacco and wheat was alleged to have been delivered to Davis, the agent of Ross, the day after he completed his settlement with M'Lauchlan in 1802, and it did not appear in the settlement of March 1803. But the same credit had been set up by M'Lauchlan in his injunction suit in the County court of Fluvanna, and also by Quarles before the commissioner in 1810, and had been rejected by both Courts. There was also a credit for the costs in the actions at law on the second and third bonds.

Besides these credits, there were others about which there was no question that they were proper credits in statement A, which included a charge of the fourth bond as well as the second and third; but which the plaintiff insisted were not properly credited in statement B, in which only the second and third bonds were charged. These credits the plaintiff insisted he had a right to apply to the discharge of the fourth bond, first, because the debtor had directed
94 no particular *application of the pay-

ments; and, second, because by the settlement between Ross and Haden, the latter was concluded from insisting on these credits; especially as in that settlement Ross had allowed him a credit for the payment made by Myers, to which it was insisted he was not entitled. These credits were first £ 150. 18. 1. Upon a settlement made in 1810, it appeared M'Lauchlan had overpaid the first bond to this amount. Second, £ 149. 17. 10½. made under an execution issued on the decree of 1810. Third, the proceeds of a lot in the town of Columbia, which belonged to M'Lauchlan's estate, and was sold in 1810. There were other credits about which there was no dispute. The statement A, after crediting the amount paid by Haden, shewed still a balance due from M'Lauchlan's estate to Ross of £ 483. 15. 3¾.; and statement B shewed that Haden had overpaid on the 8th February 1816, the amount for which he was responsible to Ross £ 632. 17.

The two causes came on to be finally heard in April 1844, when the Court confirmed the statements A and B, and made a decree against the sureties of Quarles the executor of M'Lauchlan, for the sum of £ 483. 15. 3¾., with interest thereon from the 8th of February 1816 until paid; but declined to make a decree against the representatives of M'Lauchlan or Quarles for said sum with interest, because the decrees before rendered in the cause against Quarles exceeded the amount due as aforesaid.

And in the second suit the Court reinstated the injunction granted to the plaintiff Haden so far as it had been dissolved by previous orders in the cause, and made it perpetual, and further decreed that the plaintiff in this suit should recover of Ross's executor, to be paid out of the assets of his testator in his hands to be administered, his costs and the further sum of £ 632. 17., the amount overpaid by Haden to Ross, 95 with interest *thereon from the date of the decree until paid: the Court being of opinion that it was not competent to give interest on the same from the date of such overpayment. From the decree in both cases Ross's executor applied to this Court for an appeal, which was allowed.

Cooke, for the appellant.

Irvine and Stanard & Bouldin, for the appellees.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that in the statement A, referred to and adopted as the basis of the decree in the first of said suits, the Circuit Superior court erred in allowing as credits to reduce the amount of the debt due from Duncan M'Lauchlan to David Ross, the sum of £ 78. 6. 1. for commissions on two thirds of good debts, and also the sum of £ 42. 13. 6½. short credit for interest on the hires of slaves: and, therefore, there was error in reducing the amount of each bond from the sum of £ 603. 9. 8½. to £ 573. 4. 9¼., and making such reduced amount of the bonds the basis of calcula-

tions. The Court is further of opinion, that after the decree dissolving the injunction and dismissing the bill, and the decree against John Quarles, ex'or of D. M'Lauchlan, and the proceedings had in this cause, it is too late to set up the credit of £ 84. 6. 5. for tobacco and wheat, allowed in said statement A, and that said Court erred in allowing said credit, and also the credit of £ 4. 14. 10¼. costs at law on the second and third bonds. The court is further of opinion, that when the Circuit court properly set aside the report of commissioner Shore, and caused the statement A to be made out as exhibiting the true balance due to the estate of D. Ross, for which the securities of John Quarles, the executor of D. M'Lauchlan, were liable, they should also

have been debited with the sum of 166 96 dollars 11½ cents, or £ 49. *17. 3., the amount of costs decreed to said Ross against said Quarles on the 20th of June 1812, it appearing on the face of said proceedings, that said costs were recovered by said Ross in a suit instituted to obtain an account of the assets, and charging a devastavit, and were, therefore, a proper charge against the securities. The Court is, therefore, of opinion, that the statement A, and decree based thereon, are erroneous in allowing the credits above designated, and in omitting the charge for £ 49. 17. 3. costs aforesaid; and as a consequence, that all the calculations of interest and damages in said statement A, based upon the allowance of such credits and omission of such charge, are also erroneous. It is therefore considered, that the decree in the first of the above cases be reversed with costs to the appellant, and the cause remanded to the Circuit court, with instructions to commit the accounts to a commissioner, who is to take the statement A above referred to, as the basis of his report, and correcting the same so far, and so far only, as it is herein before declared to be erroneous, and modifying the calculations of interest and damages so as to conform with the true sums after disallowing the credits so as aforesaid improperly allowed, and charging the sum improperly omitted, and rejecting all other claims for charges or credits on either side, other than those appearing on the face of said statement, or herein mentioned, the balance so appearing, will be the amount for which, with interest, the appellant in the first of said suits will be entitled to a decree.

And in the second of said suits of Ross's ex'or against the representative of Joseph Haden deceased, the Court is of opinion, that the statement B, made out and adopted as the basis of the decree rendered in the last suit, was erroneous in allowing as credits to reduce the bonds the sums of £ 87. 6. 1. and £ 42. 13. 6½., and therefore there was error in reducing the amount of each bond from £ 603. 9. 8½. to 97 £ 573. 4. 9¼. and, making *such reduced amount of the bonds the basis of calculation. The Court is further of opinion, that the security in the injunction

bond was precluded by the decree dissolving the injunction and dismissing the bill, from setting up credits passed upon by said decree between the creditor and his principal, and therefore the Court erred in allowing a credit for £ 84. 6. 5. for tobacco and wheat. The Court is therefore of opinion, that said statement B, and the decree based thereon, are erroneous in allowing the credits aforesaid, and as a consequence, that the calculations of interest and damages in the statement B, based on the allowance of such credits, are also erroneous. The Court is further of opinion, that notwithstanding the agreement of the 21st of October 1815, between said J. Haden and D. Ross, it was competent for the former or his representative, to shew that the same was entered into by him in ignorance of the true amount due on the judgments enjoined, and that by a proper application of the payments received by Ross out of the proceeds of his debtor's estate, the amount due on said judgments enjoined, was less than the sum set forth in the agreement of the 21st of October 1815. And the Court is further of opinion, that as the judgments constituted a lien on the real estate, and a debt of the highest dignity against the assets, it was the duty of said Ross to apply the payments received principally from the sale of the real estate to the credit of the judgments, and if, by his failure to do so, the security in the injunction bond, has been induced when ignorant of the misapplication of the payments by the creditor, to enter into a compromise by which he bound himself to pay, and did pay a larger sum than could rightfully have been demanded from him, such compromise and payment should not prevent the security from recovering back the money so overpaid by mistake; and upon sums so overpaid by mistake as aforesaid, the party is entitled to recover interest. The *Court is therefore of opinion, that said decree is also erroneous to the prejudice of the appellee in not allowing interest on the sum which it was ascertained he was entitled to recover back. It is therefore ordered and decreed, that the decree is erroneous, and the same is reversed; but as it is manifest the appellee, by the allowance of interest on the sum overpaid by him, will be the party substantially prevailing, as the sum, though reduced by the principles of this opinion, to which the appellee will be entitled, together with interest from the time when the same was paid to the period of rendering the decree, it is apparent, will exceed the amount of the decree appealed from, it is further ordered and decreed, that the appellee recover his costs to be levied, &c. And the cause is remanded, with instructions to commit the accounts to a commissioner, who is to take the statement B, above referred to, as the basis of his report, and correcting the same so far only as the same is herein declared to be erroneous, and modifying the calculations of interest and damages so as to conform to the said statement as corrected, and rejecting all other claims for

credit or charges on either side, than such as appear on the face of the statement; for the balance ascertained by the statement so corrected, and calculations so modified, to have been overpaid by the said J. Haden, with interest thereon as aforesaid, the representative of said Haden will be entitled to a decree against the appellant, which is ordered to be certified.

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*Moore v. Thornton & als.

April Term, 1850, Richmond.

(Absent CABELL, P.)

1. **Legatees—Division of Slaves among by Commissioner—Death of One of Slaves before Confirmation—Effect—Case at Bar.**—Commissioners are appointed to divide slaves among legatees, and are directed to allot and deliver to each his share. They make the division, and deliver to each legatee the slaves allotted to him. The legatees are satisfied at the time, with the division and allotment; and each takes possession of the slaves allotted to him, and thenceforth exercises ownership over them. Before the report of the commissioners is confirmed a slave allotted to one of the legatees dies, and he therefore objects to the confirmation of the report. **HELD:** That under these circumstances each party would have been entitled to the benefit of any increase in the value of his allotment, from the time of such division and taking exclusive possession, and is also bound to bear the loss occasioned by the death of any one of the slaves thereafter; though at the time of such increase in value or loss the report may not have been formally confirmed.
2. **Wills—Construction—Case at Bar.**—Testator gives all his estate, real and personal, to his widow, until his youngest child comes of age; and directs that it shall then be divided, one third to his widow for her life, and subject to the widow's life estate, equally among his children; but he charges the interest of his daughter W. with £500, advanced to her on her marriage. W. and her husband convey for value all her interest in the real estate to M.; and the husband conveys to M., for value, all his wife's interest in the personal estate. The estate is divided according to the directions of the will, when the youngest child comes of age, when M. receives the share of W., abated by the whole charge of £500. After the division, and in the lifetime of the husband, M. purchases the life estate of the widow in one of the slaves allotted to her, and sells the slave. The husband dies in the lifetime of the widow, leaving his wife W. surviving him, and then the widow dies. **HELD:**
 1. **Same—Same—Same.**—M. is not entitled, under his purchase from the husband, to the interest of W. in the personal estate allotted to the widow for her life; but it survives to W.
 2. **Same—Same—Same.**—M. is not entitled to the share of W. in the slave, the life estate in which he purchased from the widow.
- 100 *3. **Same—Same—Same.**—M. must account for said slave at her value at the time of the widow's death; except as to those of the legatees who consented to the sale by him.
4. **Same—Same—Same.**—W. must bear her proportion of the charge of £500; and to ascertain that proportion M. is to be debited with the value of

the estate real and personal allotted to him on the first division of the estate, at its value at that time, and the value of the real estate to which he is entitled at the death of the widow, at its value at the time of her death. And W. is to be debited with the value of the slaves to which she is entitled at the death of the widow, as of their value at that time; and the £500 is to be charged ratably to each.

Dr. Gustavus B. Horner, late of the county of Fauquier, died in 1815. By his will, which was admitted to probat in the County court of Fauquier, he directed that until his youngest daughter, Marianna, attained the age of fourteen years, his estate which might remain after the payment of his debts, should be kept undivided, and that the profits should be used by his executors for the maintenance of his widow and his unmarried children. And when the youngest daughter attained the age of fourteen years, his widow should receive such portion of his estate as she would be entitled to if he had died intestate; and the remainder thereof should be equally divided among his eight children; except that the share of his daughter Frances Whiting should be charged with the sum of £ 500., which he had advanced to her on her marriage with George B. Whiting.

In the year 1817 George B. Whiting and his wife Frances, by deed bearing date the 11th day of August of that year, in consideration of 1708 dollars 34 cents conveyed to Thomas L. Moore, the interest of Frances Whiting in the real estate of her father. And on the same day George B. Whiting, in consideration of 1000 dollars, conveyed to Moore the whole interest of his wife in the personal estate of Gustavus B. Horner.

In December 1826 the estate of Gustavus B. Horner was divided under a decree 101 of the late Chancery court *of Fredericksburg, when there were allotted to the widow slaves valued at 2375 dollars, and two tracts of land in the county of Fauquier, one of which was called Turkey run, and a house and lot in Warrenton; and the share of each of the children in the slaves amounted to 850 dollars. At this time Thomas L. Moore was entitled to two shares of the estate: one in right of his wife, who was one of the children of Dr. Horner, and the other by virtue of the conveyances from George B. Whiting and his wife to him; but the latter was subject to the charge of £ 500. under the will of Dr. Horner. In making the division the commissioners charged this £ 500. against his interest in the slaves, as well that which he held in right of his wife, as that of Mrs. Whiting; so that he only received, on account of his interest in the slaves, the sum of 33 dollars 34 cents; but he received the whole of Mrs. Whiting's interest in the real estate then divided.

Thomas B. Whiting died in 1835, in the lifetime of Mrs. Horner. She died in 1837, and Frances Whiting survived them.

In 1838 James B. Thornton and Marianna his wife, who was the youngest daughter

of Dr. Horner, filed their bill in the Circuit court of Fauquier county, against Thomas L. Moore and his wife and others, the children of Dr. Horner, or persons claiming under them, in which they asked for a division of the property which had been assigned to Mrs. Horner for her life, and for an account of the rents of land and hires of slaves which had been received by any of the parties since the death of Mrs. Horner; and also for an account of any firewood, timber, building stone or any other profit which any of the parties had obtained from the land. This bill did not make Mrs.

Frances Whiting a party.

102 *Moore and wife answered the bill, and claimed that they were entitled to five eighths of the property, one eighth in right of Mrs. Moore, and the others by purchase; and of these one was the interest of Mrs. Whiting. The other defendants also answered; and in October 1838 the Court made a decree appointing commissioners to divide the tract of land called Turkey run among the parties, assigning five eighths thereof to John Glassell as trustee for Moore and wife; and also to divide the slaves, and assign five eighths thereof to Glassell on the same trust; and appointing other commissioners to sell the house and lot in Warrenton. And a commissioner was directed to take an account of the rents and hires of the property to which the parties were respectively entitled from the time of the death of Mrs. Horner until the 1st of January 1839. At the same term of the Court so much of this decree as directed a division of the slaves was set aside.

In December 1838, the plaintiffs filed an amended bill making Frances Whiting a party defendant: and she answered, and insisted that as her husband, George B. Whiting, had died in the lifetime of Mrs. Horner, before the slaves allotted to the widow were or were capable of being reduced into possession by Moore, she was entitled to them, notwithstanding the conveyance by her husband to Moore.

The commissioners appointed to divide the land, made their report; and the cause came on again to be heard in May 1839, when the Court confirmed the report; and that branch of the cause was then terminated. The Court further held that Frances Whiting was entitled to an equal division of the dower slaves of the widow of Gustavus B. Horner deceased, with the other legatees, notwithstanding the sale and assignment of her interest therein by her deceased husband, for valuable consideration to Thomas L. Moore; and made a decree, directing a commissioner of the

103 Court to ascertain *the value of the dower of the said widow at the time of its assignment to her, and at her death; the value of each child's interest in the same at both of these periods; the value of said Frances Whiting's interest, both real and personal, in the estate of Dr. Horner, which Moore received on the division thereof; and the value of the said Frances

Whiting's interest in the real estate assigned to the said widow, both at the time of the assignment and at the death of the widow; and the value of her share of the dower slaves at said periods. And the Court not then deciding whether the interest of the said Frances in the dower slaves aforesaid, was subject to the £ 500. charged by the will of Dr. Horner on her share of his estate, directed the commissioner to report a scheme for division of said slaves, whereby the share of the said Frances in the dower slaves of the widow of Gustavus B. Horner would be subject to a portion of said charge of £ 500., estimating the value of said dower slaves at the period when the same were allotted to the widow; and also at the time of her death. And the Court further directed the commissioner to settle the accounts between the devisees and legatees of Dr. Horner, ascertaining the value of the stone and wood which either of them may have taken from the dower estate of the widow; and taking into the accounts the value at the time of the widow's death, of a slave named Celia, one of the dower slaves admitted by Thomas B. Moore to have been sold by him. And that the commissioner should take an account of the rents and hires which had accrued since the widow's death to the end of the current year; and to whom the same was chargeable.

In obedience to this decree, master commissioner Knox made a report which was returned on the 4th of April 1840. From this report, it appeared that the £ 500. charged by Dr. Horner on the share of his estate bequeathed to his daughter, Frances Whiting, had been *charged to Thomas L. Moore, as hereinbefore stated, upon the division of the estate in 1826. It also appeared from the report, that if the share of Mr. Whiting in the dower slaves was to bear an equal proportion of the charge of £ 500., then, if the whole interest was to be valued as at the time of the division in 1826, she should be charged with 126 dollars 81 cents; but if the whole share was to be valued as at the death of Mrs. Horner in 1837, Mrs. Whiting's proportion of the charge would be 203 dollars 70 cents. It also appeared, that the slave Celia was sold by Moore for 250 dollars, in 1827; and that she was worth at the death of Mrs. Horner, 350 dollars. And it further appeared, that Moore had obtained from the Turkey run land, during the lifetime of Mrs. Horner, a quantity of stone for the purpose of rebuilding his house, which had been burned; and had also obtained from the land twenty-five cart loads of wood.

Moore filed several exceptions to the report of commissioner Knox; the second of which was to the charge against him for the stone taken from the Turkey run land. This he insisted was not a proper charge; but if he was chargeable at all, that the commissioner had charged him with more than he had taken. And he introduced testimony which satisfied the Court below, that the second branch of the exception was properly taken.

In October 1840, the cause was removed to the Circuit court of Culpeper county; and came on there to be heard in November 1841, when the Court overruled some of the exceptions, sustained the second, and referred the case to a commissioner to correct the account by charging Moore with three hundred and fifty perches and five feet of stone at the price fixed by commissioner Knox. The Court further directed the commissioner to state an account between the devisees and legatees of Dr. Horner, shewing the balance due from *them to each other; in stating which account he was directed to charge Moore with the value of Celia, the dower slave sold by him, at the price of 350 dollars, except as to the shares of such of the legatees as had consented to the sale; and as to whom he was to be charged with the price of that slave at 250 dollars, after deducting therefrom the value of the dower interest of Mrs. Horner in the slave, which interest had been acquired by Moore previous to the sale, and in the lifetime of George B. Whiting. And the Court further held, that the charge of £ 500. upon Mrs. Whiting's share of Dr. Horner's estate should have been taken out of her share of the real and personal estate divided in 1826, the personal property being first set off against the said £ 500., and the balance of that sum being charged upon the land; that therefore Moore had a claim against George B. Whiting for so much as was chargeable upon the land under the warranty of his deed; and as it appeared that Whiting had conveyed property subject to the payment of his debts, in trust for Mrs. Whiting, the commissioner was directed to take an account shewing the value of all the property which came into Mrs. Whiting's possession since the death of her husband, under said deed. And commissioners were appointed to divide the dower slaves aforesaid, and deliver to the parties the slaves allotted to them respectively, except the slaves allotted to Mrs. Whiting, which were to be hired out by the commissioners.

The commissioner to whom the accounts were referred, made a report which was returned in October 1842. And the commissioners to divide and deliver the slaves, also made a report which was filed at the same time. From this report it appeared that they had proceeded in December 1841 to execute the decree of November 1841, and had divided the slaves, and delivered to the parties respectively, at the time of the division, the shares allotted to them; except that of Mrs. Whiting.

*Moore excepted to the report of the commissioner upon the accounts between the parties; but these exceptions do not refer to any question decided by this Court. He also excepted to the report of the commissioners appointed to divide the slaves, and to a confirmation of that report, on the ground that Mary, one of the slaves allotted to him by the commissioners, had died about the 9th of September 1842, after the division, but before the commis-

sioners had made out, signed or returned their report. With his exception, he filed his own affidavit of the death of the slave Mary, and also the affidavit of the physician who attended her, with the consent in writing of the counsel for two of the parties in this suit, that compensation in money might be decreed to him for the loss of the slave, instead of another division; and the statement of another of the counsel in the cause that he had understood from John Marr, one of the parties to this suit, and had no doubt of the fact, that the said slave Mary was dead, and had died since the division of the slaves.

The cause came on again to be heard in November 1842, when the Court recommitted the accounts to the commissioner, and on the motion of the defendant John Marr, suspended action on the report of the commissioners for the division of the slaves; and allowed to the parties until the next term of the Court, to take evidence in relation to the subject of Moore's exception to this report.

It appeared from the evidence, that the commissioners proceeded in December 1841, to divide the slaves in pursuance of the decree of the previous November. That the slaves allotted to the parties respectively, except those allotted to Mrs. Whiting, were delivered to them. That a Mr. Wallace was requested to draw up their report, and consented to do it; and more than once applied for the papers to one of the commis-

sioners with whom they were left, for the purpose of preparing the *report; but the commissioner having lent to Moore the copy of the decree under which they had acted, and he having mislaid it, for the want of that paper the report was not prepared in time to be returned to the spring term of the Court for 1842.

It further appeared, that all the parties were satisfied with the division when it was made. That Moore took possession of the slaves allotted to him; that he sold one of them; that he pledged the slave Mary, in April 1842, to indemnify his surety in certain forthcoming bonds. That several executions against him were levied upon her in May 1842; that at the June Court of Fauquier county, she was to have been sold, but the sale was postponed by the plaintiffs, as the sheriff understood, at the request of Moore. That at the July Court, when she was again to be sold, the sheriff applied to Moore for her, for the purpose of selling her, when he was informed by Moore that he had sent her to a Mr. M'Elhany in Loudoun county, for the purpose of selling her at private sale; and therefore she was not sold at that time by the sheriff. There was no evidence that she was dead, except that which was filed by Moore with his exception as before stated.

The commissioner returned his report upon the accounts between the parties in June 1843, to which Moore excepted. His first exception was to the charge against him, in favour of Mrs. Whiting, for her

share of the value of the slave Celia. The ground of this exception was, that George B. Whiting had sold to him all the interest of his wife in the personal estate of her father; and that he had, in the lifetime of said Whiting, acquired the life estate of Mrs. Horner in this slave; and therefore that Mrs. Whiting, though she survived her husband, was not entitled to any interest in this slave.

The cause came on to be finally heard in June 1843, when the Court overruled the exception of the defendant *Moore, to the report of the commissioners for the division of the slaves; the said defendant having failed, though indulged with time for that purpose, to produce any satisfactory evidence of the alleged death of the slave Mary, and the material facts in relation thereto. And the said report and the division of the slaves therein mentioned was confirmed; and the decree was accordingly.

And the Court overruled the exceptions of Moore to the report of the commissioner returned in June 1843, and made a decree in accordance with the report.

At the term when this cause was decided, in the course of the argument, the counsel for some of the parties opposed in interest to Moore, suggested that the death of the slave Mary did not appear by any legal evidence, and would not be admitted, unless all other facts which he deemed material to the question, were also admitted to be true. Whereupon Moore moved the Court to continue the cause to afford him time to prove the fact of the death of said slave, if the Court regarded the proof of that fact already furnished, insufficient. And to sustain this motion, he relied on his own affidavit, and the other proofs before mentioned. But the Court deciding that the proof of the death of the slave and the material circumstances relating thereto, were not sufficient, and that ample time to obtain the said proof had been allowed, overruled the motion, and proceeded to confirm the said report, and to make a decree in the cause. To which opinion of the Court, Moore excepted. And the Court certified that at the previous term, the matter of Moore's exception in relation to the death of the slave Mary, was argued, and was not then decided on by the Court, because the facts in relation to her death, and such as the parties deemed material in deciding upon that exception, were not in proof, and therefore time was allowed the parties until the present term, to take their testimony in relation thereto.

*Moore applied to this Court for an appeal from the decrees in the cause, which was allowed.

Harrison for the appellant.
Lyons for the appellees.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that as it appears by the interlocutory decree of the 6th November 1841, the commissioners thereby appointed were directed to divide the dower

slaves and allot the same to the parties respectively entitled, and to deliver over to the parties respectively the shares so allotted to them, except the share allotted to Frances Whiting, which the commissioners were to hire out; and the said commissioners having, in pursuance of such decree, divided said slaves, and the parties having drawn their shares respectively by lot, the same were delivered to them, and thereafter each exercised exclusive ownership over the share so allotted to each respectively; and no objection appearing to have been alleged against the fairness of the division when made, either at the time of the division or afterwards, under the circumstances so appearing, each party would have been entitled to the benefit of any increase in the value of his allotment from the time of such division and taking exclusive possession; and is also bound to bear the loss occasioned by the death of any one of the slaves thereafter, though at the time of such increase in value or loss, the report may not have been formally confirmed. The Court is therefore of opinion there was no error in overruling the exception on account of the death of the slave Mary, or in overruling the motion for a continuance to enable the party to take further evidence touching the time of her death.

The Court is further of opinion, that the £ 500. directed by the testator Gustavus B. Horner to be *charged against his daughter Frances Whiting, as having been advanced to her on her marriage, was a charge against her portion of the real and personal estate, to be distributed according to the will of the testator amongst his children. That it appears from the report of commissioner Knox, filed on the 4th of April 1840, that the appellant Thomas L. Moore, in his own right and as alienee of George B. Whiting and wife, and assignee of said George B. Whiting, received at the first distribution of said estate the whole of Mrs. Whiting's interest in the real estate, slaves and perishable property then divided and distributed, abated and diminished by the £ 500. charged as an advancement in the will, whereby the whole amount of said £ 500. was charged on the portion of Mrs. Whiting in said estate then assigned to and received by said Moore as alienee and assignee, whereby the reversion in the dower lands and slaves was wholly freed from any charge on account of said £ 500.; an arrangement calculated to promote the convenience of all concerned, if, as was then supposed, the assignment had operated to pass the interest of the said Frances Whiting in the reversion of the dower slaves. But in the contingency which has happened, of her surviving her husband, who died before the life-tenant, and becoming by such survivorship entitled to take her interest in such dower slaves on the death of the tenant for life, she should take them charged with a rateable portion of said £ 500.; otherwise the whole amount of the charge would be thrown upon the assignee and alienee of a portion

of the estate, instead of being, what by the will it was intended to be, a charge on the whole of her portion. And the appellant, by allowing the whole abatement to be made from the share received by him at the first division and distribution, has, in the contingency which has happened, paid out and advanced so much as would have been the rateable proportion

111 *chargeable on the interest of said Frances Whiting in the dower slaves; and to that extent has a right to charge said interest. In ascertaining the amount so chargeable the appellant should be debited with the whole value of Mrs. Whiting's interest in the land at the time of the first division, and in the slaves and perishable estate; also the value of her interest in the dower land at the death of the widow; and Mrs. Whiting should be debited with the value of her interest in the dower slaves at the widow's death. And the amounts being so ascertained, the £ 500. should be charged rateably on each; and for the amount so chargeable to Mrs. Whiting on account of her interest in the dower slaves, the appellant will be entitled to a credit against her or a decree, as on an adjustment of the accounts between them may be proper. The Court is therefore of opinion, that the interlocutory and final decrees, so far as they conflict with the principles aforesaid, are erroneous; but that in all other respects the same be affirmed. The said decrees are therefore reversed, with costs against Frances Whiting, and are remanded, in order to be corrected in the particular hereinbefore declared to be erroneous as between the appellant and said Frances Whiting, and to be further proceeded in in order to a final decree.

DANIEL, J., dissented. He was of opinion that by the assignment of George B. Whiting, Mrs. Whiting's interest in the slaves passed to Moore. And he was of opinion that Moore was improperly charged with the slave Mary, who died before the report of the commissioners was confirmed.

112 *Smith & Others v. Thompson's Adm'r & Others.

April Term, 1850, Richmond.

(Absent ALLEN, J.)

1. Equity Practice—Laches and Lapse of Time*—Case at Bar.—A party who comes into a Court of equity to enforce an equitable claim, must do so within a reasonable time; and he must not delay until, by his negligence, there can no longer be a safe deter-

*Equity Practice—Laches and Lapse of Time.—On this question, see the principal case cited in *Bargamin v. Clarke*, 20 Gratt. 553, and *note*; *foot-note* to *Carter v. McArtor*, 28 Gratt. 356; *Garland v. Garland*, 2 Va. Dec. 362; *Bell v. Moon*, 79 Va. 344; *Morrison v. Householder*, 79 Va. 631; *Perkins v. Lane*, 82 Va. 62; *Scott v. Isaacs*, 85 Va. 718. 8 S. E. Rep. 678; *Craumer v. McSwords*, 24 W. Va. 602; *Pusey v. Gardner*, 31 W. Va. 481; *Elcan v. Lancasterian School*, 2 P. & H. 66. See extensive *note* to principal case in 54 Am. Dec. 126.

mination of the controversy, and his adversary is exposed to the danger of injustice from loss of information and evidence, and means of recourse against others, occasioned by deaths, insolvencies and other untoward circumstances.

2. **Same—Same—Discretion of Court.**—The application of this equitable doctrine is for the sound discretion of the Court; and does not require the conviction of the Court against the original justice of the claim, or of any other specific ground of defence; but its belief that, under the circumstances of the case, it is too late to ascertain the merits of the controversy.

3. **Same—Same—Case at Bar.**—A case in which the Court refused relief on the ground of *laches* and lapse of time.

This was a suit in equity, instituted in September 1845 in the Circuit court of Louisa county, by the administrator de bonis non with the will annexed, and children, of Garland Thompson deceased, against the administrators de bonis non with the will annexed, of Nathaniel A. Smith deceased, his widow and children, and others. The case stated in the original, amended and supplemental bills, was substantially as follows: That in the year 1815, William Mitchell, jr., and Charles Thompson, jr., borrowed of Francis Jerdone the sum of 10,000 dollars, for which they gave their joint obligation with Thomas Price, jr., of Hanover county, and several other persons as their sureties. That in 1821 William Mitchell, jr., paid to Jerdone his moiety of the debt, and then took from

113 Charles Thompson, jr., a bond, with Nathaniel Thompson and *Nathaniel A. Smith, as his sureties, to secure Mitchell and his heirs against the payment of Charles Thompson's half of the bond. That this bond, though it had been sought for in every place where it might be expected to be, had not been found, and they charged, therefore, that it was lost. That William Mitchell, jr., died in 1822; and by his will he gave one half of his estate to his mother Isabella Mitchell, and the other half to his sister Mrs. Garland Thompson; and that Garland Thompson qualified as his executor, with Charles Goodall and others as his sureties. That Isabella Mitchell afterwards died, and left her estate to Mrs. Garland Thompson. That thus a large part of the estate of William Mitchell, jr., had become the property of Garland Thompson; and that the complainants had inherited from him a considerable property. That Garland Thompson died in 1835; and Charles Thompson, jr., qualified as his executor, and also as administrator de bonis non with the will annexed of William Mitchell, jr. That he had been lately removed, and the plaintiff Philip M. Thompson had qualified on the estate of Garland Thompson, and that of William Mitchell had been committed to the sergeant of the City of Richmond. That until recently before the institution of the suit, Charles and Nathaniel Thompson were in prosperous circumstances, and fully able to pay the balance due upon the bond to Jerdone; but

that they had then become irretrievably insolvent. That the administrators of Jerdone had recovered a judgment upon the bond against Thomas Price's representative, who had paid the amount, and had sued the sureties of Garland Thompson as executor of William Mitchell,* jr., for the devastavit of the executor, and had recovered a judgment against them; and they, having discharged the judgment, had filed their bill against the complainants as the administrators de bonis non with the will annexed of Garland *Thompson and Isabella Mitchell, and the heirs at law and devisees of Garland Thompson and Isabella Mitchell, who were the residuary legatees of William Mitchell, to have satisfaction of the amount so paid by them, with interest and costs.

The parties defendants to the bill were the personal representative, widow and children of Smith, Charles Thompson, jr., and Nathaniel Thompson, the sureties of Garland Thompson as executor of Mitchell, and others; and the prayer of the bill was, that the representative, devisees and legatees of Smith might be compelled to indemnify and save the complainants harmless against all loss or injury on account of the debt of Jerdone, and particularly against the demand of the sureties of Garland Thompson as executor of Mitchell, and for general relief.

The complainants filed with their bill, the will of William Mitchell, in which he stated that he and Charles Thompson, jr., had borrowed of Jerdone 10,000 dollars; of which he had paid his moiety, and had taken of Charles Thompson, jr., his bond for 5000 dollars, with Nathaniel Thompson and Nathaniel Smith. But this will was specially excepted to by the Smiths as incompetent evidence against them.

The personal representative, heirs and legatees of Smith, demurred to the original and amended bills, and also answered them. It is unnecessary to state the grounds of demurrer. In their answer, they denied all knowledge of the bond to Jerdone; and alleged that they had never heard until 1843, of the bond which the complainants sought to set up against their testator. And they required the fullest proof that the bond ever existed; or if it once existed, that it had not been intentionally destroyed by Garland Thompson.

The only question of fact really in dispute in the cause, was as to the existence of the bond of indemnity to Mitchell. As to that, Charles Thompson, jr., 115 *was examined, and stated, that some time in the year 1814 or 1815, William Mitchell and himself borrowed of Francis Jerdone 10,000 dollars, and executed a bond for the same, with some three or more sureties. That about the year 1820 or 1821, Mitchell paid one half of this bond, 5000 dollars, to Jerdone, and required of Thompson to execute a bond to him as an indemnity for the other half, which he did, with Nathaniel Thompson and Nathaniel A. Smith as his sureties; the condition of

which last mentioned bond was to indemnify and save harmless the said William Mitchell from all liability as co-obligor in the said bond of 10,000 dollars to Jerdone. That William Mitchell was living in Richmond at the time the bond was executed: that he wrote to Thompson on the subject, who, in his answer, mentioned Nathaniel Thompson and Nathaniel A. Smith as his sureties; to which Mitchell assented. He says further, "I think I drew the bond, and when it was executed, I expect William Mitchell was in Richmond. I procured the signatures of the sureties, and sent the bond, when executed, to William Mitchell." He had no recollection of ever seeing the bond afterwards.

The defendants, the Smiths, introduced evidence to impeach the accuracy of the statements of this witness, and one of the Judges of this Court was disposed to question whether the bond had ever been delivered to Mitchell; but the Court did not deem it necessary to decide that question. The other facts stated in the bill were made out by the proofs.

In the progress of the cause, a tract of land belonging to the heirs of Nathaniel A. Smith was sold by the consent of the parties, and the proceeds were held subject to the future order of the Court.

The cause came on to be finally heard in September 1849, when the Court was of opinion that the execution of the bond by Nathaniel A. Smith deceased, and others,

was fully established by the testimony; and it appearing that the other parties to the said bond were insolvent, and that the parties had agreed that the proceeds of the land sold as aforesaid, should be devoted to the satisfaction of the liability created by said bond, if the Court should sustain the plaintiff's claim; and the Court being further of opinion, that Goodall and others, the sureties of Garland Thompson, as executor of William Mitchell deceased, upon the recovery of the judgment against them by Price's executors, became entitled to the benefit of said indemnifying bond, and to all the rights and remedies to which Garland Thompson, as the executor of William Mitchell, would have been entitled; and the Court being further of opinion, that all the parties being before the Court, the parties ultimately liable should be decreed at once to satisfy the claims of the sureties of Garland Thompson as executor of William Mitchell deceased, to the relief of the complainants who were the legatees of Garland Thompson: It was therefore decreed, that out of the proceeds of the land aforesaid, the costs of all the parties in the cause, except the representatives and distributees of Nathaniel A. Smith, and Charles Thompson, jr., and Nathaniel Thompson, should first be paid; and then, that there should be paid to the said Goodall and others, the sum of 6922 dollars 64 cents; that being the amount paid by them as the sureties of Garland Thompson as executor of William Mitchell, in satisfaction of the judgment

of Price's executors against them; and also the sum of 109 dollars 29 cents; and to the plaintiffs the sum of 27 dollars 36 cents, that being the amount of the costs of the parties, plaintiffs and defendants, in the suit of Goodall and others against the devisees and legatees of Garland Thompson deceased. From this decree, the devisees and legatees of Smith applied to this Court for an appeal, which was allowed.

Steger and Morson, for the appellants.

P. V. Daniel, jr., and Patton, for the appellees.

117 *BALDWIN, J., delivered the opinion of the Court.

The plaintiffs in this case have shewn no original equity to set up and enforce the bond of indemnity in the proceedings mentioned, against the representatives of Nathaniel Smith, one of the sureties therein. According to their own pretensions, the plaintiffs are the representatives of Garland Thompson, and not of William Mitchell, to whom that bond is alleged to have been executed; and the condition thereof was not for the indemnity of the representatives of Thompson, but of Mitchell. Nor have the plaintiffs acquired any equity from the circumstance that the estate of Garland Thompson was derived in part from William Mitchell; the bond of indemnity not being a covenant running with the estate of Mitchell, whether real or personal, against others acquiring the same as purchasers, or as volunteers.

If the plaintiffs can derive any equity against the sureties in the bond of indemnity, it must be from a subrogation by anticipation to the successive remedies of others. These remedies are, the judgment of the administrators of Jerdone, upon the original bond which was the subject of the indemnity, against the executors of Price who was one of the sureties therein—the judgment on the relation of Price's executors against the sureties in the official bond of Garland Thompson, who had been executor of William Mitchell—the claim of those sureties to reimbursement against the representatives of Garland Thompson—the claim of those representatives to be reimbursed by Mitchell's representatives—and a consequent claim of the latter to the protection afforded by the bond of indemnity.

It is therefore only by treating their suit as a bill quia timet, and for subrogation against those who ought ultimately to be subjected to a burthen with which they are threatened, that the plaintiffs can be entitled, if at all, to the relief which they seek. In that aspect of their case, their claim is to a mere equity, which, like other equities, is open to the defence of laches and lapse of time.

The presumption of payment arising from lapse of time, when applicable to a legal demand, as in the case of a debt secured by bond, may be repelled by satisfactory evidence that the debt in point of fact has not been paid. That presumption arose in regard to the original bond executed by

Mitchell and Charles Thompson and their sureties to Jerdone, which was payable in January 1815, and upon which the action of Jerdone's administrators was not brought until after the expiration of about 30 years. The judgment recovered by the plaintiffs in that action, is conclusive, as between the parties thereto, against the presumption of payment: but it does not conclude the representatives of Nathaniel A. Smith, who were neither parties nor privies, and the judgment was recovered by default, and without notice to them pending the action. The question therefore arising upon the legal presumption of payment, and the evidence relied upon to repel it, is still open in the present suit: but upon that question, the Court deems it unnecessary to express an opinion. Nor is it necessary to decide another question presented by the pleadings and evidence, to wit, whether the alleged bond of indemnity was ever executed by Nathaniel Smith.

The plaintiffs in the present suit are not seeking the aid of a Court of equity to enforce a legal demand on their part against the representatives of Nathaniel Smith. They never had any cause of action upon the bond of indemnity alleged to have been executed by Charles Thompson and his sureties to Mitchell. They have at most, as above indicated, a mere equity to be subrogated to the place of Mitchell's representative, upon the supposition that the latter may be coerced to pay the balance asserted to have been in arrear upon
119 the original *bond, and the fear that the plaintiffs may consequently be subjected to the loss. Without deciding upon the original merits of the case in that aspect, the Court is of opinion that the plaintiffs are debarred in a Court of equity, under the circumstances of laches and lapse of time disclosed by the record, from the relief which they seek.

This suit was not brought until August 1845, more than 34 years after the original bond to Jerdone was payable, and more than 23 years after the date of the bond of indemnity. In the mean time, Garland Thompson was the executor of Mitchell, from December 1822 until he died in May 1835, a period of nearly 13 years; and it was his duty to make payment of the debt to Jerdone, or require it to be paid by Charles Thompson; and Charles Thompson himself was administrator de bonis non with the will annexed of Mitchell, from May 1836, and also the executor of Garland Thompson, from June 1835, until the revocation of his powers as such in April 1844; and was bound to see to the discharge of the debt, in his representative, as well as his individual character. And yet, the debt to Jerdone, and the claim of Mitchell's estate to indemnify were suffered to sleep until after Charles Thompson, the original debtor, became, within a few years before the institution of this suit, utterly insolvent. And now after such great lapse of time, and laches on the part of the plaintiffs, and those through whom they derive

their supposed equity, they seek by a bill quia timet to set up the bond of indemnity against the representatives of a deceased surety, upon the supposition of its accidental loss, because it cannot be found, and does not appear ever to have been seen by any one since the time of its alleged execution and delivery to Mitchell.

The pretensions of the plaintiffs against the representatives of Smith, are at war with the sound and well settled doctrine of equity, derived not merely from the
120 *presumptions and bars which prevail at law, but still more comprehensive, and founded upon considerations of policy and justice that require those who invoke its jurisdiction, to do so within a reasonable time, instead of lying by until by their supineness and negligence, there can no longer be a safe determination of the controversy, and their adversaries are exposed to the danger of injustice from loss of information and evidence and means of recourse against others, occasioned by deaths, insolvencies and other untoward circumstances. The application of this equitable doctrine is for the sound discretion of the equitable forum, and does not require the conviction of the Court against the original justice of the claim, or of any other specific ground of defence, but its belief that under the circumstances of the case, it is too late to ascertain the merits of the controversy.

The Court is therefore of opinion, that the plaintiffs are not entitled to the relief which they seek, and that the defendants, whose property has been sequestrated and sold in the progress of the cause, must be restored to the proceeds thereof.

Decree reversed with costs, and bill dismissed with costs.

DANIEL, J., dissented. He was for affirming the decree.

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*Prestons v. M'Call.

July Term, 1850, Lewisburg.

(Absent BROOKE, J.)

Lease of Salt Mines—Case at Bar.—The Ps leased to O & S their salt works, &c., upon a rent of two thirds of the salt manufactured; and O & S bound themselves to manufacture at least 60,000 bushels of salt *per annum*, so that the rent should not be less than 40,000 bushels for each year: and the salt was to be considered delivered to the lessors when measured to them at the salt works. If the water was not sufficient to make 100,000 bushels *per annum*, the lessees might give up the lease on six months notice: And the lessees bound themselves not to assign their lease without the consent of the lessors. The Ps further leased to O & S their plantation, &c., on consideration that O & S should sell the salt accruing to the Ps for rent, and collect and pay over the same to the Ps; and it was agreed that all the salt sold should be considered as sold, two thirds for the Ps and one third for O & S, and so to be accounted for by O & S. And if the lessees failed to comply with their contract the lessors might enter upon them and avoid the

contract upon two months notice. A few weeks before the end of the first year O & S, with the consent of the Ps, assigned their lease to M & K, and transferred to them their stock of every kind; and M & K bound themselves to assume and pay all the contracts, debts and liabilities, relating to the salt making business, not therefore paid by O & S. On the next day M & K took another lease of the same property from the Ps upon a rent reserved in money. O & S whilst they held their lease purchased horses to be paid for in salt, some of which salt was not delivered when they assigned the lease to M & K, who afterwards delivered it. O & S did not make the 60,000 bushels of salt whilst they held the lease. M & K manufactured salt under their second lease for a number of years, and made many payments to and for the Ps during the time, but no settlement was ever made between them of the matters growing out of the lease to O & S and its assignment to M & K; and they could not agree as to the rights and liabilities of the parties. The Ps thereupon sued M & K in equity for a settlement of all the matters, and called for a discovery, and for the production of books and papers. **HELD:**

122 ***1. Same—Rent—Governed by Amount of Salt Made**—The rent to be distrained for or recovered by the Ps from O & S, in any one year, was to be governed by the quantity of salt actually manufactured.

2. **Same—Same—Failure to Make Prescribed Quantity—Liability.**—For the failure of O & S to manufacture 60,000 bushels of salt in one year, the proper action would be for the damages occasioned thereby, and to the extent of such failure, and not for a specific rent of 40,000 bushels of salt.

3. **Same—Assignment of Lease—Effect—Case at Bar.**—The taking the new lease by M & K from the Ps operated as a surrender of the first, and extinguished the liabilities of M & K as assignees of the first prospectively; and as assignees they were not liable for prior breaches of contract by their assignors.

4. **Same—Same—Same—Same.**—But the contract between O & S and M & K embraced the arrears of salt rent then on hand, and the proceeds of such as had been sold and was unaccounted for by O & S; for which M & K were bound to account to the Ps.

5. **Same—Covenant—Assignment of Lease—Effect—Case at Bar.**—There could be no breach of the covenant to O & S to manufacture 60,000 bushels of salt *per annum*, until the end of the year; and as the surrender of that lease and the taking the new one was within the year, the breach of that covenant became impossible; and therefore M & K were not bound by their contract with O & S to comply with that covenant.

6. **Same—Same—Same—Rights of Lessors—Case at Bar.**—Though the Ps were not parties to the contract between O & S and M & K, yet as it was made in part for their benefit, and a consideration therefor moved from them, and the whole change of tenancy was an arrangement in which they participated, and which could not be made without their consent, they have a right so far as they are concerned, to enforce the undertaking of M & K to pay the debts and liabilities of O & S.

7. **Same—Assignment of Lease—Case at Bar.**—The contract between O & S and M & K was not for

an indemnity to O & S against the debts and contracts contemplated, but for their complete exoneration by the engagement of M & K to relieve them therefrom, and to become debtors and paymasters in their stead.

8. **Same—Same—Same.**—The Ps are not liable to M & K for debts paid by them to other creditors of O & S for horses or anything else, contracted to be paid for in salt, the contract between the Ps and O & S for the sale of the salt not constituting a partnership between them.

9. **Same—Equity Jurisdiction.**—This is a proper case for equity jurisdiction.

By an agreement bearing date the 14th of September 1832, John S. Preston & Co. leased to Overly & Sanders 123 *their salt works and salt manufactory in the county of Smith, reserving a rent of two thirds of all the salt to be manufactured at the works. All the houses, furnaces, kettles and implements necessary to the manufacture of salt, were included in the lease; Overly & Sanders stipulating to return them at the end of the lease in the same condition they then were, except the necessary wear and decay of the houses. It was stipulated by the lessors that the salt water should continue as good as it then was, and be of sufficient quantity to manufacture one hundred thousand bushels per annum; or that the lease should be void upon the lessees giving six months notice thereof. The lessees bound themselves to manufacture at least sixty thousand bushels of merchantable salt per annum, so that the rent should be for each year not less than forty thousand bushels; and the portion of salt accruing to the lessors as rent was to be considered as delivered to them when measured to them at the salt house. And the lessees further bound themselves not to lease, assign, or in any manner dispose of their lease, but with the consent in writing of the lessors. The lease was to continue in force for a number of years from the 1st of the next October.

It was further agreed that Preston & Co. should lease to Overly & Sanders their salt works plantation, with its appurtenances, mills, plaister banks, &c. on the consideration that Overly & Sanders should sell and dispose of the salt accruing to Preston & Co. for the rent reserved as aforesaid, and collect and pay over the same to Preston & Co. as rapidly as collections could be made. And it was agreed that all salt sold or disposed of was to be considered as sold or disposed of two thirds for the lessors and one third for the lessees; and was to be so accounted for by Overly & Sanders. The account of the salt manufactured was to be kept by a clerk agreed upon by the 124 parties, and whose salary *was to be paid by them according to their respective interest in the salt. And if the lessees became unable or failed to comply with their contract, the lessors were entitled to enter upon and avoid the contract, upon two months notice.

By an agreement bearing date the 1st day of September 1833, between Overly &

Sanders and A. M'Call and William King, Overly & Sanders, reciting their possession of the property mentioned in their agreement with Preston & Co., for the consideration thereafter expressed, relinquished and conveyed to M'Call & King all their rights and interest under the lease, in all the premises demised to them by the said lease, in as ample a manner as the same was then enjoyed by them. And they further agreed to deliver to M'Call & King, on the next day, along with the leased premises, all their stock of every kind not bought by them originally, including all their purchases of stock, all grain, &c., growing or purchased by them from any person whatever, for the purpose of carrying on the salt making business, all goods, wagons, horses or other live stock, or other property purchased with the proceeds of the salt works, and also the proportions of the said Overly & Sanders of any salt then on hand at the salt works or elsewhere. And M'Call & King bound themselves to assume and pay all the contracts, debts and liabilities relating to the salt making business, not theretofore discharged and performed by Overly & Sanders. And they agreed further to pay to Overly & Sanders the sum of 7500 dollars in three equal annual instalments from that day, and also twenty-five hundred bushels of salt.

On the 2d of September 1833 an agreement was entered into by William C. Preston, John S. Preston in his own right and as administrator of Charles H. C. Preston deceased, and Thomas L. Preston, with

125 M'Call & King, whereby they leased to M'Call & King their *salt works in the county of Smyth, with all their appurtenances of lands, mills, plaister banks, houses and plantations adjoining, for and during the life of Mrs. Smith the wife of Francis Smith. And M'Call & King bound themselves to pay in consideration of the said lease, on the 1st day of September in each year, the sum of 15,000 dollars per annum for the three first years of the lease, and the sum of 16,000 per annum on the 1st day of September in each year thereafter, during the continuance of the lease. They further agreed to pay to the Prestons thirty-five hundred bushels of salt, to be drawn by them at their pleasure during the first three years of the lease. And it was further agreed between the parties that the lease should continue for the term of Mrs. Smith's life, and one year thereafter, and for ten years longer, if M'Call & King should so elect. And they did so elect.

There were some other provisions as to the cutting of wood on the demised premises, and the return of the property on the termination of the lease, which it is not necessary to state.

In 1841 the Prestons instituted a suit in chancery in the Circuit court of Smith county against M'Call & King, for the purpose of having a settlement of the transactions growing out of the assignment by Overly & Sanders of their lease to M'Call &

King, and also of the rents arising upon the lease by themselves to these parties. In their original and amended bills they state the leases and the assignment by Overly & Sanders to M'Call & King; and say that the salt works plantation, &c., were worth not less than 200 dollars a year, and were given to Overly & Sanders as compensation for selling as the agents of the plaintiffs their proportion of the salt. That Overly & Sanders continued in possession of the leased premises for nearly a year, and did not during the time manufacture the sixty thousand bushels of
126 salt as stipulated in their *contract; nor did they pay to the plaintiffs forty thousand bushels, which was the least quantity they were bound to pay to them; nor did they sell for the plaintiffs the quantity they were bound to sell as a minimum of sales for the use of the farms, &c., as mentioned in the contract.

They further stated that M'Call & King purchased out the lease of Overly & Sanders upon an agreement between them and the plaintiffs that the lease was to be annulled and a new lease granted by which the rent was to be paid in money instead of the reservation in kind, and upon the further agreement insisted on by the plaintiffs, that M'Call & King should become responsible to them for the fulfilment of all the liabilities which Overly & Sanders had incurred to them. That the stipulation in the contract between Overly & Sanders and M'Call & King, that the latter were to discharge all the liabilities of the former, growing out of the salt making business, was not inserted to secure alone the purchase of the lease, but as the only terms on which the plaintiffs would consent to the sale, and this undertaking by M'Call & King in their contract with Overly & Sanders was an essential inducement to the plaintiffs to enter into their contract with M'Call & King, and that it was upon these conditions, and these alone, that the plaintiffs would have consented to the sale by Overly & Sanders.

They further charge that M'Call & King took possession of all the assets of Overly & Sanders by virtue of their contract with them, but had failed to account to the plaintiffs for the liabilities Overly & Sanders were under to them. That after procrastinating the settlement for many years, M'Call & King had at length presented an account which was wholly inadmissible. That at the time of their purchase, M'Call & King knew that Overly & Sanders were justly indebted to the plaintiffs for 40,000
127 bushels of salt, and a fair compensation *for the use of the plantation, &c., which had been enjoyed by them for executing the agency of selling plaintiffs' salt, and which they knew that Overly & Sanders had wholly failed to perform. That in the account rendered by M'Call & King, they had failed to give the plaintiffs credit either for the salt due, or for the use of the plantation, which last was worth 2000 dollars. That they had endeavoured to

counterbalance the paltry credits allowed to the plaintiffs by charges for horses purchased by Overly & Sanders, with which the plaintiffs had no concern. That Overly & Sanders had purchased several droves of horses, some of which were on hand when they sold their lease to M'Call & King, and were delivered to them with the other property of Overly & Sanders, and the attempt seemed to be to make the plaintiffs partners in these purchases with Overly & Sanders, and to hold them responsible for two thirds of the losses upon them. And the plaintiffs proceed to point out other errors in the account rendered by M'Call & King.

They further charge, that after M'Call & King had purchased from Overly & Sanders, as before stated, they took possession of all the books, papers, accounts and property belonging to Overly & Sanders, and proceeded to settle, assume and pay their debts and liabilities, and to all intents and purposes substituted themselves for Overly & Sanders; and the plaintiffs, relying upon their agreement to liquidate their claim upon those parties, never thought of attempting to coerce payment from them; and they had since left the Commonwealth, and, as plaintiffs understood, had become utterly insolvent. That M'Call & King had made many payments to the plaintiffs on account of rent, but that the plaintiffs, being either non-residents of Virginia, or having been frequently absent, they had kept no account of the transactions between them and M'Call & King, but have
128 been compelled to rely upon *them.

That no serious obstacle to a settlement existed with respect to the direct relation of the parties; but the difficulty arising out of the earlier charges in the account of M'Call & King against the plaintiffs, had rendered it impossible to ascertain the true balance at any time since its commencement. And they call upon M'Call & King to say whether they did not agree to discharge the liabilities of Overly & Sanders to the plaintiffs, if the plaintiffs would consent to the sale and make a new lease to them; and that they make a full and fair statement and discovery of all the transactions mentioned in the bill.

The prayer of the bill was for an account, and for a decree for the amount which might be found due thereon; and for general relief.

M'Call & King answered the bills. They admitted the execution of the leases referred to by the plaintiffs; but denied the construction put upon them. They concurred with the plaintiffs that there was no difficulty in adjusting the accounts arising out of the lease from the plaintiffs to themselves; but that the difficulties arose out of the contract between the plaintiffs and Overly & Sanders, and the claim of the plaintiffs to pass by them and to look directly to the defendants for the fulfilment of the stipulations of that contract, and to hold them responsible for the breach thereof. They insisted that they were only responsible to Overly & Sanders under their con-

tract with them, and that they were not responsible to the plaintiffs; and they insisted that these parties were necessary parties in the cause; and that the defendants were entitled to the benefit of all defences they would have against Overly & Sanders upon that contract. They denied that the plaintiffs were entitled to be regarded as parties to that contract. They say it is true that this contract and their lease from the plaintiffs, were so far dependent that they would not have made
129 the one without the other; and *that the plaintiffs knew of the negotiation of the contract with Overly & Sanders, and were informed of its terms; and to this extent only was there any dependence or connection in the contracts. They insist that if the plaintiffs are entitled to sue upon that contract, which they deny, that they can only be substituted to the rights of Overly & Sanders; and they say that they have already gone far beyond anything which could be properly required of them in the payments which they have made on account of the contracts of Overly & Sanders. They deny their liability for the forty thousand bushels of salt as rent for the time Overly & Sanders held the property. And they insist that under the contract between the plaintiffs and Overly & Sanders, the plaintiffs were liable for the losses upon the horses purchased by them, as they were purchased for salt disposed of by the plaintiffs' agents, and for their mutual benefit. And they insist that they are entitled to charge the plaintiffs with two thirds of the salt so disposed of, which not having been delivered before the defendants came into possession of the works, had been since paid by them; and also for two thirds of the charges of transportation paid by them upon salt transported during the period of the agency of the said firm for the plaintiffs.

In October 1844, an order was made by consent, referring the accounts between the parties to a commissioner; who returned his report in October 1845, with exceptions thereto by both the plaintiffs and defendants; and with special statements made by the direction of M'Call & King, presenting their views of the accounts.

In 1845, the plaintiffs, by the direction of the Court, amended their bill, and made Overly & Sanders parties defendants in the cause; and one of these defendants answered, and there was an order of publication as to the others. But it does not appear that this amended bill, and the answer thereto, were regularly filed;
130 *though in the final decree, it is said that the cause came on upon the answer and the order of publication.

The cause came on to be finally heard in May 1847, when the death of the defendant King was suggested, and the Court set aside the order of account as having been improvidently made, and dismissed the bill as to the defendant M'Call, with costs. As to the other defendants, the Court expressed his willingness to retain the cause

to enable the plaintiffs to proceed against them, but they declining to do so, the bill was also dismissed as to them. From this decree, the Prestons applied to this Court for an appeal, which was allowed.

Stuart, for the appellants.

B. Johnston and Patton, for the appellees.

BALDWIN, J., delivered the opinion of the Court.

By the contract of lease between the Prestons and Overly & Sanders, the rent thereby reserved of two thirds of the salt to be manufactured by the lessees at the salt works, accrued as the same was made, and in a condition for delivery; but the lessees, in consideration of the lease embracing the salt and plaister plantations, agreed to make sales of the rent salt, with their own, and pay over the due proportions of the lessors as the moneys could be collected. The quantity of the rent salt was therefore dependent upon the amount which should be manufactured. But to insure to the lessees an adequate profit, the lessors contracted that the salt water should continue as good as at the date of the lease, and of sufficient quantity to manufacture 100,000 bushels per annum; and on the other hand, to ensure to the lessors an adequate rent, the lessees contracted to manufacture at least 60,000 bushels of merchantable salt per annum. And in aid of the stipulations of the contract, it was provided, that in the event of a failure as to the quality or

131 quantity of the water, the lessees might avoid the lease, on giving the lessors six months notice; and that in case of the inability or the failure of the lessees to perform their part of the contract, the lessors, upon giving two months notice, might enter and avoid the lease: these provisions, however, did not exclude the parties from resorting, at their election, to their respective remedies by action or suit for non-performance of the contract. The rent, therefore, to be distrained for, or recovered by the lessors, in any one year, was to be governed by the quantity of salt actually manufactured, and in the event of the failure of the lessees to manufacture 60,000 bushels in such year, the proper action would be for the damages occasioned by, and to the extent of, such failure, and not for a specific rent of 40,000 bushels; the reservation of rent being out of the salt as manufactured; or the proceeds thereof.

The contract of Overly & Sanders with M'Call & King, operated as an assignment of this lease; and if it had stood alone, the rights of the Prestons to exact performance from M'Call & King of the stipulations of the lease, would have been governed by the law regulating the relation of lessors and the assignees of their lessees. But the contract between the Prestons and Overly & Sanders expressly provided that the latter should not underlet, or assign, or in any manner dispose of the lease, without the consent in writing of the former; and therefore the lessees could not have parted from their estate to M'Call & King without

such consent, which was obtained, and is evidenced by the cotemporaneous contract between the Prestons and M'Call & King.

The effect of the last mentioned contract was to terminate the lease so made by the Prestons, and so transferred by the latter to M'Call & King, and to create a new lease from the Prestons to M'Call & King, for an extended term, and with the reservation of an annual *rent, not in kind, but in money at a fixed amount.

132 The new lease commenced some weeks before the expiration of the first year of the former lease, and operated as a surrender thereof. It extinguished the liabilities of M'Call & King as assignees of the first lease prospectively, inasmuch as it was the substitution of another tenancy; and retrospectively there could be no liability on their part as mere assignees for prior breaches of contract on the part of their assignors.

M'Call & King, however, by their contract with Overly & Sanders, "bound themselves to assume and pay all the contracts, debts and liabilities relating to the salt making business, not therefore discharged and performed by Overly & Sanders." This undertaking obviously embraced the arrears of salt rent then on hand, or which had been transported and sold, and the proceeds unaccounted for by Overly & Sanders. Nothing is plainer than that the contracts, debts and liabilities of the latter, "relating to the salt making business," included the rents of the very property out of which the salt was manufactured. And if M'Call & King had merely succeeded to the tenancy of Overly & Sanders for the residue of their term, such an undertaking might have embraced the covenant of Overly & Sanders to manufacture at least 60,000 bushels of salt per annum. But that covenant assumed the continuance of the tenancy of Overly & Sanders, and there could be no breach of it until the end of a year; and such breach was of course rendered impracticable by the surrender of the lease before that time, and the substitution of a new lease thenceforth, with the reservation of a pecuniary rent. The undertaking, therefore, of M'Call & King to perform the contracts of Overly & Sanders in relation to the salt making business, could not have contemplated a covenant on the part of the latter which had not then been, and never could be broken.

133 *Although the Prestons were not formal parties to the covenant of M'Call & King to assume the liabilities which had been incurred by Overly & Sanders, yet it was made in part for their benefit, and a consideration therefor moved from them, as well as from Overly & Sanders. That consideration consisted of their consent to the assignment to M'Call & King, their acceptance from those assignees of the surrender of the old term, and their granting to them a new term of longer duration and upon different reservations. Indeed, the whole change of tenancy was an arrangement in which the Prestons participated,

and which could not have been accomplished without their concurrence. They have, therefore, a right, so far as they are concerned, to enforce this undertaking of M'Call & King; and the effect of their doing so, is to accomplish its true spirit and meaning so far as concerns Overly & Sanders; which was not merely for their indemnity against the debts and contracts contemplated, but for their complete exoneration, by the engagement of M'Call & King to relieve them therefrom, and become the debtors and paymasters in their stead.

M'Call & King were therefore bound to account with the Prestons for the salt manufactured at the salt works by Overly & Sanders, and chargeable with two thirds of the proceeds, after deducting the costs of transportation of so much thereof as was transported and sold by them, and with that proportion of the proceeds of so much thereof as was sold by them at the salt works, and with the same proportion of the value there of so much thereof as there remained unsold.

But inasmuch as the undertaking of M'Call & King for the contracts, debts and liabilities of Overly & Sanders in relation to the salt making business, extended only to those which had not theretofore been discharged and performed, M'Call & King are entitled against the salt rents claimed

by the Prestons, to all proper credits
134 *of Overly & Sanders at the time of that undertaking, as well for set offs as for actual payments.

There is no foundation, however, for the pretension of M'Call & King of a liability to them on the part of the Prestons for debts assumed and paid by them to other creditors of Overly & Sanders. If the alleged partnership of the Prestons with Overly & Sanders in the sales of salt could give any colour to such a pretension, there was in truth no such partnership. The sales of the rent salt which Overly & Sanders contracted to effect as the agents of the Prestons, together with their own, constituted no partnership, but rendered them accountable for the proceeds thereof; and if they chose to contract debts payable in salt for horses or any thing else, the Prestons were in no wise liable therefor; but had a right, notwithstanding, to require payment from Overly & Sanders of the proceeds of the actual sales, in money.

The accountability of M'Call & King to the Prestons on the head of the salt rents, or the proceeds thereof, assumed for Overly & Sanders, was a proper subject for the jurisdiction of a Court of equity, involving, as it did, mutual items of account, growing out of an agency and connected with a trust, and complicated as it was by conflicting pretensions, and requiring a discovery, the production of books and papers, and adjustment by a commissioner. And though in relation to the money rents reserved in the lease to M'Call & King, and the numerous payments and set offs connected therewith, there seems to have been

no actual dispute between the parties, yet the adjustment of that matter was delayed and prevented by the controversy in regard to the salt rents, without the adjudication of which, the ultimate balance between the parties could not be ascertained. The whole matters of account existing between them, constituted, indeed, but one subject, and grew out of the same transaction

135 —the substitution of M'Call & *King as the tenants of the Prestons in the stead of Overly & Sanders, their assumption of the salt rents which had theretofore accrued from Overly & Sanders, and their engagement for money rents from themselves thereafter. Under the circumstances, and after the whole accounts between the parties had, by a consent order, been referred to a commissioner, and reported by him, with special statements at the request of M'Call & King of their pretensions, embracing the money, as well as the salt rents, and indicating a balance in their favour upon the whole accounting; the entire merits of the case ought to have been ascertained, and the balance resulting therefrom, whether in favour of the one party or the other, decreed by the Court below.

The cause is, however, not in a condition to do justice between the parties without further enquiry. The commissioner has omitted in various respects to state, explain and report the grounds and evidence upon which he proceeded; and the consequence is, that his views of the accounts are in a great measure obscure and unintelligible.

The Court is therefore of opinion, that the Circuit court erred in dismissing the bill of the appellants, instead of recommending the report of the commissioner, with the exceptions thereto, for reconsideration and readjustment of the accounts between the parties, upon the principles above indicated, and such proper evidence as should be adduced before him; with such proper directions from the Court as either of the parties should request, for the examination of other parties on oath, and the discovery and production of books and papers.

It is therefore adjudged; ordered and decreed, that the decree of the Circuit court be reversed and annulled, with costs to the appellants; and that the cause be remanded to the Circuit court, to be proceeded in upon the principles, and in the mode indicated in the foregoing opinion and decree.

136 *Mitchell's Adm'r v. Trotter & Wife.

October Term, 1850, Richmond.

(Absent BROOKE, J.)

Executors and Administrators—Collection of Assets—Liability.*—An administrator or executor is not

***Executors and Administrators—Liability.**—An administrator is not bound to sue for a debt due the estate, when it is apparent that the debtor is unable to pay. Lovett v. Thomas, 81 Va. 245, citing the principal case. See also, citing and approving the principal case, Anderson v. Piercy, 20 W. Va. 327; *foot-note* to Tanner v. Bennett, 83 Gratt. 252. See generally, monographic *note* on "Executors and Administrators."

bound to sue for the recovery of a debt due the estate, where it is apparent the debtor is not able to pay it.

This was a suit in equity in the Circuit court of Brunswick county, by Thomas R. Trotter and wife against Benjamin Wilkinson, administrator of Clement Mitchell deceased, the father of the female plaintiff, for a settlement of his administration account, and for a decree for the amount which might be ascertained to be due to the plaintiff. The accounts were referred to a commissioner, who reported thereon; and there was a single question of controversy between the parties. The commissioner disallowed a credit for the sum of 263 dollars, paid by the administrator in 1834 on a judgment recovered against him upon a bond executed by his intestate as the surety of Robinson Ezell, on the ground that the administrator might have recovered the money from Ezell, and had failed to bring suit against him. The evidence on the subject was returned by the commissioner with his report.

The Court below seems to have concurred with the commissioner in his view of the evidence, but was of opinion that it was proper to credit the administrator with the amount paid at the time of payment, and to charge him with it at the end of the account for his neglect to collect it. This correction in the account was made, and the Court, in April 1843, made a decree against the administrator for the amount ascertained to be due by the corrected statement. And from this decree

137 *Wilkinson applied to this Court for an appeal, which was allowed.

The evidence in the cause was conflicting; but this Court differed in opinion with the commissioner and the Court below, upon the question of Ezell's ability to pay.

Gholson and Jones, for the appellant, and Gholson, for the appellees, submitted the case.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that the evidence in the record does not establish such a degree of negligence on the part of the appellant, as to subject him to a personal responsibility for his failure to institute legal proceedings against Robinson Ezell for the debt he, as administrator, had been compelled to pay on account of his intestate having been surety for said Ezell; that on the contrary, the testimony shews that Ezell was unable to pay the debt, and that with a knowledge of the facts established by the evidence, the administrator was not required, in the prudent discharge of his duty, to incur the costs of a suit against Ezell. And as the commissioner, by his special report of the payment and all the testimony bearing on it, submitted the question directly to the Court, whether the claim was properly disallowed, the Court, instead of a partial correction of the report in relation to said claim, should have allowed the administrator credit for the amount thereof.

The Court is therefore of opinion that said decree is erroneous; and the same is reversed with costs; and the cause is remanded, with instructions to recommit the report to a commissioner, to have the same corrected in the particular above mentioned, and for a final decree.

138 *Smith's Adm'r v. Lamberts.

October Term, 1850, Richmond.

(Absent BROOKE, J.)

1. **Attorney and Client—Authority to Accept Payment of Debt—Case at Bar.**—An attorney at law receives a claim for collection, and he brings suit upon it, and obtains a judgment. The debtor then puts into his hands the bond of a third person for about the amount that is due on the judgment; and the attorney gives him a receipt by which he says he has received the bond on which he is to bring suit, and after paying himself his fee and commission, is to apply the balance to the credit of the judgment. The attorney receives the money on the bond, but does not pay it over to the creditor. **HELD:** This is a valid payment by the judgment debtor.

2. **Attorneys—Powers in Collection of Claims.***—The powers of an attorney at law in the prosecution and collection of claims put into his hands for collection, considered and stated.

So much of this case as is necessary to present the question considered and decided by this Court is as follows:

James D. Dishman of the county of King George, died in 1813, being indebted to S. & J. Lambert in the sum of 265 dollars 95 cents, with interest from the 4th of August 1812; and Austin Smith and George White, jr., qualified as his executors. The Lamberts placed their claim in the hands of William Brooke, an attorney at law, for collection, and he instituted an action thereon against the executors in the Circuit court of King George county, and re-

***Attorney and Client—Powers of Attorney in Collection of Claims.**—In *Wiley v. Mahood*, 10 W. Va. 221, it is said: "An attorney at law employed to collect a debt may receive payment in money, but has no right to accept any thing else in satisfaction, without express authority. *Wilkinson & Co. v. Holloway*, 7 Leigh 277; *Wright v. Daily*, 26 Tex. 730; *Gullett v. Lewis*, 3 Stew. 23; *Kent v. Ricards*, 8 Md. Ch. 308; *Smock v. Dade*, 5 Rand. 639; *Smith's Adm'r v. Lamberts*, 7 Gratt. 138; *Harper, Adm'r, v. Harvey et al.*, 4 W. Va. 539." See also, citing and approving the principal case on the above point, *Higginbotham v. May*, 90 Va. 238, 17 S. E. Rep. 941; *Crotty v. Eagle*, 35 W. Va. 151, 18 S. E. Rep. 62; *Chalfants v. Martin*, 25 W. Va. 398. But in this last case it is held that a payment to an attorney is not a payment of or on a debt, unless made in good faith; and if the payment was made to the attorney by the principal debtor under a fraudulent combination between the attorney and the debtor for the purpose of defrauding the creditor, then it cannot be regarded as a payment on the debt. See monographic note on "Attorney and Client" appended to *Johnson v. Gibbons*, 27 Gratt. 632; also, monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

covered a judgment in April 1819. Soon after this judgment was obtained, the executor White put into the hands of Brooke a note due from William Coakley to Dishman's executors, and took from him the following receipt:

"Received June 10th, 1819, of Mr. George White, jr., one of the executors of 139 James D. Dishman's estate, *William Coakley's note for 396 dollars 21 cents, due 1st March 1819, on which I am to bring suit; and after paying myself my fee and commission, I am to apply the balance to the credit of S. & J. Lambert's judgment against Dishman's executors.

"William Brooke."

Brooke proceeded to collect the debt due from Coakley, and received from him on the 6th of January 1820 the sum of 80 dollars, and on the 2d of March following he received the further sum of 344 dollars; which two sums, after deducting the legal fee and writ tax, and five per cent. commission, amounted to a few cents more than the debt due from Dishman to the Lamberts, principal, interest and costs.

It appears further, that on the 2d of September 1819, Brooke gave a receipt to Austin Smith, the other executor of Dishman, for a bond of William Brent for 260 dollars, due 1st of January 1819, which he was to collect and apply, as far as it would go, to the payment of Lambert's debt, and also to a debt due from Dishman to Ann Waddy. But the testimony by which his receipt of the money from Brent was proved, was excepted to, and the exception was sustained.

In 1825 Austin Smith instituted a suit in the late Chancery court of Fredericksburg against his co-executor White, for the purpose of compelling him to settle his executorial account and discharge the debts of the estate; and in this suit the Lamberts were made defendants, and their judgment was enjoined on the ground that it had been paid by means of Coakley's debt. The Lamberts answered the bill. They say that they have no knowledge of what their attorney Brooke did in their case, except that they have been informed that he obtained a judgment for the amount of their claim. But they never heard he had received payment from the executors; and they 140 aver that they *have never received from Brooke, the executors, or any other person, any part of their debt.

The cause lingered on the docket, and was revived in the name of Smith's and Dishman's administrators. It was finally removed to the Circuit court of Spotsylvania, where it came on to be heard in 1843, when the Court decreed that the Lamberts should recover of Smith's administrator the sum of 265 dollars 95 cents, with interest thereon from the 14th day of August 1812 until paid, and their costs. From this decree Smith's administrator applied to this Court for an appeal, which was allowed.

*Morson, for the appellant, insisted, that Brooke did not receive Coakley's note in payment of the debt of the Lamberts, but as a security by which to obtain payment.

And as he received the money upon that note whilst he continued to be the attorney of the Lamberts, the effect was precisely the same as if he had received payment from the executors of Dishman. And he insisted that he was fully sustained in this proposition by the case of *Smock v. Dade*, 5 Rand. 639; which, though a case decided by the General court, had been subsequently approved by this Court in *Wilkinson v. Holloway*, 7 Leigh 277.

Moncure, for the appellee, insisted, that upon the principles decided in *Smock v. Dade* and *Wilkinson v. Holloway*, the transfer of Coakley's note to Brooke was not a payment of the debt due to the Lamberts. That these cases expressly held that an attorney at law was not authorized to commute the debt of his client. He insisted further that an attorney at law is a special agent, who must pursue his powers strictly; and that he is authorized to receive payment of his client's debt in money only; and that payment to him in money only, or what is current as money, will discharge 141 *the debt. And he referred to the

cases of *Todd v. Reid*, 6 Eng. C. L. R. 404; *Russell v. Bangley*, Id. 459; *Bartlett v. Pentland*, 21 Id. 163; and *Scott v. Irving*, 20 Id. 453.

He insisted further, that in receiving Coakley's note Brooke was the agent, not of the Lamberts, but of Dishman's executors, and therefore the receipt of the money on that note was a receipt of it for them and not for the Lamberts. But if he could be considered as the agent of both parties, yet he must first have received the money as the agent of the executors; and he must, therefore, have done some act indicating an intention to hold it for the Lamberts, before it could be considered as having been received by him for them. And he referred to *Pratt v. Northam*, 5 Mason's R. 95; *Myers v. Wade*, 6 Rand. 444; *Broadus v. Rosson*, 3 Leigh 12; *Alston v. Munford*, 1 Brock. R. 266; *Baker v. Hall*, 12 Ves. R. 496; *Wallace v. Taliaferro*, 2 Call 447.

DANIEL, J. The only question brought before the Court for its decision in this case, is, whether the claim of S. & J. Lambert against the representatives of Dishman has been paid; and its solution depends on the extent of power with which an attorney at law is clothed, who, in the ordinary course, is entrusted by a creditor with a bond, note or other evidence of debt, for suit and collection. Practitioners of the law in this country are generally regarded by the Courts as vested with a larger authority in the control and disposition of demands placed in their hands for collection, than has been usually attributed by the common law to an attorney at law in England. Here the characters of attorney and barrister or counsellor at law, are in most instances blended, and the powers pertaining to this double capacity, are held to be of a wider scope than those belonging to the office of an attorney merely.

142 *In some of our sister States the rela-

tion of client and attorney has been held to confer upon the latter the authority even to compromise, compound or commute demands of the former confided to him for collection. The general doctrine, however, so far as I have had it in my power to collect it from a review of the decisions, is, that the attorney has no right to commute the debt of his client, to release the person of the debtor when in prison by virtue of a ca. sa., or to enter a retraxit in a suit, to execute a release, or to do any other act which destroys the cause of action without receiving payment. But, on the other hand, that he has an extensive control over the remedy, and is vested with a liberal discretion in the use of the means he may deem best adapted to procuring the payment of his client's debt.

He may accept payment of the debtor, if voluntarily made to him, at any time whilst his powers continue; or he may take such steps as he may think best calculated to procure payment. In the honest exercise of a sound discretion, unless otherwise instructed by his client, he may delay bringing suit, he may consent to continuances of it, after it is brought, during its progress to judgment, and after judgment he may postpone issuing execution; he may elect whether to take one against the person or the lands or goods of the debtor; and if he issues one against the lands or goods, he may direct on what property of the debtor it shall be levied; and after levy he may control the proceedings of the sheriff or other officer having charge of the execution, and may from time to time postpone a sale of the property levied upon.

It has been decided by the Supreme court of the United States, in the case of the Union Bank of Georgetown v. Geary, 5 Peters' R. 99, that an agreement made by an attorney, in whose hands a promissory note was placed for collection, with an endorser, that if the latter would confess
143 judgment and not dispute *his liability, the attorney would immediately proceed to make the money by execution against the drawer, was within the general scope of the attorney's powers, and binding upon the creditor. And in *Silvis v. Ely*, 3 Watts & Serg. 420, it was held to be within the power and authority of an attorney to stay the execution upon a judgment in consideration of the promise of a third person to pay the debt; and that such promise was binding though not made to the plaintiff nor assented to by him at the time.

The subject has been before this Court in several cases. In *Hudson v. Johnson*, 1 Wash. 10, and *Branch v. Burnley*, 1 Call 147, it was decided that, in general, payment to an attorney at law of a debt which he is employed to recover, is good on the custom of the country, particularly if he have possession of the evidence of debt. In the case of *Smock v. Dade*, 5 Rand. 639, it is asserted by the General court as well settled doctrine, that whilst the authority of an attorney does not extend to the commutation of a debt without the client's assent,

his receipt of actual payment is complete protection to the debtor. In that case the attorney received a portion of the debt in money, a draft at ten days sight, and a bond at four months; and the receipt given by the attorney stipulates that the draft and bond when paid should be, together with the sum paid in money, in full of the executions of the creditor against the debtor. The amount of the draft was paid to the attorney, but there was no evidence to shew that he had ever realized any thing on the bond. In this state of things the Court held that the amount produced by the draft constituted to that extent a good payment, but that the creditor ought not to be charged with the bond; that the Court below ought not therefore to quash an execution which the creditor had issued to enforce collection, "although it would
144 have been entirely proper if *such motion had been submitted, for the Court to have entered satisfaction" to the extent of the payment made in money and the amount received on the draft.

The decision in *Smock v. Dade* has been approved by this Court in the case of *Wilkinson v. Holloway*, 7 Leigh 277. In the last mentioned case it was decided that it was not competent for an attorney employed to collect a debt, to discount from it a debt he himself owes the debtor, or to take as an absolute payment or satisfaction the debtor's assignment of a bond of a third person. But the Court at the same time recognize it as well settled doctrine that an attorney at law who has possession of the evidence of debt, or has obtained a judgment for his client, may receive from the debtor payment of the debt; and that the creditor having confided in him, not only to sue, but also to collect and receive the money, is bound by the payment.

I do not see how we can approve the decision in *Smock v. Dade*, in regard to so much of the creditor's demand as was held to be paid by the proceeds of the draft, and yet consistently decide that the debt in this case has not been satisfied by Brooke's receipt in actual money of the amount of Coakley's note.

It is true there is a difference in the wording of the written receipts given by the attorneys in the two cases, but I cannot perceive any such marked variance in their phraseology as would justify us in saying that the coming of the proceeds of the collateral debts into the hands of the attorney should in one case constitute a payment; but that, in the other, payment could not be predicated of the transaction till such proceeds were handed over by the attorney to his client, the original creditor.

The receipts vary from each other in two particulars. In *Stock v. Dade* the signature of the attorney's name is followed by the addition of the word "attorney." In
145 *the case before us there is no such addition. The receipt in *Smock v. Dade* recites that the draft and bond are, when paid, to be together with the money paid down, "in full of the executions."

Here the attorney stipulates that after paying himself his fee and commission, he is to apply the balance of the proceeds of Coakley's note to the credit of S. & J. Lambert's judgment. I do not think that Banks by affixing the word attorney to his signature to the receipt in *Smock v. Dade*, gave any plainer indication that in making the arrangement he was acting as the attorney of the original creditor, than he would have done by simply signing his name without the addition. The character in which he treated was to be gathered from the transaction. He was known to the debtor to be the attorney of the creditor, and the debtor in making the arrangement believed he was negotiating and intended to negotiate with one who had a right to receive the proceeds of the draft and bond when collected, in full of the executions. So in this case the relation in which Brooke stood to the Lamberts was well known to the executors of Dishman. The addition of attorney to his signature upon executing the receipt would not have made it more manifest.

And I cannot perceive how any more extensive control over the rights and interests of his client is asserted by an attorney in the undertaking that certain collateral securities placed in his hands for collection shall, when paid, be applied as a credit to his client's demand, than in undertaking that, when paid, the proceeds shall be in full of the original debt. The relations of the several parties, each to the other and to the subject matter of the contract, and the purposes sought to be accomplished by the attorneys and the debtors by the arrangements made between them, in the two cases, were essentially the same.

146 *There is nothing in the receipt given by Brooke, nothing in the intrinsic character of the transactions, nothing in any of the evidences existing in the case, upon which to base the belief, that the executors of Dishman, in placing the claims in the hands of Brooke to be collected and applied to the credit of the debt, or that Brooke in accepting them with the agreement to collect and so apply them, designed any fraud on the Lamberts. There is nothing to shew that the transaction did not grow out of an honest desire and purpose on the part of all the parties, to provide a new security and furnish a new, safe and speedy means of satisfying the debt.

Any argument, by way of analogy, to be drawn from the law regulating the property in a fund which has come into the hands of one holding towards it the double relation of executor and legatee, or of executor and guardian, furnishes, I think, no aid to the pretensions of the appellees. In such cases, the party coming into the possession of the fund, is considered as taking possession in the first instance, in the character of executor, because he cannot in the first instance, according to law, take possession in any other character, and he will be presumed to have possessed himself rightfully, and not wrongfully. Being originally

so possessed, he will be presumed to continue to hold in the same character until some act is done, indicating decisively a purpose to hold in his other character. Generally, in such cases, there are others having claims upon the fund, whose rights and interests are to be adjusted and settled before the executor can legally elect to hold it in his other character of legatee or guardian. Here by the very terms of the agreement, the fund, when received, was to be applied as a credit to the claim of the Lamberts. There were no rights or interests of other persons to be looked to and adjusted before the attorney might lawfully hold the fund as the money of his original

147 *clients. Even in the case of one combining the two offices of executor and guardian, very slight acts are often regarded by the Courts, as legal indications of an election to hold the fund in the character of guardian: and I know of no rule of law that confines the evidences of such election to acts or declarations cotemporaneous with, or subsequent to the receipt of the fund. If an executor upon receiving a collateral security to be collected and applied to the discharge of a debt due to his testator, should set forth in a written receipt, or otherwise declare, that all debts were now paid and the estate fully distributed, with the exception of the fund about to be collected, and that he designed upon receiving it, to hold the balance after deducting his commission, as the guardian of a ward, I am not prepared to say that such a receipt accompanied by proof that he had really qualified as guardian, and that his declarations with regard to the situation of the estate were true, would not amount, without any further act, other than the subsequent receipt of the fund, to an election, so as to charge him and his sureties with it in his character of guardian. If then, the analogies supposed to exist between this and the cases of the double fiduciary relations above referred to, can be properly consulted as furnishing any guide to the solution of the question under discussion, it seems to me that they tend strongly to support, rather than to defeat the views of the appellant.

It is urged, that if an attorney, entrusted with the collection of a debt, may thus treat with the debtor, and accept from him claims on third persons to be collected, and credited to the debt, he has it in his power to subject the creditor to several settlements with him, instead of one. The fact that a creditor may be thus occasionally subjected to inconvenience, furnishes, it seems to me, no argument against the legal

148 existence of such a power: for the inconvenience is one which may *as well flow from direct payments to the attorney, as from payments effected indirectly through collateral securities; and I presume it is well settled, that an attorney employed to collect a debt, is not limited to a receipt of the debt in one sum, but is fully empowered also to receive partial payments from time to time, till the debt is satisfied.

It is also urged, that the executors had a right at any time previous to the collection of Coakley's note, to withdraw it from the hands of the attorney; and that even after the collection, they had a right to revoke the directions given as to the application of the proceeds. Even if the first branch of the proposition were law, it would, by no means, follow that the second was also: for according to this hypothesis, so soon as the note was collected, it was converted into something belonging to the debtor, to wit, money, which the attorney had a right to receive in payment of his client's demand, and which, by the express agreement between him and the executors, it was stipulated should be applied as a credit to said demand. But I do not think that either branch of the proposition is true. It is true, that this Court, in the case of *Beers &c. v. Spooner*, 9 Leigh 153, decided that a verbal direction given by a person having claims in the hands of an attorney for collection, to pay part of the money when collected, to another in satisfaction of a debt due to the latter from a third person, was revocable by the person giving the directions in his lifetime, or by his administrator after his death. Judge Tucker, however, in assigning the reasons of the Court, asserted principles, and approved of a decision furnishing ample authority for treating the transaction now under consideration, as an irrevocable dedication by the debtor of a fund for the payment of his debt. He says, "If Dudley (who was the person giving the directions) had been bound for the

149 debt, and had directed Spooner (the attorney) to pay, there would *be more reason to regard the direction as irrevocable; particularly if Spooner had promised payment to the creditor. Then it would have resembled the case of *Sharpless v. Welsh*, 4 Dall. R. 279. There the person giving the direction was the actual debtor, and the person receiving it, made an express promise to apply the fund as directed: here, the party was no debtor, and there was no promise. There, the Court held, that the debtor had made an appropriation of his funds to pay his debts to his creditors, which appropriation he could not revoke: here, he directs an appropriation, without consideration, to pay the debt of another, over which direction, he had a complete power of revocation, until the money was actually paid."

Upon the authority of the principles declared in the foregoing case, I think we would be well justified in treating the transaction between White, the executor, and Brooke, as an irrevocable appropriation by the former of the fund arising from the collection of Coakley's note to the payment of the demand due the Lamberts. The fact that Brooke would, in this aspect of the case, be acting as the attorney, agent or trustee of both creditor and debtor, in the prosecution and collection of the collateral security, does in no wise impair or detract from his original right and duty as attorney of the Lamberts, to receive money of the

debtor, whenever realized, in payment of the demand, and grant him an acquittance for it. So viewing the case, were it not for the fact that the attorney stipulates in the receipt for deducting his fee and commissions from the fund, and the want of proof that such deduction was in truth ever made, it would seem to me that the collection of the money, its coming into the hands of one authorized to receive it, and the acquittance of the debtor, would be, necessarily, in legal contemplation, simultaneous acts, or rather one and the same act. Does the fact, that the attorney was only to apply the balance of the proceeds, 150 *after deducting his fee and commissions, make the receipt of the money, so far as that balance is concerned, any less a payment of the debt. I think not. In the absence of any proof, as to what the fee and commissions were to be, the law adjusts them, and it was not necessary that the attorney should do any further act for the purpose of ascertaining what the balance would be. That is a matter of simple calculation, which could as well be done, (as it has been done,) by the officer of the law, as by the attorney. Upon the collection of the money, no one had to be further consulted as to its application. The rights of all who had ever had, or could have any interest in the fund, had been foredesigned and predetermined by the agreements between the parties having the lawful control over it.

A decision which would deny to such a transaction the force of a payment, would, it seems to me, be at war with the general practice and understanding of the country, and operate much to the detriment of creditors. An attorney is generally employed in the collection of a debt, not merely because of a belief on the part of the creditor, in his skill, in the use of the ordinary legal means used for the enforcement of claims, and his promptness in paying over his collections, but also, because of his knowledge of the means, situation and relations of the debtor, and his talent in making and availing himself of such treaties and negotiations, as will be likely, without in any measure jeopardizing the rights of the client, or resorting to legal coercion, to procure payment of the demand. To say that the receipt of money by the attorney in such a case, shall not constitute a payment by the debtor, is to strip the former of a power, which, to the honour of the profession, is very rarely used except to promote faithfully, the best interests of the client; and to subject an absent creditor who has not given special instructions to his attorney,

151 to a very great disadvantage in a struggle for the effects *of a failing debtor. By the use of mild and persuasive means, having some regard to the feelings and credit of the debtor, by indulgences which do not jeopard the rights of the creditor, and the acceptance of securities which do not, until realized, discharge the demands, claims are now often made which would be lost, if the attorney was in all in-

stances to be confined to the use of legal process, or the receipt of direct payments by the debtor.

I am therefore of opinion, that so much of the decree appealed from, as relates to the demand of the Lamberts, ought to be reversed with costs, and the enforcement of the same against the representatives of Dishman perpetually enjoined.

The other judges concurred in the opinion of Judge Daniel.

Decree reversed.

152 *Williamson v. Gayle & als.

October Term, 1850, Richmond.

(Absent BROOKE, J.)

1. Foreign Attachments—Property in Possession of Home Defendant Who Has Claim against Priority.*—

In a proceeding by foreign attachment, the home defendant having property of the absent defendant in his possession, for the keeping of which the absent defendant is indebted to him, is entitled to have his claim first satisfied out of the property, as against the attaching creditor.

2. Same—Debt Established—Personal Decree.†—The attaching creditor having established his debt, is entitled to a personal decree against the absent debtor, though the whole property attached is exhausted in paying the debt of the home defendant.

This was a proceeding by foreign attachment, commenced in 1839, in the Circuit court of chancery for the county of Henrico, by Robert C. Williamson against Levin Gayle, an absent defendant, and John Minor Botts. The bill charged that Gayle was indebted to the complainant in the sum of 273 dollars 40 cents, with interest; that he resided out of the State of Virginia, and that John M. Botts of the county of Henrico had in his possession a blooded mare, the property of Gayle; and making Gayle and Botts defendants, the complainant asked that the mare in the possession of Botts might be subjected to the payment of his debt.

The complainant proceeded regularly against Gayle as an absent defendant, and proved his debt. Botts answered the bill. He admitted he had the mare and a colt in his possession, the property of Gayle; but he stated that in 1835 he had sold the mare

*Attachments—Priorities.—In *Gregg v. Sloan*, 76 Va. 409, it is said: "The attaching creditor takes his debtor's estate or interest only, and in the same plight and condition in which the debtor holds it when the attachment takes effect as a lien. *Williamson v. Gayle and Others*, 7 Gratt. 152, 154." See also, note in 1 Va. Law Reg. 180.

†Same—Personal Decree.—For the proposition that where the attaching creditor having established his debt is entitled to a personal decree against the defendant, the principal case is cited and followed in *Schofield v. Cox*, 8 Gratt. 588. See monographic note on "Attachments" appended to *Lancaster v. Wilson*, 27 Gratt. 624.

to Gayle, who had left her with him to be taken to the best horses in Virginia; Gayle desiring to raise colts from her. That the mare had remained in his possession, 153 *and had been put to Gohanna in 1836, and he had settled for that charge, which was 75 dollars. That he had taken good care of the mare; that for the keep of the mare for a part of the year 1835, and for the years 1836–37–38–39, due at the end of each year, and also for the season of 1836 to Gohanna, Gayle was indebted to him; and that he also held Gayle's bond for 100 dollars, with interest from March 1837. That his claims against Gayle amounted to 814 dollars 10 cents, for which he claimed to have a lien on the said mare and colt. And he prayed that they might be subjected first to the payment of his claim.

In the progress of the cause the mare and three colts, two foaled since the commencement of the suit, were sold under an order of the Court, and were purchased by the defendant Botts at the price of 350 dollars. This was considerably less than the witnesses examined estimated as the cost of keeping the mare and colts whilst they were kept by Botts.

The cause came on to be finally heard in March 1842, when the Court held that the claim of Botts to the attached effects had priority to that of the plaintiff; and that as the proceeds of the sale did not amount to enough to satisfy his claim, the whole proceeds, after paying the expenses, should be applied in part discharge of the debt due to him from the defendant Gayle. And the plaintiff's bill was dismissed, with costs to the defendant Botts. From this decree Williamson applied for and obtained an appeal to this Court.

Stanard and Bouldin, for the appellant.

Philip and Walter Harrison, for the appellee Botts.

BALDWIN, J. I deem it unnecessary in this case to consider whether the defendant Botts has a common law lien upon the attached property, such as that of an 154 *innkeeper upon the horse of his guest, of a carrier upon goods bailed to him for transportation, or of an artizan in whose hands an article has been enhanced by his skill and labour. However that may be, I think that for so much of his account as has been proved, he is entitled to priority of satisfaction over the plaintiff.

A creditor proceeding by foreign attachment can stand upon no better footing than his absent debtor, whose moneys, goods or effects he seeks to subject; and his claim to satisfaction therefrom is subordinate to the rights and equities of the garnishee. *Glassell v. Thomas*, 3 Leigh 113.

There are obviously cases of stoppage, retainer or set off on the part of a debtor founded in natural justice, and which Courts of equity ought to recognize and enforce. These were admitted to a very limited extent by the common law, which did not even allow mutual debts to be discounted or set off against each other; the effect of

which would have been to blend substantially cross actions, by permitting a matter of demand to be made a ground of defence. This narrowness often drove defendants at law into equity, where mutual debts were, to a great extent, applied to the reduction or extinguishment of each other, under the name of mutual credits, upon the fact or intendment of a reciprocal trusting by the parties on account of their respective debts. At length the English statutes of set off, which ours has followed, authorized set offs at law in cases of mutual debts, though of a different nature, and in no wise connected; and to these statutes Courts of equity have conformed, and in general to the rules derived from the construction of them by the Courts of law. But the inherent powers of equity, founded in natural justice, have been in no wise abridged by the statutes. 2 Story's Eq. § 1432. On the contrary, they have been to some extent enlarged; for now, in cases falling within equitable jurisdiction, *set offs are allowed of mutual debts, legal and equitable, however independent of each other, and of course without the necessity of resorting to the principle of mutual credits. Nor does equity always follow the express provision of the statutes, but extends them to cases falling within the principles of justice and policy which led to their enactment. Thus, though at law the debts must be strictly mutual, or in the same right, and so excluding set off between individual and representative debts, or individual and partnership or joint debts, and though the debts sought to be set against each other must be actually due at the time; yet there are cases of hardship, or oppression, or irreparable loss, or mutual trusting, which are allowed in equity as exceptions to these rules.

And although Courts of equity, no more than Courts of law, will, without agreement of the parties, enlarge a pledge or custody of goods, beyond the original purpose, into a security for an independent demand; yet there may be cases of gross injustice and irretrievable loss, in which the right of stoppage of goods so situated would be recognized and enforced in an equitable forum. As, if a person entrusting goods to the care and protection of one, then or afterwards becoming his creditor, should abscond or remove from the Commonwealth, and seek to withdraw and elude them, without discharging or securing his indebtedness, I presume it would be a case proper for redress in a Court of equity, and especially if its aid were sought to accomplish the design.

It cannot, I think, be doubted, that a creditor who has no remedy at law, and comes into a Court of equity, where alone he can obtain relief, is subject to the application of the rule, that he who seeks equity must do it. *Brown v. Jones*, 1 Atk. R. 188.

In *Shish v. Foster*, 1 Ves. sen. 88, Lord Hardwicke, in commenting upon the rule that he who will *have, must

do equity, said, "That rule does not hold throughout, so as to tack things together independent in their own nature; but wherever the Court can do it, they will lay hold of any circumstance for it. And here there is danger of the plaintiff's losing his demand, if the estate should be taken from him, the defendant having frequently absconded; which makes the case very like the case of *Jacobson v. Hans Towns*, (or merchants of Almain,) of part of whose estate the plaintiff Jacobson and his family had been lessees, and negotiated it for them. They brought an ejectment to recover, when the leasehold estate was expired. Jacobson objected that he was a creditor in a long account for negotiating, &c., and brought a bill that they should not take the estate from him till he received satisfaction of his demand; and an injunction was granted by Lord Macclesfield and continued by Lord King; not that he had any real lien on the estate, but from the difficulty of his getting satisfaction, if this estate was taken from him, as they were a corporation residing beyond sea; therefore they were restrained from recovering. The same reason weighs here as there."

There is no judicial proceeding to which the maxim we are noticing can be applied with more propriety than a foreign attachment. It is a suit in equity, in which the equitable rights of the parties are recognized, and enforced or protected, as the case may require; in which the plaintiff creditor seeking the aid of the Court, is without any remedy whatever at law; and in which the garnishee creditor, if overruled in his defence, is deprived of all means of redress, whether at law or in equity. He cannot sue himself, and therefore his very possession and care of the attached effects expose him, in the event mentioned, not only to the priority of the plaintiff, but of all other creditors who may have levied their attachments. His case is unlike *that of a creditor petitioning in bankruptcy for priority, and who, if he fails in that, comes into participation with the other creditors.

It can hardly be denied in this case, that if the fund attached consisted of money belonging to the absent defendant, or of a debt due to him from the garnishee, that the latter would have a right to set off against it a debt due to him from the absentee, or a liability which he had incurred as his surety. *Ross v. M'Kinny*, 3 Rawle's R. 227. And what is to prevent goods attached and sold under the authority of the Court from being governed by those principles of equity which go beyond the express provisions of the statutes of set off, when required by natural justice, and to prevent it from being defeated?

It is unnecessary in this case to decide whether a garnishee who, with the consent of the absent owner, is the lawful custodian of goods attached, and has at the same time an independent demand against that owner, is entitled to priority of satisfaction over the attaching creditor. Throwing that out

of view, a connection of mutual demands may be properly regarded as a controlling circumstance upon questions of equitable set off or stoppage, 2 Story's Eq. § 1434; and here there is a connection between the asserted ownership of the absent defendant and the claim against him on the part of the garnishee. In fact they arise out of the same transaction, and neither could exist without the other. The mare attached was left by Gayle with Botts for care, protection and subsistence, until a contemplated period, and then to be taken away by the former; and the claim of Botts is chiefly for that very care, protection and subsistence, without which there would have been no subject for the attachment.

This connection is strengthened by what in the nature of things must have been the tacit understanding *between those parties. The mare was purchased by Gayle, a resident of Alabama, from Botts, and left with the latter to be kept till sent for, and he was to be paid for his expense and trouble in keeping her; and if she should not recover from a lameness which unfitted her for the turf, to be put to a horse, in order that a colt might be obtained from her for the benefit of Gayle. And Bott's demand against Gayle is for the keep of the mare and her colt; a sum advanced for a season of the mare to a horse; and a due bill for some other consideration, executed to him by Gayle. Now it could hardly have been otherwise contemplated than that Gayle, when he should resume the possession of the property to remove it from the Commonwealth, was to discharge his indebtedness to Botts, especially for the keep of the mare and her increase.

The attached property having been sold by the authority of the Court, and purchased by the defendant Botts, and the proceeds of sale being less than the amount appearing from the evidence to be due to Botts (even if the items of his demand other than for the keep of the mare and colt be excluded), I think there is no error as regards the defendant Botts, in the decree of the Chancellor dismissing the plaintiff's bill, after adopting suitable provisions for securing the rights of the absent defendant, if he should appear and shew cause against the decree within the time prescribed by law. But the decree is wrong to the prejudice of the plaintiff in regard to the absent defendant, in dismissing the bill as to him also, instead of giving the plaintiff a personal decree against him; the demand for which the attachment was sued out having been established by sufficient evidence, and the Court having jurisdiction of the subject by reason of the levy of the attachment upon the property of the absent defendant in the hands of the garnishee, which jurisdiction has not been defeated by the exhaustion of the proceeds of *sale in the application thereof to the equitable priority of the garnishee.

The other judges concurred in the opinion of Judge Baldwin.

The following is the decree of the Court. The Court is of opinion that there is no error in the decree of the Chancellor as between the appellant and the appellee Botts. It is therefore adjudged, ordered and decreed, that so much of the said decree be affirmed, with costs to the appellee Botts. And the Court is further of opinion, that there is error in the said decree as between the appellant and the appellee Gayle, in dismissing his bill as to the said Gayle, instead of giving him a personal decree against that defendant, for the amount of his demand, and his costs in the Chancery court. It is therefore adjudged and ordered, that so much of the said decree of the Chancellor as is above declared to be erroneous, be reversed and annulled, with costs to the appellant against the appellee Gayle. And this Court proceeding to render such decree as the Chancellor ought to have rendered, in lieu of so much of his decree as is above declared to be erroneous, it is further adjudged, ordered and decreed, that the appellant do recover against the appellee Gayle the sum of 273 dollars 40 cents, with interest on 197 dollars 40 cents, part thereof, from the 1st day of July 1837, till paid, and on 76 dollars, the residue thereof, from the 1st day of July 1839, till paid, and his costs by him expended in the prosecution of his suit in the Chancery court.

160 *Nelson's Ex'or v. Page & als.

October Term, 1850, Richmond.

(Absent CABELL,* P., and BROOKE, J.)

1. **Executors and Administrators—Suit by Residuary Legatees—Parties.**†—In a suit by residuary legatees against the executor, for a distribution of the estate, the specific legatees should be parties, unless it satisfactorily appears that their legacies have been satisfied.
2. **Same—Liability‡—Case at Bar.**—Under the circumstances, the executor held not to be responsible for a debt due to the estate, and lost by the insolvency of the debtor, occurring after the testator's death.

*JUDGE CABELL sat during the arguments of all the causes heard at this term, but he was not present at the decision of this or any of the following cases, owing to severe indisposition.

†**Executors and Administrators—Chancery Practice—Legatees—Parties.**—Where there are assets sufficient to pay all, one entitled to her legacy to an amount certain, may maintain a suit for such legacy, without making the other legatees parties; but it is otherwise, in case of residuary legatees, unless it appears that all prior legatees have been satisfied. *Sharpe v. Rockwood*, 78 Va. 84, citing 1 Barton's Ch. Pr. (2d Ed.) 154; *Nelson v. Page*, 7 Gratt. 160.

‡**Same—Liability.**—Upon the question of the liability of a personal representative for the collection of assets of his decedent's estate, see the principal case cited in foot-note to *Tanner v. Bennett*, 33 Gratt. 251; *Surber v. Kent*, 5 W. Va. 104; *Anderson v. Piercy*, 20 W. Va. 328; *Hurst v. Morgan*, 31 W. Va. 532, 8 S. E. Rep. 291. See also, *McCall v. Peachy*, 8 Munf. 288; *Davis v. Newman*, 2 Rob. 664; *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. Rep. 660; monographic note on "Executors and Administrators."

3. Same—Overpayment to Legatees—Commissions.—

Partial payments made by an executor to legatees, from time to time, on account, though upon a settlement of accounts thereafter, it appears that such payments exceed the amount to which some of the legatees were entitled, does not constitute such a settlement of the executor's accounts as to take the demand for commissions out of the operation of the statute.

Charles C. Page, of the county of King William, died in 1822, leaving a widow and four children. By his will, after providing for Mrs. Page, and giving small legacies to his two youngest sons, he gave to his son Robert Carter Page 3000 dollars, and to his grand daughter, Sally Page Welford, a slave by name and 1000 dollars, if she should live to be married or come to the age of twenty-one years; and the residue of his estate he gave to his four children. Thomas C. Nelson, one of the executors appointed by the will, qualified as such, and proceeded to administer the estate until 1828, when he was removed. He did not settle his accounts whilst he acted as executor, but seems to have made a settlement of them before the commissioners of the Court of probat in 1837.

161 *In 1838 Robert Carter Page, in his own right and as administrator of John Camm Pollard, who married a daughter of Charles C. Page, and the other residuary legatees of Charles C. Page, filed their bill in the Circuit court of King William against Thomas C. Nelson the executor, for an account of his administration; and on the death of Nelson, the suit was revived against his executor. The bill was afterwards amended, and Mrs. Page, then Mrs. Atkinson, was made a party. The accounts were referred to a commissioner, who made his report, in which no notice was taken of the special legacies to Robert Carter Page and Sally Page Welford and the two younger sons, but the whole personal estate, after payment of debts, was divided amongst the widow and the four children. The only questions of contest in the Circuit court were the executor's right to commissions; and his liability for the balance of a debt due from Benjamin Dabney to Charles C. Page in his lifetime, and a large portion of which was lost by the insolvency of Dabney's estate.

On the first question it was insisted by the plaintiff, that the executor had forfeited his commissions by his failure to settle his accounts. On the other hand, the executor relied on the fact established by the report of the commissioner, that he was largely in advance to the widow and Robert Carter Page and Pollard, by payments made to the during his administration of the estate; and that as to the other two plaintiffs, the amounts found to be due to them were very small; and therefore, though he had not settled his accounts before the Court of probat, he had in fact settled with the parties.

Upon the other question it was charged in the bill, that the debt of Dabney had been

lost by the negligence of the executor, and that he, sensible of his neglect, had repeatedly admitted his liability for it. The executor, in his answer, denied that he 162 was liable for *the debt, or that he had ever admitted his liability. The facts appear to be, that in the year 1817, Charles C. Page sold to Benjamin Dabney a tract of land in the county of King William, called Toler's, for 5266 dollars, one third of which was paid in cash, and the balance was to be paid on the 1st of January 1819 and 1820. Page seems to have taken no security or even bonds or notes, from Dabney, for these deferred payments, until April 1820, when they were secured by a deed of trust on the land. Neither principal or interest was paid by Dabney during the life of Page. In 1824, a payment of 210 dollars 64 cents was made by Dabney to Nelson; and in 1825, there was another payment of 150 dollars. In 1824, Nelson procured from Dabney another deed of trust to secure this debt, upon seven slaves. In 1826, Dabney died, having continued to be in good credit up to time of his death. In 1827, the slaves were sold for 1371 dollars 80 cents; and in 1828, the land was sold for 490 dollars 74 cents: thus leaving unpaid on the 31st of December 1828, of this debt, the sum of 3278 dollars 66 cents.

Mrs. Atkinson released to her children her interest in this debt, and was examined as a witness; though she was objected to as incompetent by the executor. She stated that she had frequently conversed with the executor about the collection of this debt from Dabney, and that he had admitted his negligence, and that he had thereby made the debt his own. She said, too, that the circumstances of Dabney grew worse between the death of Charles C. Page and his own death. Another witness also stated that he had heard the executor say in 1824, when the deed of trust was taken on the slaves, that he had indulged Mr. Dabney so long in relation to that debt, that Mr. Page's estate should not suffer, and that he would take the responsibility on himself. Other witnesses who lived near to Dabney, and were well acquainted with him, say that his property was not diminished

163 *after the death of Page; that his personal estate amounted, at that time, to about four or five thousand dollars; that he owned a tract of six hundred and twenty-five acres of land beside Toler's; and that this land had been divided after his death among his widow and children, and was still in their possession. That he was considered solvent up to the period of his death, and they should have considered the debt safe.

The cause came on to be finally heard in May 1843, when the Court below held, that the executor was responsible for the loss of the debt due from Dabney; and that he was not entitled to commissions; and there being no exceptions to the commissioner's report, in which alternate statements were made, the Court adopting the statement disallowing commissions, made a decree in

favour of the executor against Mrs. Atkinson, and the plaintiffs Robert Carter Page and John Camm Pollard's estate, for the sums which the executor had overpaid them, and in favour of the two other children for the sums found due to them by the report of the commissioner. From this decree, Nelson's executor applied to this Court for an appeal, which was allowed.

Griswold and Lyons, for the appellant, objected,

1st. That the legatee, Sally P. Welford, was not a party. That this being a bill by the residuary legatees, they were only entitled to the residue after the payment of the specific legacies; and it was necessary they should be before the Court, in order that they might be paid, or that the executor might be protected by the decree. And this objection they insisted, might be made in this Court, though not made in the Court below. *Richardson v. Hunt*, 2 Munf. 148; *Sheppard v. Starke*, 3 Id. 29; *Bland v. Wyatt*, 1 Hen. & Munf. 543; *Clarke v. Long*, 4 Rand. 451.

164 *2d. That there was error in decreeing in favour of the residuary legatees until the special pecuniary legacies were paid. And that it did not appear by the report, that either the legacy to Robert Carter Page or to Sally P. Welford had been satisfied.

3d. That there were errors in calculations, &c., appearing on the face of the report, and which therefore might be objected to and corrected here, though no exception had been taken to the report in the Court below on that account; and they proceeded to point them out.

4th. That the statute forfeiting an executor's commissions for his failure to settle his accounts every two years before the Court of probat, did not apply to this case, because the executor had in fact settled with the parties entitled to the estate, and was largely in advance to the widow and to Robert Carter Page and Pollard's estate.

5th. That the executor was not liable under the circumstances of this case, for the debt due from Dabney to the estate. That the bill charged and the answer denied that the executor admitted his negligence and liability for this debt, and it was therefore necessary to be proved by two witnesses. That Mrs. Atkinson was not a competent witness, because although she might release her interest in the debt, she was still liable to the executor for the amount he had overpaid her, and that amount must necessarily be affected by the liability of the executor for this debt. That without her testimony, there was but one witness to the fact of his admissions. That even if the admission was proved, it did not render him liable; and that the facts of the case did not constitute a liability for the debt on the part of the executor. And on this point, they referred to *Churchill v. Lady Hobson*, 1 P. Wms. 141; *Toller's Executors* 427-8, citing *Brown v. Litton*; 2 Fonb. Equ. 178, § 4, to 186, § 6; *M'Call*

165 v. Peachy, 3 *Munf. 288; *Moseley v. Ward*, 11 Ves. R. 581; *Kee's ex'or v. Kee's creditors*, 3 Gratt. 116; *Cavendish v. Fleming*, 3 Munf. 198; *Tibbs v. Carpenter*, 1 Madd. 298; 2 Lomax Ex'ors 290 to 293.

Joynes and R. T. Daniel, for the appellees, insisted,

1st. That in a bill by residuary legatees against the executor a specific legatee is not a necessary, or even a proper party, and that therefore it was not necessary that Sally P. Welford should have been brought before the Court. *Story's Equ. Pl.* § 149, § 89, in note, § 230.

2d. That in the whole proceedings below, no suggestion had been made by the executor, that the specific legacies were unpaid. That the whole estate remaining in the executor's hands had been distributed among the residuary legatees by the report in this case, and in the account settled by the executor in the Court of probat, without the slightest intimation that the specific legacies remained unpaid. That the legacy to Sally P. Welford was contingent, and it did not appear that the contingency had occurred; and that Robert Carter Page was a party in the cause, and the executor had taken a decree against him to which he certainly was not entitled if his legacy was unpaid. That it therefore did not lie in the mouth of the executor to insist that the legacy was still due.

3d. That if there were errors of calculation, &c., appearing on the face of the report, against the executor, there were much greater errors in his favour; and they proceeded to point them out.

4th. That the executor was not entitled to commissions. *Wood v. Garnett*, 5 Leigh 271; *Turner v. Turner*, 1 Gratt. 12.

5th. That the executor was liable for the loss of Dabney's debt. That Mrs. Atkinson was a competent witness, the question not being one in which the estate 166 *of Charles C. Page was interested; and the testimony relating to facts occurring after the termination of the coverture. *Robin v. King*, 2 Leigh 140; 1 Greenleaf's Evi. § 337-8. Nor was she interested to swell the amount of the estate in order to prevent a decree against her, as the executor was not entitled to such a decree although he may have overpaid her. *Davis v. Newman*, 2 Rob. R. 664. That the proofs made out a case against the executor of such negligence as subjected him for not collecting the debt. 3 Paige's R. 182; *Shultz v. Pulver*, 11 Wend. R. 361; *Powell v. Evans*, 5 Ves. R. 839.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that partial payments made by the executor to legatees from time to time on account, though upon a settlement and adjustment of accounts thereafter, it should appear that such advances may exceed the amount to which some of the legatees were entitled, does not constitute such an actual settlement of the

executor's account, as to take the demand for commissions out of the operation of the statute. The Court is therefore of opinion, that there is no error in so much of said decree as disallowed the claim for commissions.

But the Court is of opinion, that there is error in so much of said decree as charges the executor with the debt due from Benjamin Dabney deceased, to the testator of the appellant, for the purchase of the farm called Toler's. The testator, in his lifetime, had rested upon the security of the deed of trust on the land; the executor had acquired additional security on slaves, and it does not satisfactorily appear that by any degree of diligence, he could have more to secure the payment of the whole debt. The loss would seem to have been incurred from the extraordinary depreciation in the value of the property covered by the deed of trust, *rather than from any culpable neglect on the part of the executor.

And as to other errors alleged in argument by the counsel of the appellant to be apparent on the face of the account, which, if they exist, it is contended by the counsel of the appellees, are more than counter balanced by other errors apparent on the face of the account to their prejudice, this Court deems it unnecessary to express any opinion. As the case must go back to a commissioner, such errors of calculation or of improper credits, or charges of interest, or any other errors alleged to exist on the face of the account, can be considered and corrected, and the conclusions of the commissioner brought to the notice of the Court by specific exceptions directed to the particular matters objected to. And in respect to the specific legacies bequeathed, it will be competent for the executor upon such recommitment to shew, if he can, that he is entitled to any additional credits for payments on account thereof. And an enquiry should be directed to ascertain, if said legacies are still unpaid, whether in the condition of the estate, distribution should be decreed among the residuary legatees, of the funds in the hands of the executor, or the same should be retained for the payment of specific legatees; and for this purpose, the appellees should be required to make the legatee, Sally P. Welford, a party, unless it should appear she died unmarried before attaining the age of 21 years.

The Court, therefore, without pronouncing any opinion upon the errors alleged on both sides to be apparent on the face of the account, but leaving them to be corrected, if they exist, upon a restatement of the account, is of opinion, that the decree is erroneous in charging the executor with the debt due from B. Dabney deceased, as aforesaid.

Reversed, with costs to the appellant, and remanded, with leave to make the legatee, S. P. Welford, or her representatives, *a party or parties if necessary, and with instructions to recommit the account to a commissioner, to restate the

same; in which the executor is not to be charged with the uncollected balance of said Dabney's debt; and to correct any other errors if discovered, apparent on the face of the account; for the proper enquiries in regard to the specific legacies; and for further proceedings in order to a final decree.

Columbian College v. Clopton's Adm'r &c.

October Term, 1850, Richmond.

(Absent CABELL, P., and BROOKE, J.)

1. **Bonds—Obligation to Pay a Certain Amount on College Debt on Condition That Rest of Debt Is Raised—Death of Obligor before Debt Paid.**—A executes a bond, by which he binds himself to pay a sum certain for the purpose of discharging the debts of C. college, upon condition that like pledges shall be obtained to the whole amount of the college debts; and that this fact shall be announced by a committee constituted of persons named, of whom he was one. A dies before the announcement that the pledges have been obtained; but they are obtained, and the announcement is made by the other members of the committee and another person appointed in his place; and the whole of the college debt is afterwards discharged. **Held:** The bond having been given for the purpose of paying the debts of the college, and they having been paid, a Court of equity will not enforce the payment of the bond against A's estate.

2. **Same—Same—Recognition of Obligation in Will of Obligor—Payment of Debt—Liability of Obligor's Estate.**—A by his will says he is bound and willing to pay his bond, provided the pledges given shall appear to be indubitably valid, and the whole amount pledged shall be first paid. **Held:**

1. **Same—Same—Same—Effect.**—The will does not contemplate the payment of the bond for any other object than for the discharge of the college debts, but adds another condition to the payment, and therefore does not give any additional force to the bond.

2. **Same—Same—Same—Same.**—The provision of the will is not a bequest of the amount of the bond to the college.

169 *3. **Same—Same—Same—Bequest by Implication.**—A by his will says, "If C. college should fail, I will that the sum pledged to that shall be given to N. institution." **Held:** This is not a bequest by implication to C. college.

4. **Same—Same—Same—Equity Practice.**—**Quære:** If a Court of equity will relieve against a condition precedent, where the subject admits of compensation, or the parties can be placed in the same condition in which they would have been if the condition had been performed, and there has been a substantial performance of the condition.

The Columbian College in the District of Columbia was chartered by Congress in 1821. In 1832 the college had become deeply involved in debt; and on the 10th of December of that year, the board of trustees appointed a committee, of which the Rev. Abner W. Clopton was one, to report on the state of the college debt, and their means of paying it. This committee made a report, shewing the amount of the debts,

with interest thereon to the 1st of January 1833, to be 31,413 dollars 6 cents; and thereupon Mr. Clopton was appointed by the board of trustees their general agent to obtain bonds, pledging the sums therein named, with interest from the 1st of January 1833, for the purpose of securing the payment of the said debt of 31,413 dollars 6 cents.

To aid in carrying into effect the objects of the trustees, Mr. Clopton executed the following bond:

"Whereas at a meeting of the board of trustees of the Columbian College, held in the City of Washington, December 11th, 1832, it was ascertained that the debts against the college, with interest till the 1st of January 1833, amounted to 31,413 dollars 6 cents: And whereas, in making provision for the certain and speedy payment of said debts, regard must be had also to the interest accruing upon the principal from the 1st of January 1833, till both principal and interest shall be paid: I do hereby promise to raise, by voluntary contributions or out of my own funds, and to pay to Enoch Reynolds, treasurer of the college, towards the payment of the said amount of 31,413 dollars 6 cents, *the sum of 2413 dollars 6 cents, with the interest accruing thereon from the 1st of January 1833, until principal and interest shall be paid: Provided, however, that the whole amount of 31,413 dollars 6 cents shall be pledged on the same condition. And provided, moreover, that this fact of the whole amount being thus pledged shall be distinctly announced by a committee consisting of the Rev. S. Cornelius, Enoch Reynolds, George Wood and A. W. Clopton, before the obligation shall be binding. Witness my hand and seal, this 24th day of January 1833.

Abner W. Clopton, [Seal.]"

Very soon after the execution of this bond, Mr. Clopton was taken sick; and he died in April 1833. By his will which bore date the 12th of March 1833, and which was duly admitted to probat, he provided: "First, I am bound and willing to pay my bond placed in the hands of the treasurer of the Columbian College, provided the whole amount pledged shall first appear indubitably valid. And, as I am under such peculiar circumstances, provided further, that the whole amount thus pledged shall have been first paid." He then proceeded to make bequests to different relations; and towards the conclusion of his will he says: "If the Columbian College should fail, I will that the sum pledged to that shall be given to the Newton Institution, in the State of Massachusetts."

The whole amount necessary to discharge the college debt was pledged by the execution of bonds similar to that executed by Clopton; but before the announcement of the fact was made by the committee, not only Clopton but Enoch Reynolds, another member of it, had died. On the 27th of December 1833, the board of trustees appointed two other persons members of this

committee, in the place of Clopton and Reynolds; *and in 1834 the committee so constituted did announce the fact that the whole amount was pledged and that the pledges were indubitably valid; and prior to March 1842 the entire debt of the college, the payment whereof was intended to be secured by the said bonds and pledges, had been fully discharged and paid.

In November 1843, the Columbian College filed its bill in the Circuit court of Charlotte county, in which the foregoing facts were stated; and having made the administrator de bonis non of Clopton and the administrator of Daniel Terry, the first administrator, parties defendants, it was claimed that either under the bond or the will of Clopton, the college was entitled to have the amount which he had pledged himself to pay towards the discharge of the college debt.

The administrator de bonis non answered, submitting the question to the Court. But the administrator of Daniel Terry, who was one of the residuary legatees of Clopton, in his answer contested the claim, on the ground that the provisos in the bond were conditions precedent, and by the death of the parties who were to perform them, had not been and could not be complied with. And he insisted that the will, instead of dispensing with the necessity of performing these precedent conditions, added another; and that, therefore, for the same reason, the college had no title under the will.

The cause came on to be finally heard in November 1843, when the Court below dismissed the bill. Whereupon the plaintiff applied to this Court for an appeal, which was allowed.

Stanard and Bouldin, for the appellant, contended,

1st. That though at law a condition precedent must be strictly performed, yet equity will relieve where compensation can be made, or where the parties can be put in the same condition as they would have been in *if the condition had been complied with. And they insisted that in this case the first condition of the bond of Clopton had been fully complied with; and that there had been a substantial compliance with the second. On this point they referred to *Holtham v. Ryland*, 1 Equ. Cas. Abr. 18; *Neal v. Logan*, 1 Gratt. 14; *Hayard v. Angell*, 1 Vern. R. 222; *Ld. Falkland v. Bertie*, 2 Vern. R. 333, 343; *Simpson v. Vickers*, 14 Ves. R. 341; *Roper Leg.* 771, 773; *Hollinrake v. Lister*, 1 Russ. R. 500; *City Bank of Baltimore v. Smith*, 3 Gill & John. 265. And they further insisted, that if the Court would refuse relief upon the bond if it stood alone, yet that the first clause of the will dispensed with the condition contained in the second proviso of the bond, and taking the bond and will together the plaintiffs were entitled to recover.

2d. That by the first clause of the will of Abner Clopton, there was a bequest of the

amount of the bond to the college, upon the conditions specified in the will; and that these conditions had been fully performed. And they further insisted, that if the will was to be considered as imposing the condition embraced in the second proviso of the bond, then it was an impossible condition, and therefore void. And on this point they referred to *Worsley v. Wood*, 6 T. R. 711; *Lowther v. Cavendish*, 1 Eden's R. 99; 1 Roper Leg. 755; 2 Williams' Ex'ors 786; 2 Story's Equ. Jur. § 1307.

3d. That the bequest over to the Newton Institution, if the Columbian College should fail, was a bequest by implication to the college. On this point they referred to 2 Roper Leg. 1439, 1441; *Crowder v. Clowes*, 2 Ves. jr. 449; *Waineright v. Waineright*, 3 Ves. R. 558.

Robinson, for the appellee, insisted,

1st. That a condition precedent must be strictly performed; and that the condition contained in the *second proviso of Clopton's bond had not been and could not now be complied with. He referred to *Platt on Cov.* 104; 1 Jarm. on Wills 797; *Maryon v. Carter*, 19 Eng. C. L. R. 392; *Worsley v. Wood*, 6 T. R. 711; *Popham v. Bampfild*, 1 Vern. R. 79, 83; *Bertie v. Ld. Falkland*, 2 Freeman 220, 3 Ch. Cas. 129, 2 Vern. 333; *Harvey v. Aston*, 1 Atk. R. 361; *Whitmel v. Farrel*, 1 Ves. sr. 256; *Hargrave's argument in Scott v. Tyler*, 2 Bro. Ch. R. 456 to 463; *Knight v. Cameron*, 14 Ves. R. 389; *Clarke v. Parker*, 19 Id. 1; *Long v. Ricketts*, 1 Cond. Eng. Ch. R. 405; *Bracebridge v. Buckley*, 2 Price's Exch. R. 200; *White v. Warner*, 2 Meriv. R. 459; 1 Jarm. on Wills, 805, 836; 4 Kent's Com. 125; 1 Maddox Ch. 41; *City Bank of Baltimore v. Smith*, 3 Gill & John. 265.

2d. He referred to the fact that the bond of Clopton was executed for the purpose of paying the college debt, and that the proofs shewed that the whole debt was paid, and therefore if Clopton's estate was compelled to pay the bond it must be applied to some other purpose than that for which it was intended; it was not, therefore, a case which commended itself to the favour of the Court. And he then insisted that it was not the purpose of Clopton, by the first clause of his will, to make a bequest to the college, but to recognize his existing obligation. Nor was it his purpose to dispense with the conditions of his bond, but to add another.

3d. He insisted that the bequest to Newton Institution upon the failure of the Columbian College, was not upon the failure of the latter to pay its debt, but upon its failure to become entitled to demand the payment of the bond. It was a question, therefore, between the two institutions, and presented a case in which a condition precedent must be strictly performed. And he referred to *Simpson v. Vickers*, 14 Ves. R. 341; *Lister v. Garland*, 15 Id. 248.

174 *ALLEN, J., delivered the opinion of the Court.

The Court is of opinion that it distinctly

appears from the recital in the bond executed by the testator of the appellee, that the sole purpose of the obligor in giving said obligation, was to aid in raising funds to pay the debts then pressing upon the college. After reciting that at a meeting of the board of trustees of the Columbian College, held in the City of Washington, December 11, 1832, it was ascertained that the debts against the college, with interest till the 1st of January 1833, amounted to 31,413 dollars 6 cents, and that in making provision for the certain and speedy payment of said debts regard should be had also to the interest accruing on the principal from the 1st January 1833, till both principal and interest should be paid; the obligor promised to raise by voluntary contributions or out of his own funds, and to pay to the treasurer towards the payment of the said amount of 31,413 dollars 6 cents, the sum of 2413 dollars 6 cents, with the interest accruing thereon from the 1st January 1833 until principal and interest should be paid; provided, however, the whole amount of 31,413, dollars 6 cents should be pledged on the same condition; and provided moreover, that the fact of the whole amount being thus pledged should be distinctly announced by a committee consisting of persons named, before the obligation should be binding.

The recital shews that the testator of the appellee was looking solely to the release of the college from its embarrassments; that in entering into the obligation, he did not contemplate a mere gift or benevolence to the college, to be used by it for any ulterior purpose consistent with the general objects of the institution. Accordingly, and in conformity with this general intent, he bound himself to raise by voluntary contributions or out of his own funds the sum stipulated, not for the general purposes of the college, but towards the *payment of the debt designated. But as

that sum would still leave a heavy debt unpaid under which the institution might sink, and so his contribution fail in effecting his object, the whole sum was to be pledged and the fact announced. Whatever might have been the rights of the parties in a Court of law, if the condition precedent had been strictly complied with, here the appellant is seeking the aid of a Court of equity, upon the ground of a substantial performance of the condition; and to make out a case for relief, has proved that the whole debt of 31,413 dollars 6 cents, principal and interest, has been paid, and the college relieved from difficulty. The object therefore which the testator of the appellee had in view when he gave his obligation, has been attained otherwise: the liabilities have been discharged towards the payment of which alone he bound himself to raise a stipulated sum. If the creditors of the college, prompted by the same motives which actuated the obligor, had immediately after the execution of the obligation, released the debts, there would have been no obligation, at least in equity, to raise and pay

over the money. The Court is therefore of opinion, that upon the bond alone the appellant is not, upon the facts disclosed by the record, entitled to any relief.

And the Court is further of opinion, that the appellant's claim to relief is not aided by considering the bond in connection with the will of the appellees' testator. The first clause of the will recognizes his obligation and willingness to pay, provided the whole amount pledged should first appear indubitably valid; and provided the whole amount thus pledged should have been first paid. This recognition of his bond, and expression of a willingness to pay on certain conditions, does not change the nature of the obligation so far as respected the purpose for which it was given;

it superadds conditions to those contained in the bond, *but did not contemplate a payment for any other object than the one specified in the bond, the discharge of the debt due by the college.

And the Court is further of opinion, that neither the clause referred to, nor the clause in which he directs that if the Columbian College should fail, the sum pledged to that should be given to the Newton Institution in the State of Massachusetts, constitutes, under the circumstances of this case, a direct legacy or a legacy by implication to the college of the sum specified in the bond; because there is no bequest of the amount of the bond, but a mere recognition of the bond as an existing obligation, and an expression of a willingness to pay on certain conditions; but the purposes for which payment was to be made is still to be gathered from the bond itself, the discharge of the liabilities of the college; and this is made clear by the second clause, from which it would seem he looked to the contingency of the college failing in being relieved from its embarrassments, in which event he directed the amount pledged to that should be given to another institution. He does not speak of the amount as given to or bequeathed to the college for its general purposes, but as pledged to it; and a reference to the bond referred to discloses that the sole object of the pledge was to pay a specified debt; and it appearing that the debt intended to be provided for has been otherwise paid, the college cannot assert a claim to the fund to be applied to any ulterior object.

The circumstances shew that the arrangement was made for the purpose of discharging the college debts by means of voluntary contributions, and not to contract a debt to the college to be paid in any event. The pledge was entered into to give weight to the appeal expected to be made to the members of his religious society, his personal friends, and the friends of the institution, for liberal contributions.

Prevented by *the approach of death from soliciting voluntary contributions, he felt himself, under the peculiar circumstances alluded to in his will, bound to pay the amount out of his own estate, to be applied to the college debts, provided

the whole debt should be thereby extinguished; but he did not thereby recognize himself as a debtor, or intend a gift or bequest to the college for any other purpose than that for which the pledge had been given; and the object having been accomplished in some other mode, the obligation incurred by the pledge originally, and the recognition of it in the will, is at an end.

West's Adm'r & als. v. Thornton & als.

October Term. 1850. Richmond.

(Absent CABELL, P., and BROOKE, J.)

Equity Practice—Laches and Lapse of Time—Bill Set Aside.*—Bill dismissed on the ground of lapse of time and the *laches* of the plaintiffs, and the danger of doing injustice by attempting to settle the accounts between the parties.

This was a suit by the administrator de bonis non and the distributees of Meaux Thornton deceased, against the administrator de bonis non of Robert West deceased, and the administrator and legatees of the surety of Robert West as administrator of Meaux Thornton, and the administrator de bonis non, widow, devisees and legatees of George M. West deceased, originally brought in the Circuit court of King William, and removed from thence to the Circuit court of Hanover county. The object of the suit was to redeem certain slaves which the plaintiffs alleged had been mortgaged by Meaux Thornton to Robert West to secure *a debt due from Thornton to West, and to have a settlement of Robert West's administration upon the estate of Meaux Thornton. The pleadings and proofs make the following case:

Meaux Thornton by a deed bearing date the 17th of January 1807, conveyed to Robert West seven slaves by name, and also his interest in a suit pending in the County court of Gloucester against the administrator of John Perrin, to secure to West the sum of £102. 10. 6., with interest from 1804, with power to sell as many of the slaves as should be sufficient to pay the debt, upon ten days notice, provided he was not paid within six months out of the proceeds of the suit against Perrin's administrator.

Meaux Thornton seems to have died prior to February 1809, as on the 6th of that month Robert West qualified as his administrator, in the County court of Gloucester, as appeared from the certificate of the clerk of the General court. It does not appear

***Equity Practice—Laches and Lapse of Time.**—On this subject, see principal case cited and approved in *Bargamin v. Clarke*, 20 Gratt. 558. See also, *foot-note* to same case where there is a collection of cases; *foot-note* to *Smith v. Thompson*, 7 Gratt. 112; *Smith v. Britton*, 2 P. & H. 129; *Cranmer v. McSwords*, 24 W. Va. 602, citing the principal case; monographic *note* on "Laches" appended to *Peers v. Barnett*, 12 Gratt. 410.

whether West had possession of the slaves mentioned in the mortgage before his qualification as administrator; but it is certain that he removed from the county of Gloucester to the county of Buckingham, taking these slaves with him; and that he held them until his death in 1816. In January 1817, George M. West qualified in the County court of Buckingham, as the executor of Robert West; and these slaves were inventoried by him as the property of his testator's estate; and were so held until 1824, when he died. The unadministered estate of Robert West was then committed to Price Perkins, sheriff of Buckingham county, and these slaves were held by him until 1829, when they were levied on and sold by the marshal of the Richmond Chancery court, under a decree of that Court made in a case therein depending, of Lyons, administrator of Robinson against Perkins, administrator de bonis non of Robert West.

179 *The present suit was commenced in June 1832. The plaintiffs alleged in their bill the execution of the mortgage, and exhibited a copy thereof certified by John Robinson, clerk of the Circuit court of Henrico. They alleged that Meaux Thornton continued in possession of the slaves until his death in 1809. That West qualified as his administrator and took possession of the slaves, and held them until his death. And they state as the ground of the delay which had occurred in the institution of their suit, that a suit had been brought by John W. Perrin and others against Meaux Thornton in his lifetime, for the recovery of these slaves; that this suit was revived against Robert West as administrator of Thornton, and having been removed from the County court of Gloucester to the Chancery court at Richmond, it had been recently decided in favour of the administrator of Meaux Thornton.

A copy of the record in the case of Perrins against West's administrator and others, was made a part of this case. That was a suit brought in 1803, by the distributees of John Perrin deceased, some of them infants who sued by their next friend, against Meaux Thornton, to recover certain slaves, Mary and her children, which the plaintiffs alleged belonged to the estate of John Perrin; and of which Mary went into the possession of his widow, who afterwards married Meaux Thornton. Thornton answered the bill, and insisted that John Perrin, in his lifetime, never claimed the slave Mary, who had been the property of his wife before her marriage, and that after his death in 1791, Mrs. Perrin held her as her own property, and the slave and her increase had remained in the possession of Mrs. Perrin and of himself since his intermarriage with her, ever since, without any question of his title until this suit was brought.

180 *In April 1809, the death of the defendant, Meaux Thornton, was suggested, and the suit was revived by consent against Robert West as his administrator.

He does not appear to have filed an answer, or to have set up any other defence than that set up by Thornton. In 1817, the suit abated as to Robert West, by his death, and was revived against George M. West, as his executor. He filed an answer, in which, after insisting that the plaintiffs had no title to the slaves, he says, that Meaux Thornton, in his lifetime, sold said slaves to Robert West for a full consideration; or that being indebted to Robert West, he mortgaged the slaves to West to secure the payment of the debt. That he was not then acquainted with the precise character of the transaction, but expected to be able at the hearing to explain and prove it to the satisfaction of the Court. That he was then in possession of the slaves as a part of his testator's estate, and in that character claimed them as his property. That if the slaves ever did belong to the estate of John Perrin, the title was lost by lapse of time, and the adverse possession held by Thornton vested the title in him; and that Robert West having purchased them of Thornton, had a just title to them.

The mortgage executed by Meaux Thornton to Robert West in 1808, was filed in that suit. All the other evidence in the cause was upon the question of Mrs. Thornton's title to the slave Mary, who was the mother of the others.

The cause came on to be heard in March 1820, when there was a decree dismissing the bill with costs; and from this decree, there was an appeal to this Court. Whilst the cause was here, George M. West died, and the appeal was revived against Price Perkins, administrator de bonis non, &c., of Robert West; and in 1831, the decree was affirmed.

181 *Jane West, the widow of George M. West, and Perkins the administrator de bonis non of Robert West, in their answers, denied all knowledge of the plaintiffs' claim; and Perkins expressly relied upon the lapse of time, the death of all the parties who had any knowledge of the transaction, the fact that the clerk's office of the County court of Gloucester, with all its records, had been burned, and the other circumstances of the case, as a bar to the recovery sought by the plaintiffs.

The Court below directed various accounts, which were taken; and the commissioner reported that there was due from Robert West to Meaux Thornton, after satisfying the mortgage debt, on the 31st of December 1816, 490 dollars 61 cents. That there was due from George M. West, on the 1st of January 1825, for the hires of the mortgaged slaves, 2165 dollars 45 cents of principal, and 431 dollars 5 cents of interest; and that there was due from Perkins, for the hires of these same slaves up to the time they were sold by the marshal, 1000 dollars of principal, and 90 dollars of interest; and that the slaves sold for 1758 dollars.

The cause came on to be finally heard in April 1842, when the Court made a decree in conformity to the report of the commis-

sioner, holding Perkins liable personally, for the hires of the slaves whilst in his possession; and also for the price for which they were sold by the marshal. From this decree, the defendants applied to this Court for an appeal, which was allowed.

The case was elaborately argued in this Court by R. T. Daniel, Taylor, Patton and the Attorney General, for the appellants, and Lyons for the appellees, upon various questions presented on the record; but the Court considered but the question of lapse of time.

182 *ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that under any aspect of the appellees' claim, they are not entitled to the relief prayed for. The alleged mortgage by Meaux Thornton to Robert West, was executed on the 17th January 1807. When Robert West acquired possession of the slaves, does not distinctly appear. Meaux Thornton having died, Robert West administered on his estate in the County court of Gloucester, in February 1809. It is alleged he took possession of the slaves as administrator, not as mortgagee; but of this allegation, there is no proof. The records of Gloucester County court having been destroyed by fire, no account of his administration appears; and none after such a lapse of time, and the death of the original parties and their immediate representatives, can now be looked for. In the mean time, the slaves were removed by Robert West to another county, where he died. In 1817, his executor, George M. West, administered on his estate, took possession of the slaves as the assets thereof, and died in 1824; and his administratrix, Jane West, having been removed, administration of his estate has been committed to the sheriff. After the death of George M. West, administration de bonis non of the estate of Robert West, was committed to Price Perkins, sheriff of Buckingham, in November 1824. He took possession of the slaves as part of the unadministered assets of the estate of Robert West, and held them until February 1829, when they were sold as assets of that estate, at the suit of the creditors thereof. On the 13th of June 1832, this suit was instituted, 25 years after the execution of the mortgage, 23 years after the death of Meaux Thornton and administration on his estate, 15 years after the death of Robert West and administration on his estate, 8 years after the death of his executor, and 3 years after the sale of the negroes, as assets of Robert West's estate found in the hands of

183 the sheriff, his administrator *de bonis non. The long delay and laches of the appellees in asserting their claim, is not satisfactorily accounted for. The suit of Perrin asserting an adverse claim to the property against Meaux Thornton, does not furnish a sufficient apology. If they had notice of the suit at all, they would have perceived that as early as 1817, George M. West, the executor of Robert West, asserted by his answer, that his testator, Robert

West, had a clear and just title to the property; thus setting up, and insisting upon a title adverse to the claim of the appellees. This assertion of an adverse claim should have led to enquiry. Had such enquiry been made, they would have perceived that the executor had made the allegation in good faith; that he had inventoried the slaves as part of the assets of his testator; thus making himself responsible to creditors and distributees for their hires and value. It does not appear when administration de bonis non upon the estate of Meaux Thornton was taken out, or how long it remained unrepresented after the death of Robert West; the fact, if material, should have been shewn by the appellees. But so far as the record discloses, they were all competent to act for themselves at the death of Meaux Thornton; no disability is alleged or shewn. As distributees of Meaux Thornton, they were the proper parties to have sued the administrator for a settlement and distribution; and that is one aspect of their bill. And though the personal representative was the proper party to file the bill to redeem, yet those who claim through him are not relieved from the consequences of their gross laches, if without any valid excuse, they fail to take the proper steps to procure a representative for such a length of time, and until after such a change of parties and circumstances, as to render it doubtful whether any decree can be pronounced without the hazard of injustice. In this case, the assertion of their claim

involves the settlement of the administration account of Robert West *on 184 Meaux Thornton's estate, 15 years after the death of the administrator, and after the destruction of the records of the Court by which administration was granted; a settlement of the administration account of George M. West, executor of Robert West, 8 years after his death; an account of the hires and profits of the slaves from 1809, after the death of all the original parties and their immediate representatives, and after the property itself has passed into the hands of bona fide purchasers, and the proceeds arising from the sale have been applied to the payment of the creditors of Robert West's estate.

The Court is therefore of opinion, that upon the ground of adverse claim asserted upon the part of the estate of Robert West, and so long uncontroverted, the laches of the appellees in asserting their claim, and the hazard of injustice to others in going into settlements of estates, and calling for accounts of hires and profits of slaves under the circumstances of this case, the bill of the appellees should have been dismissed.

BALDWIN, J., concurred in so much of the decree as dismissed the bill as to Price Perkins individually, beyond the hires of the slaves whilst in his hands, but dissented from the residue; being of opinion, that the appellees are not precluded from relief by the statute of limitations or lapse of time.

Decree reversed, and bill dismissed.

185 *Curd v. Miller's Ex'ors.

October Term, 1850, Richmond.

(Absent CABELL, P., and BROOKE, J.)

1. **Fraudulent and Voluntary Conveyances—Grantor Continuing in Possession—Presumption—Burden of Proof of Fairness.**—The grantor in an absolute conveyance of personal property, continuing in possession thereof, such continued possession raises the legal presumption that the sale was fraudulent as regards the creditors of the grantor; which presumption throws imperatively upon the grantee the whole burthen of proving the fairness and good faith of the transaction; and that cannot be done without sufficient evidence that the pretended sale was for a fair and valuable consideration; and in the absence of such evidence, the *prima facie* presumption becomes absolutely and irresistibly conclusive.

2. **Same—Judgment against Grantor and Surety—Right of Surety.**—A judgment having been obtained against the grantor and his surety, the surety may direct the execution to be levied upon the property so conveyed, and set up the fraud in the conveyance.

This was a suit by William Miller in the Circuit court of Goochland, to enjoin the sale of a slave named Hezekiah, levied on by the sheriff under an execution which issued upon a judgment recovered by John Guerrant against William Lewis and Thomas Curd, upon a bond in which Lewis was principal and Curd was his surety. Miller, who was the father in law of Lewis, claimed the sale under a deed bearing date the 27th of November 1835, and admitted to record in the clerk's office of the County court of Goochland, by which Lewis, in consideration, as stated in the deed, of his having sold several negro slaves which he received by his wife, and of William Miller having paid and advanced for him at various times the sum of 1084 dollars 93 cents in cash, and of his the said Miller's having loaned to him for two years past a young negro man about twenty years
186 old, named James, granted, *bargained and sold to said William Miller nine slaves by name, one of whom was the

***Fraudulent and Voluntary Conveyances—Grantor Continues in Possession—Presumption.**—The retaining possession of personal property by the vendor, after an absolute sale, is *prima facie* fraudulent; but the presumption may be rebutted by proof. *Davis v. Turner*, 4 Gratt. 422. For this proposition the principal case is cited and approved in *Livesay v. Beard*, 22 W. Va. 594; *Bindley v. Martin*, 28 W. Va. 793; *In re Benford*, 3 Fed. Cas. 292.

In *Dally v. Warren*, 80 Va. 523, the principal case is distinguished, the court saying that an assignee of a chose in action is not required to do more than to take possession of the thing or evidence of debt assigned. After a careful and critical comparison of the facts of this case with facts of the cases cited by appellant, *Davis v. Turner*, 4 Gratt. 422, *Curd v. Miller*, 7 Gratt. 185, *Twyne's Case*, 3 Coke 80, we find no analogy or proper application to the case under review. See generally, monographic note on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348.

slave Hezekiah, and all his household and kitchen furniture. And the deed concluded as follows: "The possession of whom and all which property I do hereby acknowledge is to be taken, and hereby do authorize to be taken by the said William Miller, his executors or administrators or assigns, whenever he or they may think proper. In witness whereof," &c.

Lewis lived on a farm of Miller at the time of the execution of this deed, and continued to live there until the execution was levied. And he retained in his possession all the property mentioned in the deed until after the bill was filed in this case. The slave Hezekiah was employed by him on a boat which he ran upon the James River and Kanawha canal, at the time the execution was levied; and the levy was made by the directions of Thomas Curd, who indemnified the sheriff.

Miller, in his bill, after setting out his title under the deed of the 27th of November 1835, charged that he had purchased the slave from Lewis for a valuable consideration, and paid for him, and that he was his property without any condition; and having made the sheriff, and Guerrant, Curd and Lewis, defendants, he asked for an injunction to restrain the sale; which was granted.

Curd, in his answer, said, that he was a surety of Lewis in the debt on which the execution issued; that Lewis had ever held possession of the slave Hezekiah, and was in possession and with him at the time of the levy. That he did not admit that Miller had purchased the slave from Lewis and given valuable consideration for him, but he insisted that the deed upon its face shewed that no valid and bona fide sale of the property mentioned in said deed was made by Lewis to Miller; but the con-
187 siderations therein mentioned *were in all the instances considerations executed, and were not at all valuable considerations and given for the property therein conveyed. And that Lewis having retained possession of the slave, the sale to Miller, even if fair in other respects, was fraudulent in law as to the creditors of Lewis.

No evidence other than the deed, as to the considerations therein mentioned, was introduced by either party.

The cause came on to be heard in June 1844, when the Court below perpetuated the injunction. Whereupon Curd applied to this Court for an appeal, which was allowed. Whilst the cause was pending in this Court, Miller died, and it was revived against his executors.

Grattan, for the appellant.

Lyons and Taylor, for the appellees.

BALDWIN, J., delivered the opinion of the Court.

Lewis, the grantor in the bill of sale to the appellee of the 27th of November 1835, in the proceedings mentioned, having, notwithstanding his alleged absolute sale of the slave Hezekiah thereby conveyed, con-

tinued in the possession of the said slave, such continued possession raises the legal presumption that the sale was fraudulent as regards the creditors of Lewis; which presumption throws imperatively upon the appellee the whole burthen of proving the fairness and good faith of the transaction; and that cannot be done without sufficient evidence that the pretended sale was for a fair and valuable consideration; and in the absence of such evidence, the prima facie presumption becomes absolutely and irresistibly conclusive.

No such evidence has been furnished by the appellee; on the contrary, the bill of sale itself contains no acknowledgment of a consideration actually paid by 188 *the grantee to the grantor, or of an equivalent existing indebtedness from the latter to the former, but serves to shew upon its face mere gratuities and voluntary advancements, entirely compatible with the relation of father in law and son in law existing between the parties.

The registration of the bill of sale is an immaterial circumstance, as in this case it throws no light upon the question whether the alleged sale was fair and honest, or a fraudulent contrivance to defeat the creditors of the grantor. And the authority given to the grantee by the bill of sale to take possession of the property at pleasure amounts to nothing, it being no more than that which results from the absolute conveyance itself.

Nor is it material, the property being that of Lewis, the principal debtor, that the execution was levied thereupon at the instance of the appellant Curd the surety, instead of Guerrant the creditor; for the question still recurs, whether the sale was fair or fraudulent as regards the creditors of the grantor; and it cannot be doubted that the surety has a right to avail himself of the fraudulent character of the transaction, and in truth is, within the spirit of the statute, at least in a Court of equity, a creditor himself. There is no pretence on the part of the appellee that, as between him and the appellant, the latter is primarily bound for the debt, or that he stands in any other relation to it than that of a mere surety.

Decree reversed with costs; injunction dissolved, and bill dismissed with costs.

189 *Orrick v. Colston.

October Term, 1850, Richmond.

(Absent CABELL, P., and BROOKE, J.)

1. **Promissory Notes—Endorser in Blank—Liability.*—**

A paper signed in blank and endorsed in blank, may be filled up either as a common promissory note or a negotiable note; and the person who

***Promissory Notes—Endorser in Blank—Liability—Rights of Holder.**—In *Powell v. Com.*, 11 Gratt. 828, it is said: "From these and other cases to the same effect. I deduce that if a third party put his name in blank upon the back of a negotiable promissory note

endorsed it in blank will be liable on his endorsement to a holder for value.

2. **Same—Same—Same.**—In such a case, if the paper is filled up as a common promissory note to a third person, who advances the money for it to the makers, he may treat the endorser as an original security, or as a guarantor of the note.

3. **Same—Same—Right of Holder.**—If, after the note is filled up and delivered to the payee, the holder fills up the blank endorsement with a guaranty, he may afterwards erase it and proceed against the endorser as an original security.

4. **Same—Same—Case Agreed—Judgment in Court of Appeals.**—In this case the endorsement was filled up after suit brought thereon; and the declaration charged the endorser both as original surety and as guarantor. On the trial the parties agreed a case, on which the Court below gave a judgment for the defendant. On appeal, this Court, without deciding whether the filling up of the endorsement constituted a guaranty or an original security, reversed the judgment, and entered a judgment against the defendant as an original surety, without sending the case back to have the filling up of the endorsement erased, and to have it filled up as an original promise.

Starbuck and Forman were partners and millers in the county of Berkeley; and Edward Colston of the same county was in the habit of endorsing their notes for their accommodation, and also of becoming their security where the evidence of debt was not negotiable. In August 1839 he was their endorser on a note discounted at bank, and a short time previous had given his blank

made payable to another party, and to which he is a stranger, while the same remains in the hands of the maker, he will be presumed, in the absence of controlling proof to the contrary, to have intended to give the note credit and currency; and if the endorsement was at the time of the making of the note, he may be treated by the payee as an original promiser or joint maker of the note. If the endorsement were after the date of the note, however long, the payee may treat him as a guarantor, and may write over the signature a guaranty consistent with the nature of the case. And the fair and reasonable, if not necessary inference from cases which have occurred in this court, will bring us to the same result. See *Douglass v. Scott*, 8 Leigh 48; *Watson v. Hurt*, 6 Gratt. 683; *Orrick v. Colston*, 7 Gratt. 189." See, in accord, citing the principal case, *Hopkins v. Richardson*, 9 Gratt. 496; *Powell v. Com.*, 11 Gratt. 828; *Fant v. Miller*, 17 Gratt. 80; *Broun v. Hull*, 33 Gratt. 36; *Frank v. Lillienfeld*, 33 Gratt. 385, 391; *Welsh v. Ebersole*, 75 Va. 659; *First Nat. Bank v. Lockstitch Fence Co.*, 24 Fed. Rep. 225; *Burton v. Hansford*, 10 W. Va. 481, 482, 485; *Bank v. Johns*, 22 W. Va. 526, overruling *Morehead v. Bank*, 5 W. Va. 74; *Long v. Campbell*, 37 W. Va. 674, 17 S. E. Rep. 190; *Lafferty v. Lafferty*, 42 W. Va. 789, 26 S. E. Rep. 264.

In *First Nat. Bank v. Lockstitch Fence Co.*, 24 Fed. Rep. 225, it is said: "Shortly stated, the controversy between the parties involves this question: What liability is assumed by a third party who places his name upon the back of a negotiable promissory note at the time of its execution by the maker, and before its delivery to the payee; and must liability in such case be determined in this court according to the course of judicial decision in the state where

endorsement to the partner Starbuck, for the purpose of renewing said note.

190 *On the 12th of August 1839 the plaintiff Orrick, who lived in the county of Morgan, about twenty-five or thirty miles from the residence of Starbuck and Forman, and about fifteen miles from Colston, received from Starbuck the following note: "Dear Sir:—I have for you a blank note at eight months, which I wish you to fill up with as much as you can spare me, and if convenient, enclose a check for the amount to-morrow to Charlestown, where I shall be till Thursday morning. Should you want it at the expiration of the time, I can give it you, but would prefer extending it longer, leaving the matter at your option. Yours,

"C. C. Starbuck."

In this note was enclosed a paper signed in blank with the name of Starbuck and Forman, and endorsed in blank by Edward Colston, both the signatures being genuine. On the next day the plaintiff did, in pursuance of this application, advance and pay over to Starbuck and Forman one thousand dollars as a loan, and wrote over their signature the following note: "Eight months after date we promise and bind ourselves, our heirs and assigns, to pay to Cromwell Orrick, his heirs or assigns, the sum of one thousand dollars, with interest from the date hereof, for value received; as witness our hand and seal this 13th day of August 1839.

"Starbuck & Forman."

And after this action was brought he wrote over the blank signature of Colston the following: "In consideration of the loan of 1000 dollars by Cromwell Orrick, I hereby guaranty the payment of the within sum of money.

"Edw'd Colston."

Between March and June 1840, executions amounting to about 5000 dollars, issued on judgments recovered against Starbuck and Forman, went into the hands of the sheriff of Berkeley county, and were levied upon

the obligation was incurred? Whether, in the cases stated, the liability is that of original promisor, indorser, or guarantor, has been a question upon which great diversity of opinion has existed in many of the courts of the states. But the growing current of authority, even before *Good v. Martin*, 95 U. S. 90, seemed to tend towards the view that the liability assumed by a third party who thus indorsed a note in blank was that of original promisor, although a different rule was, and is yet, adhered to in some of the states. In New York it has been held in a long line of cases, of which *Haviland v. Haviland*, 14 Hun 627; *Phelps v. Vischer*, 50 N. Y. 60, and *Coulter v. Richmond*, 59 N. Y. 478, are examples, that presumptively such a party stands to the paper in the relation of indorser, but that this presumption may be rebutted by parol proof that the indorsement was made to give the maker credit with the payee. The same rule of liability prevails in Wisconsin. *Cady v. Shepard*, 12 Wis. 718. In Massachusetts it is held in a series of cases too extended for citation that if a third person place his name in blank on the back of a note before its delivery to the payee,

the whole of their personal property, 191 which was not *sufficient to satisfy them. They absconded from the State in the early part of June, when they were ascertained to be insolvent; though when they absconded they held in possession a considerable real estate in the county of Berkeley, which was attached by some of their creditors, but was claimed by others, of whom Colston was one, under a deed of trust bearing date the 27th of June 1840, executed by Starbuck in the City of New York.

No communication took place between Orrick and Colston in relation to this transaction before the loan was made and the blank signature used as before stated; indeed, Colston had been absent from the Commonwealth, in the State of Kentucky, for more than a month prior to the 12th of August 1839. And about the time this loan was made Starbuck had, in one or more cases, fraudulently used certain blank endorsements furnished him by persons other than Colston.

In June 1841, Orrick brought an action against Colston in the Circuit court of Berkeley, upon the endorsement aforesaid, and charged him in his declaration both as an original surety and also as a guarantor of the debt. The issue was made up on the plea of non assumpsit; and on the trial, the parties agreed the facts as they have been stated, and submitted the questions arising thereon to the Court. Whereupon the Court gave a judgment for the defendant; and the plaintiff applied to this Court for a supersedeas, which was granted.

Johnson & Johnston, for the appellant, considered first, the question whether Colston was liable to Orrick upon his endorsement. On this point they stated the general principle to be that the delivery of a blank signature binds the deliverer for whatever is written over it consistent with the face of the paper; and that this principle applied to paper that was not negotiable as

he is an original promisor, and the presumption is, in the absence of anything to the contrary, that the names on the back and on the face of the note were written at the same time. To the same effect are 1 Pars. Cont. (6th Ed.) 248; *Irish v. Cutter*, 31 Me. 536; *Schneider v. Schiffman*, 20 Mo. 571; *Orrick v. Colston*, 7 Gratt. 189; *Riggs v. Waldo*, 2 Cal. 485; *Sylvester v. Downer*, 20 Vt. 355; *Lewis v. Harvey*, 18 Mo. 74.

"In this state (Illinois) it appears to be the established rule that a blank indorsement by a third party, made under the circumstances heretofore stated, is *prima facie* evidence of a liability in the capacity of a guarantor. In most of the cases wherein it has been so held, the holder sought to enforce against such third party the liability of guarantor, and the contention of the latter was that he could only be made liable as indorser. *Camden v. McKoy*, 3 Scam. 487; *Cushman v. Dement*, 3 Scam. 497; *Carroll v. Weld*, 13 Ill. 683; *Klein v. Currier*, 14 Ill. 237; *Webster v. Cobb*, 17 Ill. 459; *Heintz v. Cahn*, 29 Ill. 308; *Glickauf v. Kaufmann*, 78 Ill. 378; *Boynton v. Pierce*, 79 Ill. 145; *Stowell v. Raymond*, 83 Ill. 120; *Wallace v. Goold*, 91 Ill. 15."

192 *well as to paper that was. And they referred to *Russel v. Langstaffe*, Doug. R. 514; *Schultz v. Astley*, 29 Eng. C. L. R. 414; *Lickbarrow v. Mason*, 2 T. R. 63; *Putnam v. Sullivan*, 4 Mass. R. 53; *Violett v. Patton*, 5 Cranch's R. 142; *Douglass v. Scott & Fry*, 8 Leigh 43.

They insisted, that when Colston endorsed the blank paper he authorized Starbuck and Forman to write upon it either a common promissory note or a negotiable note, and that his blank endorsement bound him for either in the character appropriate to the note written. And for this they referred to the cases of *Russel v. Langstaffe*; *Schultz v. Astley*; and *Violett v. Patton*, supra.

They insisted further, that Colston was liable either as an original surety or as a guarantor of the note. That whether as the one or the other, the loan of the money to the makers of the note was a sufficient consideration to bind him; and that he was not released by the failure to prove a demand of payment of the makers and notice of their failure to pay. And they cited *Nelson v. Dubois*, 13 John. R. 175; *Campbell v. Butler*, 14 Id. 349; *Ulen v. Kittredge*, 7 Mass. R. 233; *Moies v. Bird*, 11 Id. 436; *Violett v. Patton*, supra; *Watson v. Hurt*, 6 Gratt. 633; *Russel v. Langstaffe*, supra; *Schultz v. Astley*, supra; *Josselyn v. Ames*, 3 Mass. R. 274; *Austin v. Boyd*, 24 Pick. R. 64; *Oxford Bank v. Haynes*, 8 Id. 423.

They insisted further, that if Colston was strictly and only a guarantor of the note, in order to release him there must have been not only negligence on the part of Orrick in pursuing his remedies against Starbuck and Forman, but that Colston must have suffered loss by such negligence. For this they cited *Allen v. Rightmire*, 20 John. R. 365; *Fell on Commercial Guaranties*, 200, 201, 203, and the notes; *Reynolds v. Douglass*, 12 Peters' R. 497.

193 And they referred to *the facts to shew that it was impossible to have made the money out of Starbuck and Forman after the note fell due.

Robinson, for the appellee, admitted that if Starbuck, to whom Colston had entrusted his blank endorsement, had written on the paper a negotiable note, and Orrick had discounted it, Colston would, in that case, have been liable; his name in that case, would have bound him for the amount for which Orrick trusted Starbuck and Forman. But he insisted that Orrick had no authority from Colston to fill up the paper at all; and that Starbuck had only authority to fill it up with a negotiable note, so as to make Colston liable as endorser; and that he had no authority to subject him as guarantor. And he referred to *Jordan v. Neilson*, 2 Wash. 164; *Tillman v. Wheeler*, 17 John. R. 326; *Seaberry v. Hungerford*, 2 Hill's R. 80; Id. 194; *Prosser v. Luqueer*, 4 Hill's R. 420.

He insisted further, that if Colston's contract was a contract of guaranty, it was such a contract as that he would be dis-

charged by the neglect of the holder of the note to give Colston notice of the sum advanced on it, or by his neglect to demand payment of the maker and to give the guarantor notice of non-payment. And for this he referred to *Douglass v. Reynolds*, 7 Peters' R. 113; *Lee v. Dick*, 10 Peters' R. 482; *Oxford Bank v. Haynes*, 8 Pick. R. 423; *Whiton v. Mears*, 11 Metcalf's R. 563. And he referred to the facts to shew that when this note fell due Starbuck and Forman had property from which it might have been paid.

He insisted further, that if Colston was to be held liable as guarantor of a note which was not commercial paper, that there was no consideration for his guaranty, and that he therefore was not bound. *Britten v. Webb*, 9 Eng. C. L. R. 154; *Fitzhugh v. Love*, 6 Call 5.

194 *DANIEL, J. Upon the case agreed and submitted to the Court below, and now brought under revision here, two questions arise which have been very elaborately discussed at the bar: 1. Whether the appellee, Colston, by his endorsement, subjected himself to any liability; and 2. If so, whether he is liable in the form of contract and mode in which the appellant seeks to charge him.

It is well settled, that a blank endorsement on a negotiable instrument, blank as to date or amount at the time of the endorsement, if made for the purpose of giving a credit to the drawer, is as effectual to bind the endorser for any amount with which the instrument may be filled up by the drawer, or an innocent holder for value, as if the instrument had been complete at the time of the endorsement. In the case of *Russel v. Langstaffe*, Doug. R. 514, the Court of King's bench held, in the language of Lord Mansfield, that such an endorsement "is a letter of credit for an indefinite sum"—that the endorser, in effect said, "trust the drawer to any amount, and I will be his security." So in *Schultz v. Astley*, 29 Eng. C. L. R. 414, which was the case of an acceptance written on a paper, before entirely blank, it was held, that the blank acceptance was an acceptance of the bill afterwards put upon it; and that there is no distinction in principle, when the bill has passed into the hands of third persons, between holding the acceptor liable to a given amount, when the bill is afterwards drawn in the name of the party who has obtained the acceptance, and when it is drawn by a stranger who becomes the drawer at the instance of the party to whom the acceptance is given. And in the case of *Douglass v. Scott & Fry*, decided by this Court, 8 Leigh 43, where the paper was signed in blank, and endorsed in blank, and delivered to another to be filled up and used as a negotiable instrument to raise money on, the decision was

195 founded on the proposition, *that the negotiable note afterwards drawn over the signature of the maker, did, together with its endorsements, bind all the parties

to the same extent as if the maker had signed, and the endorsers endorsed, the paper in its perfect form.

Of a promissory note which is not in its form negotiable, and which has never been placed by our statutes on the footing of bills of exchange, there cannot, technically speaking, be an endorser. Yet no reason is perceived why one who endorses a paper in blank, and delivers it to another, with authority to fill up the paper with an ordinary promissory note, and then to use it for the purpose of raising money, should not be precluded from escaping liability by objecting the incompleteness of the instrument at the time of endorsement, equally with one who conducts himself in the like manner with respect to a paper which is delivered with the understanding that it is to be perfected into a negotiable note. The same policy would seem to govern both transactions, and to require that the endorsers should, in each case, be subjected to the same liabilities, whatever they may be, that they would have incurred, respectively, had the drawing out and perfecting of the notes, in each case, immediately preceded the execution of the endorsements.

The questions whether such an endorsement should not be held to be without consideration, whether it was not void because of its preceding the making of the note, and because of there being no memorandum of the agreement in writing, were all considered in the case of *Violett v. Patton*, 5 Cranch's R. 142, and decided in favour of the validity of the endorsement.

I do not therefore perceive, that the legal force of the endorsement in this case, is in any measure impaired by the consideration that it preceded, in order of time, the filling up of the note drawn upon the face of the paper. Nor do I discover any thing

196 in the facts and circumstances* of the case agreed, which would justify us in so restricting the authority of the payee, as to confine it to the drawing of a note, negotiable and payable at some one of our banks, over the signatures of the drawers, rather than the note now before us. The signature and the endorsement were both in blank at the time the paper passed into the hands of the payee, and the terms of the letter in which it was enclosed, "I have for you a blank note at eight months, which I wish you to fill up with as much as you can spare me," &c., would be equally as well satisfied by filling up the blank with the note that was made, as with one negotiable at bank. We are therefore warranted in treating the case before us as if the perfecting of the note on the face of the paper, and the endorsing of it by Colston had been contemporaneous acts, and had both preceded the delivery of the instrument to the payee.

What is the legal force of such an endorsement? No case is recollected in which the precise question has been directly before this Court for its adjudication; but extensive reference has been made by counsel to cases settled in the Courts of some of our

sister States, in which questions of a like character were the subjects of decision. The decisions of some of these States, are so much in conflict with those of others, and indeed, the decision of the Courts of the same State, have, in some instances, been found to fluctuate so much at different periods, that it is difficult to educe from their examination any well settled doctrine on the subject.

In Connecticut, the cases are numerous, and not without apparent conflict, but I think it may be stated as the result of the current of the later decisions of its Supreme court—that endorsements in blank on promissory notes not negotiable, and on negotiable notes by one not a party to them, in order to warrant the maker's responsibility, are treated as possessing the same

197 *legal effect; and as binding the endorser to the undertaking that the money shall be obtained from the promiser when it falls due, by the endorsee, he using due diligence, and taking the remedies which the law has provided; but if the endorsee suffers it to lie without taking legal steps to secure or recover it, the endorser will be exonerated in case of a loss, unless the promisor was absolutely insolvent when the note fell due. *Perkins v. Catlin*, 11 Conn. R. 213; *Laffin v. Pomeroy*, Id. 440; *Castle v. Candee*, 16 Conn. R. 223.

In Massachusetts, it is held, that where the note is made payable to the party sought to be charged, and negotiable in its form, the holder should be restricted to such an engagement over the signature endorsed in blank as will conform to the nature of the instrument. In such case, the party placing his signature in blank on the back of the note, is liable as endorser, and in no other form. But where the note was not payable to the defendant, or from its form was not negotiable by his endorsement, the nature and extent of his liability has been determined by the circumstances under which the endorsement has been made: if made after the note has been given, and under circumstances shewing that the endorser had no concern in the original contract, parol proof has been resorted to for the purpose of shewing what was the true character of this promise or engagement; and his undertaking has been treated either as a collateral or direct promise, according to such proof. If on the other hand, such endorsement is made at the same time with the execution of the note, the holder has been allowed to treat the endorser at his election, either as a direct or collateral promisor, without any proof of consideration, or of any actual promise to pay, except what is derived from his signature on the back of the note. *Josselyn v. Ames*, 3 Mass. R. 274; *Hunt v. Adams*, 5 Id. 358; *Moies v. Bird*, 11 Id. 436; *Austin v. Boyd*, 24 Pick. R. 64; *Baker v. Briggs*, 8 Pick. R. 122; *Oxford Bank v. Haynes*, Id. 423.

198 *In New York, the decisions upon the question have not been uniform, but the weight of authority is in favour of the proposition—that when the note is ne-

gotiable, the inference to be drawn from a third party's placing his name on the back of it, is that he intends to give credit to the maker, by becoming answerable as endorser; and that where he can be made liable as endorser, he cannot be charged in any other character. If, however, by reason of the note not being negotiable, he is not chargeable as endorser, and he made the endorsement under an agreement, and with the intent to bind himself in some other form, the payee may write over the blank endorsement such a promise or guaranty as will carry into effect the intention of the parties. *Nelson v. Dubois*, 13 John. R. 175; *Tillman v. Wheeler*, 17 John. R. 326; *Seabury v. Hungerford*, 2 Hill's R. 80; *Prosser v. Luqueer*, 4 Hill's R. 420. The reasonable inference which one about to accept a promissory note filled up as the one before us, and endorsed in blank in the ordinary course of business transactions, would draw from a mere inspection of the instrument is, that the endorsement was made with the intent to give strength and credit to the paper. He would perceive that the person putting his name on the back of the paper, had not, from the nature of the instrument, subjected himself to the liabilities, or entitled himself to the privileges, which attach to the endorser of paper strictly commercial. And as, of the only other contracts, having reference to the note on the face of the paper, which could be fairly predicated of the blank signature on the back, viz: an absolute and direct promise to pay, or a collateral guaranty, it would be just as fair to presume the one as the other; it would, I think, be reasonable further to infer, that the person so endorsing in blank intended to leave it in the power of the payee to elect in which of the two aspects he would hold him bound.

199 *I regard the weight of authorities above referred to, as in favour of these views; the decisions in Connecticut being opposed by those of New York and Massachusetts; and I do not think that there is any thing in the decision of this Court in the case of *Watson v. Hurt*, 6 Gratt. 633, in conflict with them. In the last mentioned case, the blank endorsement being construed in reference to the note on the face, and the latter being barred by the statute of limitations, it was not necessary to decide whether the endorsement imported an absolute suretyship for the maker, or a collateral undertaking for the payment of the note; as, whether the action was to be treated as founded on the one form of contract or the other, it would in either case have been barred by the statute.

I have hitherto considered the case as if the endorsement were still in blank, as it was when it passed into the hands of the payee. Since then, nothing has occurred to impair the right of the payee to treat the endorsement as still in blank. I do not deem it necessary, therefore, to express any opinion, as to what would have been the construction to be given to the terms of the writing over the signature of the en-

dorser, had they been filled out before the paper passed to the payee, or upon the questions of diligence, which might have arisen had we regarded the undertaking of Colston as a collateral guaranty.

It was competent for the appellant, in my view of the case, as before stated, to have charged Colston either as a collateral promisor, or as a direct and absolute surety. The filling up of the endorsement has not destroyed the right of the appellant to hold the appellee bound to him in either character. It was made after the institution of the suit; and might have been erased or altered in any way, at or before the trial, so as to conform to any of the counts in which the plaintiff had a right, upon the state of facts, to recover. *Tenny v. 200 *Prince*, 4 Pick. R. 385; *Josselyn v. Ames*, 3 Mass. R. 274. Even then, if we were to hold that according to the terms of the endorsement as they now stand, Colston would be a collateral promisor, and as such, not bound because of the alleged want of proper diligence on the part of the payee against the maker, I do not think it would be necessary to send the case back for the formal erasure of the filling up of the endorsement, and its alteration so as to make Colston, by the express written terms of the endorsement, a direct promisor. No change in the declaration or other pleadings, in such a state of things being necessary to the recovery. I feel the less reluctance in coming to this conclusion, as from the facts agreed, it is highly probable that no measure of diligence would have resulted in procuring payment of the note from the makers. I think that there is error in the judgment of the Court below; that it ought to be reversed with costs, and one rendered in favour of the appellant for the amount of the note and its interest.

The other Judges concurred in the opinion of Judge Daniel.

Judgment reversed, and entered for the appellant.

201 *Bell v. The Commonwealth.

October Term, 1850, Richmond.

(Absent CABELL, P., and BROOKE, J.)

Appellate Jurisdiction—Criminal Cases—Writ of Error—Habeas Corpus.—The Court of appeals has no jurisdiction to grant a writ of error in a criminal case, or to a judgment upon an application for a writ of *habeas corpus*.

Bell being confined in the jail of the county of Buckingham under a charge of larceny, applied to the Judge of the Circuit court of that county for a habeas corpus, and asked for his discharge, on the ground that he had not been brought to trial for three terms of the Court after he had been sent on for trial by the examining Court. The Circuit Judge upon a hearing of the case, refused to discharge the prisoner; and he thereupon applied to this Court for a writ of error to the judgment of the Court below.

Irvine for the applicant.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that as by the act concerning the writ of habeas corpus, ch. 156, page 613, Code of 1850, no provision is made giving to this Court jurisdiction to grant a writ of error to a judgment upon an application for a habeas corpus, and as by the act concerning appeals and writs of error and supersedeas, Code of 1850, p. 682, the jurisdiction to grant a writ of error or supersedeas is confined to judgments in civil cases, this Court has no jurisdiction to grant a writ of error in a criminal case.

202 *Williamson v. Crawford.

October Term, 1850, Richmond.

(Absent CABELL, P., and BROOKE, J.)

1. *Scire Facias*—Statutes—Case at Bar.—The act, 1 Rev. Code, ch. 128, § 65, p. 505, in relation to a *scire facias* to revive a judgment, is not repealed by the act of 29th March, Supp. Rev. Code, ch. 197, § 2, on the same subject.*

2. *Pleading and Practice*—*Scire Facias*.†—Upon a *scire facias* to revive a judgment, neither a declaration nor a rule to plead is necessary. And if the writ is made returnable to the rules, and the defendant makes default, there should be an award of execution, which, if not set aside at the next term, becomes a final judgment as of the last day of the term.

At the May term for 1837 of the Circuit court of Henrico county, James Crawford

*Act of 1819. "On writs of *scire facias* for the renewal of judgments, no judgment shall be rendered on the return of two *nihilis*, unless the defendant resides in the county, or unless he be absent from the Commonwealth, and have no known attorney therein. But such *scire facias* may be directed to the sheriff of any county of the Commonwealth, wherein the defendant or his attorney shall reside or be found, which being returned served, the Court may proceed to judgment thereupon, as if the defendant had resided in the county."

Act of 1831. "That all writs of *scire facias* which shall issue to revive either a pending suit, or a judgment or decree in any of the Courts of this Commonwealth, where it shall appear by affidavit of the plaintiff or other person, filed with the clerk, that the defendant is out of the Commonwealth, may be served on the defendant's agent or attorney in fact, if any he have within the Commonwealth, or if he have no such agent or attorney known, by publication for four weeks successively previous to the return day of such Court, in some newspaper published in this Commonwealth."

†*Pleading and Practice*—*Scire Facias*.—In *McVeigh v. Bank of Old Dominion*, 76 Va. 208, it is said: "Upon the authority of *Williamson v. Crawford*, 7 Gratt. 202, which is recognized in a later case—*Bolanz & al. v. Commonwealth*, 24 Gratt. 88—as accurately expounding the law of this state, the court is of opinion that there is no error in the judgment of the court below. Upon a *scire facias* to revive a judgment, neither a declaration nor rule to plead is necessary."

See, in accord, citing the principal case, *Smith v. Hutchinson*, 78 Va. 688.

recovered a judgment, in an action of detinue against William Williamson, for two slaves, each valued at 700 dollars, and also for 100 dollars damages for detention of the slaves, and his *costs. No proceedings seem to have been taken upon this judgment until March 1843, when the plaintiff sued out a *scire facias* to revive it, returnable to the April rules. On this writ the sheriff returned that the defendant did not reside in his county, nor was found in his bailiwick; but as he was informed he was absent from the Commonwealth, and had no known attorney therein.

At the April rules the plaintiff sued out an alias writ of *scire facias* against the defendant, returnable to the May rules; and upon this writ the sheriff made the same return as on the first.

At the May rules, the alias writ having been returned, the clerk entered up a judgment by default against the defendant, according to the writ: and at the next term of the Court, which commenced in the same month, this office judgment was confirmed, and there was a judgment as of the last day of the term, against the defendant, for the two slaves or their alternative value, with the damages and costs of the original action, and also the costs of this proceeding. To this judgment, Williamson obtained a supersedeas from this Court.

The case was elaborately argued here by Patton and Cooke, for the appellant, and A. Johnston and Cabell, for the appellee. The questions discussed were, first, whether the act of 29th of March 1831, Supp. Rev. Code 258, in relation to proceedings upon a *scire facias* to revive a judgment or decree, repealed the act of 1819, 1 Rev. Code, ch. 128, § 65, p. 505, on the same subject; and second, whether, when the *scire facias* was returned to the rules, the defendant was entitled to a rule to plead.

BALDWIN, J., delivered the opinion of the Court.

The practice of the English courts, in relation to writs of *scire facias* for the renewal of judgments, as *well as other matters of practice, came to us on the settlement of the country, and has prevailed here, so far as adapted to the organization of our Courts, and compatible with our own legislation. By that practice, execution was awarded on the return of two *nihilis*, and it was recognized by our act of 1792, (1 Rev. Code, ch. 128, § 65, p. 505,) but was restricted by that act to cases where the defendant resided in the county, or where he was absent from the Commonwealth, and had no known attorney therein. By the act of 1831, (Supp. Rev. Code, p. 258,) upon the affidavit therein prescribed being made and filed, service of the *scire facias* was authorized, where the defendant was out of the Commonwealth, upon his agent or attorney in fact, or by publication in some newspaper as therein provided for. But this last mentioned act is permissive only, and in no wise abolishes the previously existing practice. The purpose of the

writ of scire facias is to give notice to the defendant of an application for award of execution, which cannot be had without an order to that effect, where execution had not been sued out upon the judgment within a year and a day: and the order is made in Court, or at the rules, upon due return of the process, unless good cause can be shewn to the contrary; and it is not a proceeding which requires a declaration or a rule to plead. The default of the defendant in not appearing to shew cause, is a sufficient foundation for award of execution, which if made at the rules, and not set aside at the next succeeding term, becomes a final judgment of the last day of the term. The provisions of the 6th section of ch. 170 of the New Code, are not applicable to the present case, which occurred before the same took effect.

It seems, therefore, to the Court, that there is no error in the judgment of the Circuit court: and it is considered that the same be affirmed, with costs to the defendant in error.

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***Somerville v. Wimbish.**

October Term, 1850, Richmond.

(Absent CABELL, P., BROOKE, J.)

1. **Judicial Notice—Private Acts—Relied Upon in Lower Court—Statute.**—The Code, ch. 51, § 1, p. 660, provides that an appellate Court shall take judicial notice of private or local acts, that appear to have been relied on in the Court below. The judicial notice to be taken of such a law, is the same that is to be given to the laws of a general or public nature, and has reference to the hearing of the cause in the appellate forum, whether decided in the Courts below, before or after the commencement of the revised statute.

***Judicial Notice—Private Acts—Relied Upon in Lower Court—Statute.**—In *Groves v. County Court*, 42 W. Va. 502, 26 S. E. Rep. 461, it is said: "The Acts of 1872 show that the county seat of no other county was relocated during the period from the 1st day of January, 1872, to the 22d day of August, 1872, the day when the constitution went into effect. The act of 1872, and all acts of the legislature from the 1st day of January, 1872, to the 4th day of February, 1895, were relied on in the court below as showing that no county seat save that of Grant county was relocated by special act of the legislature, and therefore this court must take judicial notice thereof. See section 1 of chapter 130 of the Code. This act took effect for the first time on the 1st day of July, 1850. See Code 1849, tit. 51, p. 660, § 1. See effect thereof as shown in *Somerville v. Wimbish*, 7 Gratt. 205, 226; *Hart v. Railroad Co.*, 6 W. Va. 336, 350; *State v. Railroad Co.*, 15 W. Va. 392; *Beasley v. Town of Beckley*, 28 W. Va. 81; *Ross v. Austill*, 2 Cal. 183. Therefore we judicially know that when the act of 14th day of February, 1895, now in question, was passed, Grant county stood alone as the one county having this peculiarity in its history, and no other county could have it when the act of 1895 was enacted." See, in accord, citing the principal case, *Hart v. B. & O. R. R. Co.*, 6 W. Va. 350.

The principal case is cited in *James River & K. Co. v. Littlejohn*, 18 Gratt. 76, where it is held that the bill having alleged that the order was drawn by one

2. **Ferry Franchise—Rights of Owner—Statute.**—A ferry franchise in Virginia is the creature of the statute law; and the rights of the owner of the franchise are to be measured by the statute.

3. **Same—Right of Legislature to Establish Another from Opposite Side.**—Though a ferry has been established for any length of time across a river, it is competent for the Legislature to establish another ferry from the opposite side of the river, to pass along the same line used by the first: and this is no invasion of the franchise of the owner of the first ferry.

4. **Same—Rights of Owner—Case at Bar.**—The establishment of such a ferry confers upon the owner no title to any portion of the soil on the other side of the stream, and no easement there, beyond the incidental delegation of such as has been theretofore, or may thereafter be, acquired by the public as a highway.

5. **Same—Right to Use Public Road on Opposite Side.**—*Quare*: If in such a case, the ferry franchise will carry with it the privilege of using any public roads on the opposite land, for the purpose of landing or taking in passengers.

6. **Ferry Cases—Summoning Justices to Consider Verdict—Notice.**—The order of the County court directing the justices to be summoned to consider of the verdict of the jury, in ferry cases, may be executed by leaving a notice in the mode directed in the general law in relation to notices.

7. **Same—Jurors—Competency.**—A person who signed a memorial to the Legislature for the establishment of a ferry is not thereby rendered incompetent to act on the jury.

In 1762, a public ferry across the Roanoke river, was established from the lands of William Harwood in the then county of Lunenburg, to the lands of William Royster in the same county. This ferry was subsequently the property of David Ross; and at present belongs to James Somerville. It has been kept up for many years, except perhaps for a short period, between 1794 and 1804, whilst it was in the hands of Ross. It is located on the north side of the river on the lands of Somerville, through whose lands a road runs to the ferry landing; and it passes to the land formerly belonging to Royster, at the town of Clarksville, in the county of Mecklenburg.

of the defendants, section 38, ch. 171, Code 1860, applies, and no proof of the signature is necessary.

+Ferry Franchise—Power of Legislature over.—In *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 413, it is said: "The legislature in this state in the case of ferries has never in any instance, as far as I am advised, attempted to surrender its power over the subject. See *Tuckahoe Canal Co. v. Tuckahoe R. R. Co.*, 11 Leigh 42; *Somerville v. Wimbish*, 7 Gratt. 205; *Turnpike v. State*, 3 Wall. 210." See also, citing the principal case, *Wheeling Bridge Co. v. Wheeling, etc., Bridge Co.*, 34 W. Va. 164, 11 S. E. Rep. 1012; *Christie v. Malden*, 23 W. Va. 672; *Roper v. McWhorter*, 77 Va. 219, where the principal case is cited as authority for the proposition that in the construction of grants by the legislature to a corporation an ambiguity or doubt arising out of the terms used by the legislature must be resolved in the favor of the public.

There seems also to have been a ferry as early as 1770, from the lands of William Royster, on the south side of the Roanoke river, to the landing which is now Somerville's on the north side of the river. This ferry seems to have been kept up, except for a time when Clarke Royster lost his ferryman, until about 1825, when it was rented by Somerville, and permitted to go down. He continued to rent Royster's landing until 1847, when Clarke Royster died.

In December 1847, William Townes, the executor of Clarke Royster, sold, and in July 1848 conveyed, to John and Lewis W. Wimbish, the lot of land described in the deed as "lying on the south bank of Roanoke river, adjoining the town of Clarksville," "and containing between one and two acres, on which is located the ferry landing known as Somerville's ferry." And in March 1848, the General Assembly of Virginia, upon the petition of the Wimbishs and of a large number of the citizens of Mecklenburg, passed an act entitled, "an act to revive the ferry at Clarksville, in the county of Mecklenburg, formerly known as Royster's ferry across Roanoke river." This act authorized the Wimbishs, upon giving twenty days notice at the door of the courthouse, and also giving reasonable notice in writing, to the owners of all lands which would be affected by the establishment of said ferry, to apply to the County court of Mecklenburg, which was directed

207 *to have a jury empaneled to enquire and report whether public convenience would result from the establishment of the ferry; and upon their report, as well as any other evidence which might be offered, the Court was authorized to establish it. And the act further provided, that all the acting magistrates of the county should be summoned to consider of the verdict of the jury and the application; and if a majority of the justices, being duly summoned, should fail to attend, the Court then present, or any subsequent Court, should have power to act on the application. This act was not copied into the record; nor does it appear to have been made a part thereof, unless by reference to it in the first order of the Court.

At the June term 1848, of the County court of Mecklenburg, an order was made, which said, on motion of John and Lewis W. Wimbish, who desire to establish a ferry in this county across Roanoke river, from their lands on the south side of said river, in the town of Clarksville, to the lands of James Somerville, on the north side of the said river. And it appearing to the satisfaction of the Court, that the said John and Lewis W. Wimbish have complied with the provisions of the act of the General Assembly entitled, "an act to revive the ferry at Clarksville, in the county of Mecklenburg, formerly known as Royster's ferry, across Roanoke river," passed March 23, 1848, and given notice to James Somerville, and posted notice, &c. The order then proceeded to direct the sheriff to empanel a jury for the purposes directed in the act,

and also, to direct the sheriff to summon all of the acting justices to attend at the next term of the Court, to consider of the verdict of the jury, and of the application to establish the said ferry. The notice to Somerville, described the route of the ferry, as going from their landing on the Roanoke river, at Clarksburg, formerly known as Royster's landing, to the opposite side of the river, at Somerville's landing or ferry.

208 *The sheriff proceeded to empanel the jury, and they rendered their verdict, that in their opinion public convenience would result from the establishment of the ferry; and this verdict was returned by the sheriff to the July term of the Court. All the justices of the county not having been summoned to this term of the Court, another order was made directing them to be summoned to the next term.

On the return of the summons of the justices, James Somerville made himself a party defendant to the motion, and opposed the application for the ferry; and the case having been continued until the October term of the Court, came on then to be tried, when Somerville moved to quash the verdict of the jury in the case, on the ground that the Wimbishs in their application to the Court, did not set out that a public road had been established through their lands, or any other lands to the place where the said ferry was sought to be established. But the Court overruled the motion, and Somerville excepted.

Somerville further moved to quash the proceedings in the cause, on the ground that all the acting justices of the county had not been summoned to consider of the verdict. The ground of this objection was that as to two of the justices, the return of the sheriff was that copies of the summons had been left for them; and the proof by the sheriff was that copies were left at their respective places of abode more than ten days before the Court to which the summons was returnable, they being from home, and the sheriff not being able to find them. The Court overruled this motion, and Somerville again excepted.

Somerville further moved the Court to quash the verdict, on the ground that two of the jurors had signed the petition which had been presented to the General Assembly for the establishment of the ferry then applied for by the Wimbishs. But the Court refused *to quash the verdict, and Somerville again excepted.

209 Upon hearing the evidence the Court established the ferry; and upon this judgment Somerville appealed to the Circuit court of Mecklenburg.

At the October term of the Circuit court the cause came on to be heard, when a large mass of testimony was taken as to the mode in which Somerville's ferry had been kept; and upon the question whether the public convenience would be promoted by the establishment of the ferry asked for by John and Lewis W. Wimbish. On this point the Court below and this court concurred

in the opinion that the establishment of the ferry would promote the convenience of the public: And at the May term 1850, the Circuit court affirmed the judgment of the County court. Whereupon Somerville applied to this court for a supersedeas, which was awarded.

Stanard and Macfarland, for the appellant.

1 Hen. St. 156, shews that the ferry from the lands of Ross to that of Royster was then established. There has been some effort to prove that there was a ferry from the land of Royster to that of Ross; but the proof of the existence of such a ferry is very meagre; and it is certain that if Royster ever did use such a ferry he had no authority for it: No statute or any other act by any power authorized to grant it can be produced; and if it was used it must be presumed to have been used in subordination to the rights of the owners of Ross's ferry. But further, it appears that the ferry ceased to be used in the lifetime of William Royster, and by the act 2 Rev. Code, ch. 237, § 23, p. 260, even a legally established ferry under the circumstances proved in this case, would have been discontinued. That act fixes two years as a discontinu-
210
ance; *and this is a provision much older than the act of 1819.

Here then is a case in which the appellant is the owner of the only legally established ferry at the place, and in which there has been no other ferry there for many years: and the question is, what are the rights of a ferry owner by the common law; and what were his rights under our statutes when this new ferry was established? In considering this question, we shall treat the act of 1848 as a public act, or as a private act which has been given in evidence on the hearing of the cause.

What then, under these circumstances, were the rights of Somerville? He was entitled to a ferry franchise. And this franchise was not limited to the mere right of transporting passengers and freight across the river; but it was exclusive within such reasonable limits as would protect him from ruinous competition. Charles river bridge v. Warren bridge, 11 Peters' R. 420, 620; Huzzy v. Field, 2 Crompt. Mees. & Ros. 432. In the first of these cases these principles of the common law in relation to ferries are recognized in their full extent by Judges Story, Thompson and M'Lean. The majority of the Court did not controvert the doctrines of the dissenting Judges as to the common law; but held that the Charles river bridge had not acquired any ferry rights; and if the Charles river bridge had acquired the rights, the act establishing the second ferry, though it took away vested rights, did not impair the obligation of contracts; and therefore the Supreme court of the United States had no jurisdiction to decide upon it.

In Virginia, then, a party owning a ferry has the common law rights appertaining thereto, except so far as they are modified

by our statutes. The two acts 2 Rev. Code, p. 241 and 261, are the only general statutes on the subject: And the act of 1840, 211 Sess. Acts *1839-40, is the only other act which it is necessary to notice.

This act prohibits a ferry within a mile of an established ferry. These statutes certainly do not impair the common law rights of the ferry owner; but confirm and protect them against the establishment by the County court of another ferry within the prescribed distance, even with compensation to the owner of the existing ferry.

It may be said that our legislation recognizes the right to establish ferries opposite to existing ferries. It is true that there was such a provision in the act of 1792; but there was no such provision in the act of 1819; and the act of 1840 so far from giving to the County court the authority to establish such a ferry, expressly prohibits it.

There is nothing then in our legislation to impair the common law rights of the ferry owner. And if we are correct in this conclusion, it follows as a consequence, that if it was the intent of the act of 1848 to withdraw from the owner of this ferry the rights he had so long held under the common and statute law; and to authorize these appellees to appropriate his property without compensation, then it was unconstitutional. This, however, was not the intent of the act of 1848, as is obvious from the language and provisions of the statute. The language is permissive, not imperative, and all parties interested are to have notice of the application, obviously to enable the owners of the land in question to shew to what extent the value of their lands will be affected by the establishment of the ferry, and to obtain compensation for the injury. No compensation however has been given to Somerville; and the case must therefore turn upon the question whether the rights conferred upon the appellees by the judgment of the Court below, does so injure Somerville as to entitle him to compensation therefor.

212 *The judgment of the Court below gives in the most general and comprehensive terms a ferry from the landing of the Wimbishs to the lands of Somerville; and under this order the Wimbishs are entitled to land anywhere on the lands of Somerville. If it be said that this was not intended by the Court, we can only say that their rights are only to be ascertained by the judgment itself. It may be that they asked for the ferry to a certain point and that the Court has given them more than they asked for; but they have not had the judgment corrected, and must therefore be considered to have accepted all that is given by it. The judgment then must be regarded as establishing a ferry to any or every point on the lands of Somerville; and the question is whether such a judgment can be sustained.

A ferry right includes the right to pass from the boat to the land. If this right to land from the boat is not included in the ferry right, a ferry must be rather a means

of diversion or exercise than of expediting the public travel. If the ferry right is merely aquatic and stops with the water, it may be used to disappoint the hopes and expectations of the traveller. Looking to the origin of the term we will find that a ferry takes its definition from the land, not from the water: and so, that is not a ferry at all which does not subserve the purposes of travel. Our idea of a ferry is the legislative idea; and that is, that a ferry includes the right to land. The statute imposes a penalty on the ferry keeper for not setting over any person applying. 3 St. at large, N. S., ch. 25, § 7. Then most incontestibly the ferry included the right to set over, to carry across the stream from land to land. And this is the idea of a ferry in *Patrick v. Ruffners*, 2 Rob. R. 209; *Charles river bridge v. Warren bridge*, 1 Pick. R. 344.

The privilege of landing is so necessary to the idea of a ferry, that it was at one time thought that the owner of a ferry must own the land on both sides of
213 *the river. It is true this was an error; but it does include the idea of some ownership in the soil or license to use it from the owner. This is the doctrine of *Patrick v. Ruffners*, 2 Rob. R. 209.

We beg leave to call the attention of the Court to the fact that whatever is necessary to the convenient use of the ferry passes by the grant of the ferry. In *Crenshaw v. The Slate river Co.*, 6 Rand. 245, Judge Green says: The conferring a right to build a mill gives the right to build a dam if necessary. The right to fish carries the right to enter on the land. The right to carry water across land carries with it the right to enter upon and dig the necessary canal.

If we are right in our views as to the extent of a ferry franchise, then by the judgment of the Court in this case, the Wimbishs have acquired a right of dominion over the land of Somerville which authorizes them to repel him if he attempts to keep them off his property: And if this be so, then clearly the judgment is erroneous. If the judgment of the Court gives the appellees the right to go upon the lands of Somerville, however small the injury may be in fact, he is entitled to the protection of the Court. Nor was it necessary to shew to the Court below the amount of injury he would sustain. We take it, the presumption is that an entry on the land of another is an injury, and he is not bound to prove the injury or its extent; but the party claiming to go upon it must shew there is no injury. The right to go upon the land of another implies injury; and it implies a franchise in the lands. The statute too makes the same implication. It gives to any person, though not a party to the proceeding, the right to appeal from a judgment establishing a ferry; and it is only necessary to suggest injury.

It may be said that the judgment will not prevent an action for damages by Somerville if he sustains injury by the establishment of the ferry. This argument

214 *was advanced in *Crenshaw v. The Slate river Co.*, 6 Rand. 245, but it was scouted by the Court; and it was held that compensation must be made eo instanti that property is taken for public use. And this was affirmed in *Perry v. Wilson*, 7 Mass. R. 395; *Stevens v. Middlesex canal*, 12 Id. 468; *Vanhorne's lessee v. Dorrance*, 2 Dall. R. 304; *Gardner v. Trustees of Newburgh*, 2 John. Ch. R. 166.

It may be said that as there was formerly a ferry at the same place, it is to be presumed that the right to land on Somerville's land had been acquired at that time; and that this ferry has been revived, and is entitled to the same right.

Our controversy is not with Royster, but with the Wimbishs. They are not the successors of Royster, nor has his ferry been transferred to them. And they did not go into the County court to establish Royster's ferry. All the Wimbishs did was to buy a slip of ground from which Royster's ferry started. The only circumstance which indicates the title of Wimbish to Royster's ferry is the title of the act of 1848, which is an act to revive Royster's ferry. But the Legislature had no right to revive Royster's ferry for the benefit of Wimbish. And the fact that the Roysters may apply to have their ferry revived for themselves is another objection to the proceeding in favour of Wimbish. If, then, the Wimbishs had not the rights of the Roysters, it cannot aid the argument in their favour that the Roysters have their rights.

But let us suppose that the Legislature had the right to revive Royster's ferry, and transfer it to John and Lewis W. Wimbish. This is not what has been done by the County court. The Royster ferry went to the road on the north side of the river. The ferry of the Wimbishs is to go to the lands of Somerville. Though Royster was restricted to a landing at the road, no one

can doubt that the Wimbishs may
215 land anywhere on *the lands of Somerville if this judgment is affirmed. Then it cannot be said that this is a revival of Royster's ferry which was restricted to a landing at a particular spot, when this ferry is not thus limited.

We will now proceed to enquire whether the Wimbishs can sustain their claim if it is confined to the road on the lands of Somerville. It would seem to be useless to consider this question unless it appears that this road has been legally established. Of that fact there is no evidence in this record. For aught that appears, the public may have been permitted to use the road for the benefit of the ferry; and it may have been opened contemporaneously with the establishment of the ferry by the owner of the ferry. All we know on the subject is, that there has been a road in existence for a number of years; but whether it was opened by the owner of the ferry, or was legally established, does not appear. Can this Court say then how it was established? The burden of proof is upon the Wimbishs. They claim to enter upon Somerville's land, and they

must shew their right to do so. Somerville may stand upon the defensive. It is certainly possible that the predecessors of Somerville opened the road to increase the profits of the ferry. The Wimbishs claim that it shall now be used to destroy the ferry. Must they not, then, shew the grounds of their claim? If they claim by prescription, it is incumbent upon them to shew that the prescription originated not in the consent, but against the consent of Somerville's predecessors; and the Court below should have required the Wimbishs to shew that the road originated in a manner which entitles them to use it.

But if this is a public road, the Wimbishs are not entitled to use it for their landing. For this, we have the authority of one of the Judges of this Court; Allen, J., in *Patrick v. Ruffners*, 2 Rob. R. 209. The act for establishing landings has no relation to this question. *That relates to landings on navigable streams, to carry produce there to be carried down the river.

The road, though wide enough for a road, may not be wide enough for a ferry landing. Then are they to be restricted to the ground taken up by the road? When they get there, they may find the boat of Somerville filling up the road. Can they not then go above or below the road? They are subjected to a penalty if they do not set over whatever is offered to them in reasonable time. Can they not do what they are punishable for not doing? If they are sued for not setting over as required, could they defend themselves by alleging a deficiency of landing privileges under this order? We have already shewn that, by the grant, all that is necessary to the convenient use of the grant passes; and, therefore, if more ground than is covered by the road is necessary, it passes by the grant of the ferry.

In establishing a road a jury is required to ascertain the damages. There may be damages when the road may be used as a landing, which would not exist if it is only to be used as a road. It may be said this is a small injury. But it involves the right to use the soil; and however small the injury, the party subjected to it is entitled to compensation. It was, therefore, the duty of the County court to have directed an enquiry whether the use of the public road as a landing would not enhance the damages of the owners of the land. It is true that the Legislature has established many ferries by its own action; but we must presume that the proper enquiries were made through its committees. Or it may be, that the Legislature acted on the idea, at one time existing, that the banks of rivers were in the public. But that idea has been long since exploded; and now it is clear that there is not a foot of ground on rivers or bays which may be taken for public uses without compensation; and, therefore an enquiry of damages was necessary.

*A public road is for the use of the public generally; one and all have the same rights and interest in it. But when

you confer on a ferry owner a right to use it, you give him a right and interest which is exclusive and peculiar. And thus a person who has contributed no more than others for the establishment of the road is to have a peculiar right in it. Are you to take the land of one subjected to a public road, and confer it on another, and thus give him a peculiar property in it?

But not only is Somerville's rights of property invaded by this order, but his franchise is invaded; and if the judgment is sustained, it will be ruined. It is unnecessary to enquire into the extent of the franchise on either side; whether it extends to half a mile, or more or less, though, at common law, it clearly extended on each side. If limited in extent, it is nevertheless property, entitled to be held as sacred and inviolate as any other property. A franchise is property, and the title to it is as sacred as that to any other property. Has the public a right to divide the property of Somerville, and say that another shall share with him the right to carry at this place? The case of *The Charles river bridge v. The Warren bridge*, 1 Pick. R. 344, and the same case in 11 Peters' R. 420, shews clearly that the public has no such right.

We say, then, that the establishment of the ferry of the Wimbishs was a plain violation of Somerville's rights, and, of necessity, injurious to him. These rights have been acquired under the law, and are vested in him by statute. It may be said these statutes may be repealed, and that is true; but the repeal of a statute does not annihilate the rights which have been acquired under it. *Crenshaw v. Slate river Co.*, 6 Rand. 209; *Tuckahoe Canal Co. v. Tuckahoe Railroad Co.*, 11 Leigh 42.

The act of 1848 recites that the Wimbishs own the land on the south side of the river. This is no proof *of that fact.

There is in the record the deed of Townes, the ex'or of Royster; and the testimony shews that Royster owned land there; but is his title vested in the Wimbishs? This depends upon another question, and that is, whether Royster made a will which authorized Townes to sell? This the Wimbishs must shew, and they have failed to do it. And, on this ground, there is error in the judgment. *Henry v. Underwood*, 1 Dana's R. 247.

There are other formal errors for which the proceedings should have been quashed. 1st. The petition does not set out that the Wimbishs owned land, and that there was a road through it. 2d. All the justices were not legally summoned. 3d. The inquest is defective, because it does not state what route the Wimbishs proposed to use, or the jury estimated.

Robinson and Patton, for the appellees.

The statute by which the ferry now owned by Somerville was originally established, provided in terms that, "where a ferry is by this act appointed on one side of a river, and none on the other side answerable

thereto, it shall be lawful for the respective County courts to appoint an opposite ferry." 7 Hen. St. p. 558. Accordingly we find that certainly as early as 1770, Royster's ferry was in existence; and with the exception of a short interval when his ferryman was killed, the ferry continued to be in existence until 1826, when it was rented by Somerville, who continued to rent it until Clarke Royster's death in 1847, and permitted it to go down in his hands. It was therefore no further nor otherwise discontinued, than was Ross's ferry, which was not used at one period for several years; and if the act 2 Rev. Code, ch. 237, § 23, p. 260, discontinued the ferry of Royster, it equally discontinued the ferry of Ross. But the mere fact of not using a privilege, or of violating a charter, does not produce a

219 forfeiture. *The forfeiture must be enforced by the public by some legal proceeding. The law is too well settled on this point to be argued. We insist then that the Wimbishs had a right to set up a ferry from the Royster ferry landing without any authority from the Legislature or the Court.

We shall not stop to make an argument to prove that the act of 1848 is a public act, of which the Court is bound to take notice. Such we must consider it, whether we look to the objects or subject or provisions of the law; and so we will treat it. The act was intended to release to the appellees the Commonwealth's right to enforce the forfeiture. There was also another object. The act of 1840 had forbid the County court to establish a ferry within a mile of another ferry: And as this ferry had not been used for some time, the appellees have preferred to avoid the penalties of that act by asking the Legislature for authority to establish the ferry. And the act of 1848 only removed a restriction upon the general power of the County court.

The counsel for the appellants, in order to sustain their claim as to the extent of their franchise, are obliged to insist that a new ferry cannot be set up to the prejudice of an old one, notwithstanding the new ferry be authorized by the king's license. On this point, we refer to Tapp v. French, 4 T. R. 666, as recognized in Huzzy v. Field, cited by the counsel for the appellant. The case of Huzzy v. Field sustains no such position. This case is cited in 11 Peters' R. 420; and it goes no further than to recognize the doctrine that if a new ferry be set up without the king's license, to the prejudice of an old one, an action will lie: And it also recognizes the doctrine that a new ferry may be set up with the king's license, though it does injure an old one. It was not deemed necessary by the majority of the Court in the case in 11 Peters

220 to go into this subject; but it was *gone into in the case of Day v. Stetson, 8 Greenl. R. 365. And in the case of the Tuckahoe Canal Co. v. The Tuckahoe Railroad Co., 11 Leigh 42, it was held that the Legislature had full power and authority to authorize a second road

between the same points to carry the same tonnage and travel.

In Virginia a ferry is a privilege derived under a statute, and it exists to the extent authorized by the statute, and no further. Derived not from the common law, but the statute, the rights and remedies of the ferry owner are to be ascertained, not from the common law, but the statute. *Almy v. Harris*, 5 John. R. 175; *Johnson v. Hitchcock*, 15 John. R. 185; *Trent v. Cartersville Bridge Co.*, 11 Leigh 521. We are then to look to the statute, and that alone, to ascertain the nature and extent of the grant to Somerville and to those under whom he claims. Is it a grant precluding the Legislature, or a Court acting under its authority, from granting another ferry at any other point on the same river? Surely not. Is it a grant precluding the Legislature, or a Court acting under its authority, from authorizing a ferry from the opposite side of the same river? We submit not. The argument on the other side is wholly incompatible with the entire legislation of Virginia on the subject of ferries.

The establishment of ferries in Virginia has been very uniformly from one bank to the other; the statutes shewing on their face, that the right remained in the Legislature or the County court to establish another ferry from the opposite bank of the same river. Look to the general act of 1648, which was in force when the ferries in question were originally established. 6 Hen. Stat., p. 20, § 11. So 7 Id., p. 403, § 4, and p. 588, § 1; 8 Id. p. 45, § 3, p. 370, § 1, p. 555, § 2; 9 Id. p. 238. These references might be multiplied.

221 *So far from the statutes establishing ferries, giving any exclusive right of ferriage from each side of the river, there was a doubt even whether it was lawful to make such a grant until the act of 1769. 8 Hen. Stat. p. 371, § 5. That is now the general policy, but it is at times departed from; as has been done in relation to the Kanawha river. Where, then, is the foundation for the idea, that there is any such exclusive right as is contended for on the other side.

It is argued, that by the judgment in this case, we have taken the land of Somerville without compensation. We admit that the right to a ferry does not authorize the use of the land of any other person; but we do not admit that it appears in this record, we have taken the land of Somerville. If there is a public road on the north side of the river, the ferryman may take passengers to it. Every one may pass along the road to the edge of the river; and the ferry is only a continuation of the public road.

If, indeed, the Wimbishs cannot find a public landing, they will be obliged to get one in the legal mode. But here we are discussing a ferry right; and when this question is settled, then the other question may come up, whether the Wimbishs have a landing; or if it is necessary to get a landing, how compensation is to be made. The law provides for condemning a public

landing; and we apprehend that when it is condemned, it is for all the purposes for which a public landing may be used.

There is not in this record, an intimation that Somerville's rights, as owner of land, or a landing was involved in the cause. The proposition of the other side is, that the effect of the grant of the ferry right, invests the Wimbishs with the right to use the landing of Somerville, though it has not, or shall not be granted. If the consequence of the grant of this ferry right is *proprio vigore*, to entitle the Wimbishs to use the landing *of Somerville, then clearly it is an invasion of his right. But there is no claim even, in this record, of Somerville, that his right to his landing would be invaded; and no proof that it would be injured. All that the proofs do shew, is, that Somerville's land lies on the north side of the river; and that the road runs to his landing. When such an objection as this is made, it should be made on the record, and it should be sustained by proof. Here, there is neither. There is proof of a landing; but no proof that it was a private landing. There is an established road; but no proof that it was only a road to Somerville's landing. Was it condemned only to get to his landing, or for all the purposes for which the public may use a public road? Was it intended for the accommodation of Royster's ferry rather than Ross's? We know that no ferry is established except where there is a public road. Royster's ferry has been established for more than a century; and has been used and kept up, and recognized by Somerville himself, as late as 1826.

Conceding, then, that as a general proposition, the right to the ferry does not give the right to use the landing or road on the opposite side of the river, is it not too late now, to say that the landing was not condemned and paid for, for this purpose, as well as others; especially as no question was made on this point until this case came to this Court. Would the Wimbishs be allowed to controvert Somerville's right to use their landing through which the public road runs? And would not the more than thirty or fifty years use by each of the landing of the other, conclude both of them from claiming some reserved right in their landings inconsistent with their use of them as they had been thus long enjoyed.

The proofs shew that Somerville recognized the right of Royster to use his landing just as he had a right to use Royster's landing, down to 1826, when he having 223 *possession of it as the tenant of Royster, sunk both ferries in his own; and we are now gravely told that the ferry right of Royster is lost as against Somerville by this discontinuance. There was in fact, no discontinuance as to Somerville. As to the public, it was never enforced, and has been, in fact, released by the act of 1848. And we, therefore, say that Somerville cannot, at this day, under the circumstances of this case, insist that he is entitled to the constitutional protection that his

private property shall not be taken for public use without just compensation.

We have thought, and think, that whatever may be the rights of a party as owner of the soil, those rights cannot be determined in a proceeding for the establishment of a ferry. What is a ferry right? It is a right to carry passengers over the water, not to put them on shore. They have a right, when a party comes to the water, to take him in their boat and carry him over the water. That is the ferry right. We grant this would be of no value, unless the owner of the ferry either owned the soil or had a right to use it, so as that people might get to and from his boat. Our law does not permit the County court to grant the ferry right except where the grantee owns the land on one or both sides of the river, and there is a road leading to it; but the Legislature might grant such a ferry right, if the circumstances made it advisable. Of course, a grant of a ferry would not be made, except with reference to the public convenience; and, therefore, there must generally be a public road to and from the ferry.

None of our ferry acts provided for the condemnation of the landing or road. Then are all these acts unconstitutional and void; the act establishing the ferry owned by Somerville with the rest? The Legislature has always recognized the right of the owner of the land on one side of a river to have a ferry. It must, therefore, be intended that he would obtain the right 224 to *use the land on the other side; or that he was entitled to use the road down to the river. Can there be any difference, so far as the rights of the owner of the road are concerned, between the use of the road by a carriage fording the river, or where it goes into a ferry boat from the road.

It has been universally acquiesced in in Virginia, that where there was a public road, a ferry might be used in connexion with the road, so as to carry over the persons travelling on the road. What is a public road, but a road for the public to travel on; and what is a ferry but a road. Affirm this judgment, and the Wimbishs carry a wagon over in their boat; if the other side are right, Somerville may say the wagon shall not land; that the road was only condemned to be used with his ferry; and then this judgment does not affect his rights.

What, then, are the rights of the public in respect to a road condemned for the use of the public? We have supposed there could be no doubt, that when a road was condemned for a public road, the public had a right to use it for the purposes of travel and transportation, through its whole extent. Whatever might be the original object in establishing the road, whether to accommodate one ferry, or two ferries, or whether both ferries went down, and the road was only used to get to a landing on the river, for the purpose of transporting on the river, whatever the object originally, we had supposed there could be no doubt about the

right of the public to use the road until it was discontinued in some legal mode. But we find great conflict of judicial opinion on the question, and one of the Court has referred us to *Patrick v. Ruffners*, 2 Rob. R. 209. That case in fact, raised no enquiry as to the extent of the ferry rights; but the whole question was, whether, as the landings did not belong to the ferry owner, an obstruction to the landing was a special injury to him as the owner of the ferry, for which he could sustain an action.

225 *The case has no bearing upon or relation to the question we are considering. So far as the questions before us were incidentally considered in that case, Judge Stanard concurred with Judge Baldwin. There is in the opinions of the Judges an apparent conflict on these questions; and the cases there cited, were somewhat in conflict; but there is not one of the cases which impairs our ground, that the right of the ferry is good, and that the want of the right to use the landing does not affect the right to the ferry. The question obviously did not arise in the case of *Chambers v. Furey*, 1 Yates' R. 167, and what is said there is wholly extrajudicial. The case of *Cooper v. Smith*, 9 Serg. & Rawle 26, is an authority for our proposition, that the ferry right is distinct from the right to the landing; and that the landing was to be acquired by another proceeding. And we have the decision in the case of *Peter v. Kendal*, 6 Barn. & Cress. 703, cited by Judge Baldwin in *Patrick v. Ruffners*.

All we can say then, is, that it is a question not settled by decisions; but must be decided upon principle. We cannot say more upon it than we have said.

As to the formal objections stated to the proceedings, the first is answered by the act of 1848, authorizing the Wimbishs to make the application. The second is answered by the act 2 Rev. Code, ch. 238, § 12, p. 263. And the third is unfounded in fact.

BALDWIN, J., delivered the opinion of the Court.

The proceedings in this case are founded upon the act of the 23d of March 1848, Sess. Acts 1848-9, p. 240, ch. 223; as appears from the order made on the application of the appellees to the County court and other parts of the record. That act must have been inspected by the Court, or relied on and conceded; as it is referred to by its title in said order, which states that the applicants had

226 complied with its provisions requiring *the notice thereby prescribed.

The existence of the act was in no wise controverted in any part of the proceedings, either in the County or the Circuit court, nor any objection taken to its due authentication. It appears upon the printed statute book, published by Legislative authority, which was doubtless the reason why it was not spread at large upon the record, as it might have been from the printed statute book, that being legitimate proof of the statute. And now, by the New Code, p. 660, ch. 51, § 1, it is provided

that an appellate Court shall take judicial notice of private or local acts that appear to have been relied on in the Court below. In this case, the act was not only relied upon, but made the foundation of the whole proceedings, and its inadvertent omission from the bills of exception stating the evidence, is therefore immaterial. The judicial notice we are to take of it, is the same with that which we give to laws of a general and public nature, and has reference to the hearing of the cause in the appellate forum, whether decided in the Courts below before or after the commencement of the revised statute. And this renders it unnecessary to consider whether the act in question is to be regarded as a public or private act, and dispenses with any formal amendment of the record.

The purpose of the act was to establish a ferry upon the lands of John and Lewis W. Wimbish, on the south side of the Roanoke river, in the town of Clarksville, to the lands of James Somerville, on the north side of the river, provided the public interest required it, and that matter was referred to the decision of the County court, which was directed to proceed upon the application of the Wimbishs, to cause a jury to be empaneled to view the place proposed, and to say whether, in their opinion, public convenience would result from the establishment of the ferry; and, upon such opinion,

227 and any other evidence that should be offered, *the Court was authorized to establish the ferry, and fix the rates for passing the same.

No one doubts that it is within the legitimate province of legislation to establish highways, whether by land or water, or ferries or bridges across water courses, for the convenience and use of the public; and that there is no limitation of this power, other than the regard due to the rights of private property, which cannot be invaded or taken from the owner without just compensation. Such eminent domain may be exercised by the legislative department, either directly or through the instrumentality of judicial, or other tribunals, or agents; and the expenses of construction, reparation and other charges, may be defrayed out of the public treasury, or by means of franchises, granted to companies or individuals, or attached when appropriate, to the ownership or use of the soil.

The power of the Legislature to establish particular ferries by direct and special enactments has been freely exercised, from an early period of our colonial history, down to the present time; and our statute book is full of such laws. This eminent authority never has been, and never could have been, surrendered by the delegation of it to any extent, whether limited or unlimited, to judicial or other tribunals; and has continued to be exercised, notwithstanding the power given by the act of 1705 (2 Hen. St. 475), and of 1792 (1 St. L., N. S. p. 152), to the County courts, in general terms, to appoint such ferries over rivers and creeks, in their respective counties, as

should be deemed convenient and necessary, and the act of 1806, (3 Id. p. 301,) and the revised act of 1819, (2 Rev. Code, p. 261, 267,) prescribing the limits and providing for the exercise of their jurisdiction on that subject.

The last mentioned act is a general law providing for the establishment of ferries, on the application of the owner of land on both sides, or one side only, of any
228 *water course, through which a public road passes. The ownership of the land, and the existence of the public road are, under this general law, essential to the jurisdiction of the Court. The degree or evidence of ownership required by it, we need not consider here. In the present case, the application is not founded upon it, but upon the special act of the 23d of March 1848, passed upon the representation, "to the General Assembly that the establishment of a ferry from the lands of John and Lewis W. Wimbish, on the south side of Roanoke river, in the town of Clarksville, in the county of Mecklenburg, to the lands of James Somerville on the north side of the said river, would very much promote the convenience of the people and facilitate their intercourse;" and its provisions are full and complete for that object, without reference to or deriving any aid from the general law above mentioned.

This special act designates the place where, and the persons on whose application, the ferry should be established; and the designation is satisfied by the possession and enjoyment of the Wimbishs, under a bona fide and undisputed claim of title. It could not have been in the contemplation of the Legislature to submit to the jury or the Court the question, whether any flaw could be found in the title of the appellant, which by possibility might at some future day give rise to an adverse claim to the property. The Legislature doubtless proceeded upon the assumption and belief of the fact, that the Wimbishs were the owners of the land which they held and claimed and enjoyed, and to which no one else asserted a title; and there was no necessity for any further enquiry upon that subject. The public interest could be in no wise affected by a recovery of the land from them thereafter upon a paramount claim of title, nor could the establishment of the ferry in any degree rebound to the prejudice of the future claimant. It could not affect his
title to the subject, inasmuch as

229 *he would not be bound by a collateral adjudication of a collateral question, in which moreover he might not know at the time that he had any interest. The notice required by the act, to the owners of all lands which would be affected by the establishment of the ferry, did not embrace the case of persons who had no existing ownership or even claim to the locus in quo; but had reference to other lands, and was properly applicable to the appellant Somerville, whose land on the opposite shore was the seat of a conflicting ferry.

We need not therefore consider whether

there is any defect in the derivation by the appellees of their title. The merits of the case turn upon different questions, one bearing upon the public interests, and the other upon the individual rights of Somerville. The first is simply whether, in the language of the statute, "public convenience will result from the establishment of the ferry;" the affirmative of which we consider abundantly proved by the evidence in the record, which we think requires no comment. The second has a double aspect, one looking to the appellant's right of property in his land, the other to his right of property in his ferry.

A ferry franchise is with us the creature of our statute law: and the instances are extremely rare of a grant of it to individuals personally. By the course of our legislation since 1748, and under our existing laws, the owner of the ferry seat is incidentally the owner of the franchise. In establishing a ferry, the usual form of its designation is from the lands of an individual on one side of the water course, to the lands of another or the same individual on the opposite side; and the place of departure is always regarded as the seat of the ferry. There is no necessity for requiring a more precise description of the ferry ways on either side; and it would be extremely inconvenient to

do so, both as regards the public and
230 the ferry keeper; for that would *render an exact description on both sides by metes and bounds indispensable, and make every departure from them unlawful, however immaterial, and whatever the urgency of the occasion, and though attended with no invasion whatever of the rights of others. And hence it probably is that no provision has ever been made in all our legislation on the subject, whether general or special, for the condemnation of a landing on the opposite side from the ferry seat. The Commonwealth confers, by her grant of the franchise, such right in regard to landing on the opposite shore as she may lawfully impart, and no more. The very object of the grant carries with it whatever privilege the public then has, or may thereafter acquire, to the use of a highway there for that purpose; and if the grantee claims any thing more, he must shew a title to it by private contract. It is not to be supposed for a moment that the Commonwealth contemplates by the creation of the franchise what is beyond her power to grant, the invasion of the property of others without compensation.

As to the alleged invasion of the appellant's right of property in his ferry, we need not require how far such a franchise is protected from competition by the doctrines of the common law. The question here is how far it is exclusive under the provisions of our statute law. The ferry seat, as we have seen, is on one side of the water course. It is there only that the ferry keeper is bound to keep his boats and his hands; there are no such obligations in regard to the opposite side: his right to take in passengers on that side has fre-

quently been questioned; and hence the often repeated provision in our legislation authorizing him to do so. The establishment of an opposite ferry may often be demanded by the public interest and convenience; the power has been repeatedly exercised by direct legislation, and often conferred upon the County courts; and prior

to the revised act of 1792 (1 St. L., 231 N. S. 152,) *their general jurisdiction to establish ferries embraced such only. And that act, by which the appellant's ferry, amongst many others, was established, contains an express provision that wherever there was no ferry corresponding to any one thereby appointed, it should be lawful for the County court to constitute and appoint an opposite ferry, with the same rates. It is true that by the act of 1840, (Sess. Acts 1839-40, ch. 79, § 1, p. 58,) in order to prevent injurious competition, the Courts are prohibited from granting leave thereafter to establish a ferry over any water course within one half mile, in a direct line, of any ferry legally established over the same water course: But if that prohibition embraces opposite ferries, as to which we express no opinion, it was no surrender of the legislative power thereafter to establish such opposite ferries, whether directly or through the agency of the Courts.

The right of the owner of the opposite ferry to participate in the use of the ferry way on the other side of the stream, depends upon the correctness of the views already presented. The establishment of his ferry confers upon him no title to any portion of the soil on the other side, and no easement there beyond the incidental delegation of such as has been theretofore, or may thereafter be, acquired by the public as a highway, or derived from the consent or contract of the owner of the land, or those under whom he claims.

We are of opinion, therefore, that the establishment of the ferry in question will be no invasion of the appellant's right of property in his land, nor of his right of property in his ferry. The effect of it will be the grant of a franchise as incidental to the apparent ownership of the ferry seat, with the enjoyment of tolls and other appurtenant privileges. Such franchise will prevail against all wrongdoers who may invade it in any respect. But it cannot prevail in favour of the apparent owner

232 against any adverse claimant of the *ferry seat who shall establish a paramount title. Nor will it confer any right to use the opposite land of the appellant for a ferry way, except as above mentioned. Whether it will carry with it the privilege of using any public roads on the opposite land, for the purpose of landing or taking passengers, &c., is a question which we deem it unnecessary to determine. That is a question which does not properly arise in this controversy about the establishment of the franchise, though it may in future controversies with the appellant, or others claiming under him, in regard to

the extent of the franchise so established.

As to the evidence in the record in relation to the existence, the antiquity, the user or non-user, the abandonment by the owners, the recognition by the appellant, or the acquisition by the appellees, of Royster's ferry—whether it may have any bearing or not upon future controversies—it has none that we can perceive upon the one before us, unless perhaps it may tend to throw some light upon the question, whether the ferry now sought to be established will be of convenience to the public. The title, it is true, of the act of 1848, upon which the present application is founded, is "to revive the ferry at Clarksville, in the county of Mecklenburg, formerly known as Royster's ferry, across Roanoke river;" but that title is inappropriate to the enacting clauses, which look to the establishment de novo of a ferry upon the application of the appellees.

The formal objections taken in the argument to the proceedings in the Courts below, we think not well founded, for reasons to be deduced from the remarks already made upon the merits.

The Court is of opinion, that there is no error in the judgment of the Circuit court affirming that of the County court; and it is considered that the same be affirmed, with costs to the appellees.

Judgment affirmed.

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*M'Gruder v. Lyons.

January Term, 1851, Richmond,

(Absent CABELL, P., and BROOKE, J.)

Court of Appeals—Statute Regulating Jurisdictional Amount—Retrospective Effect.*—The act in the Code limiting appeals to the Court of appeals to \$200, applies to cases decided before the act went into effect, where the application for an appeal is made since.

This was an application for an appeal from a decree of the Circuit court of Albemarle county. The decree was rendered prior to the 1st of July 1850, when the new Code went into operation; and it was for a less sum than 200 dollars.

ALLEN, J., delivered the opinion of the Court.

The act concerning appeals and writs of error and supersedeas, Code of Virginia, ch. 182, § 3, p. 683, provides that no petition

*Statutes—Remedial—Retrospective Effect.—The citations of authorities against construing statutes retrospectively where they disturb vested rights do not apply to remedial statutes; by all the authorities the remedial statutes are an exception to the rule. Lackland v. Davenport, 84 Va. 640, 5 S. E. Rep. 540, citing McGruder v. Lyons, 7 Gratt. 233; Perry v. Com., 3 Gratt. 632; Danville v. Pace, 25 Gratt. 1 (see foot-note). The principal case is cited as authority for the above proposition in Price v. Harrison, 31 Gratt. 121 (see foot-note); Crawford v. Halsted, 20 Gratt. 235 (see foot-note).

shall be presented for an appeal from or writ of error or supersedeas to a judgment of a County or Corporation court, when it is rendered on an appeal from a judgment of a justice; nor to a judgment, decree or order of any other Court, where the matter in controversy is merely pecuniary, and not of greater amount than two hundred dollars, exclusive of costs. The words are general, and as they merely apply to the remedy, they extend to and comprehend all petitions to this Court, or a Judge thereof in vacation, for an appeal, writ of error or supersedeas, whether the judgment, decree or order was prior to or after the 1st July 1850, when the new Code took effect. The 18th sec., ch. 16, p. 101, and 2d sec., ch. 216, p. 800, of the Code, providing that the repeal of previous acts should not affect any right established, accrued or accruing before the 1st July 1850; or any prosecution, suit or proceeding pending on that day, do not operate so as to save to the party a remedy by way of appeal, writ of error or supersedeas, to this Court, allowed by previous acts, but taken away by the law now in force. The Court is therefore of opinion, that this Court has no jurisdiction to grant an appeal, writ of error or supersedeas to a judgment, decree or order rendered or made before the 1st July 1850, where the matter in controversy is merely pecuniary, and not of greater amount than 200 dollars, exclusive of costs, unless the petition had been presented to the Court, or some Judge thereof in vacation, previous to that day.

Appeal refused.

Sutton v. Sutton.

January Term, 1861, Richmond.

(Absent CABELL, P., and BROOKE, J.)

1. **Sale of Land—Without Warranty of Title*—Mistake—Effect.**—A mistake in respect to the title to land, is no ground for relief to a purchaser, where he purchases the land without an agreement, express or implied, for a conveyance with warranty of the title.

2. **Same—By Trustee—Liability to Purchaser.†—A**

***Sale of Land—Without Warranty of Title.**—If a vendor does not effect to have a perfect title, and expressly sells such as he has without special warranty, he is entitled to specific execution without being first required to show a clear title. *Broyles v. Bee*, 18 W. Va. 520, citing *Bailey v. James*, 11 Gratt. 408; *Goddin v. Vaughn*, 14 Gratt. 124; *Vall v. Nelson*, 4 Rand. 478; *Sutton v. Sutton*, 7 Rand. 294. See principal case cited in *Heavner v. Morgan*, 41 W. Va. 444, 23 S. E. Rep. 879.

†**Same—By Trustee—Liability to Purchaser.**—A trustee sells only such title as is vested in him, and in the absence of fraud incurs no liability to the purchaser. For this proposition, see principal case cited and followed in *Fleming v. Holt*, 12 W. Va. 162; *Jones v. Thorn*, 45 W. Va. 193, 32 S. E. Rep. 176. See *foot-note* to *Goddin v. Vaughn*, 14 Gratt. 117. The principal case is reported with a *foot-note* in 56 Am. Dec. 109.

trustee to sell, selling such property, and such title only, as is vested in him, according to the terms prescribed, and without warranty of fraud, incurs no responsibility to the purchaser.

3. **Same—Same—Mistake in Estimated Quantity.**—The object of the trust being to sell for what the property will bring, and there being no warranty by the grantor of either title or quantity, the purchaser is not entitled to relief for a mistake in the estimated quantity of land.

By deed bearing date the 14th of December 1823, Richard Hoomes and Hannah his wife conveyed to *Norborne E. Sutton a tract of land in the county of Caroline, containing one hundred and thirty-two acres, more or less, in trust, to be sold, first, to pay off certain debts therein mentioned, and to indemnify Samuel Chiles as the surety of Hoomes in certain bonds; and then to pay over the balance of the purchase money, if any should remain, to Hannah Hoomes, in consideration of her relinquishing her right to dower in the land. The deed contained no warranty of title; and though signed by Hannah Hoomes, she was not privily examined.

The trustee seems to have sold the land at public auction, about the 1st of January 1824, when John Sutton became the purchaser at the price of 726 dollars, and was put in possession; and the trustee executed to him a transfer endorsed on the trust deed, in the following terms, viz:

"I assign, transfer, convey and deliver all that right, title and interest to John Sutton, jr., which was conveyed to me as trustee, by Richard Hoomes and Hannah his wife, for the purposes mentioned in the within deed; which land was purchased by the said John Sutton, jr. of me as trustee aforesaid, on the 15th of January 1824, and duly delivered on that day.

"Norborne E. Sutton, Trustee."

In September 1836, John Sutton, jr. filed his bill in the Circuit court of Caroline county, in which, after stating the conveyance by Hoomes and wife, and the sale by the trustee to him, he stated that eighty acres of the land so purchased by him, was claimed and held by a certain William W. Dickinson. That Richard Hoomes was dead, and his estate insolvent. That the debts secured by the deed were discharged, and that there was a considerable proportion of the purchase money in the hands of the trustee. And making the trustee Norborne E. Sutton, and Benjamin Gatewood *and Hannah his wife, who was Hannah Hoomes, and the administrator and heirs of Richard Hoomes deceased, parties defendants, he asked that the trustee might be restrained from paying over any part of the purchase money in his hands; and that he might be compelled to pay to the complainant so much thereof as would satisfy him for the land which he had lost; and for general relief.

The injunction was granted; and none of the parties having answered, the Court in April 1841, made a decree directing a commissioner to take an account of the pur-

chase money paid by the plaintiff to the trustee; and also to enquire into and report the quantity and relative value of the land to which the title was defective; and the nature of the adverse title set up to it by Dickinson.

Before the commissioner made his report, the trustee filed among the papers in the cause, his answer to the bill, in which he says, that he sold only such title as was vested in him by the deed from Richard Hoomes and wife to him. That he did not know whether it was a life estate or a fee; and that he never heard the least complaint until long after the whole matter had been paid and settled by John Sutton, jr.

The commissioner reported that for thirty-seven acres of the land, Richard Hoomes held but a life estate, which had expired; though it did not appear whether the life estate had terminated before or after the conveyance by Hoomes to the trustee. These thirty-seven acres he estimated at 203 dollars 62 cents. And he reported that the trustee had in his hands, 308 dollars 6 cents of the purchase money, which he had held since the 6th day of June 1826.

In March 1844, Mrs. Gatewood filed her answer, in which she said she had never relinquished her right of dower in the land; but that she was willing to unite in the conveyance to the purchaser, provided the trust in her favour was complied with.

237 *In September 1844 the cause came on to be finally heard, when the Court made a decree, perpetuating the injunction as to the sum of 203 dollars 62 cents, with interest thereon from the 13th of January 1825, and such further sum as would be equal to the costs expended by the plaintiff in this suit, and dissolving it as to the residue; without prejudice to any claims which Gatewood and wife, or the said Hannah, might have against the trustee, or against the lands, for her dower. And the decree further directed the trustee Norborne E. Sutton to pay to the plaintiff the said sum of 203 dollars 62 cents, with interest as aforesaid, and his costs, out of the proceeds of said lands. From this decree, Norborne E. Sutton applied to this Court for an appeal, which was allowed.

Patton and Lyons, for the appellant, insisted that there was no warranty in Hoomes' deed, and therefore the purchaser could have no relief as against his estate. And further, that in sales by a trustee, the rule caveat emptor strictly applies. *Petermans v. Lawes*, 6 Leigh 523; *Findley v. Hickman*, 10 Id. 354; *Grantland v. Wight*, 5 Munf. 295.

Robinson, for the appellee, insisted that the purchaser was entitled to relief on the ground of mistake. He referred to 2 Rob. Pr. 32, and the cases there cited; *Id.* 192; *Chinn v. Heale*, 1 Munf. 63.

BALDWIN, J., delivered the opinion of the Court.

The appellant incurred no responsibility to the appellee by his sale as trustee, under

the deed of trust in the proceedings mentioned, of the land thereby conveyed. Acting as trustee, he sold at public auction, such property and such title only as were vested in him by the deed, according to the terms therein prescribed, without any warranty; and it is not pretended that in

238 *conducting and accomplishing the sale, he was guilty of any fraudulent act or misrepresentation, or even fell into any error or irregularity whatever. Nor does the appellee in his bill seek relief against him upon any other ground than the allegation, that a part of the proceeds of the trust sale remain in his hands, and ought to be subjected to the equity asserted against the other defendants.

The equity asserted by the appellee is founded upon an alleged deficiency in the tract of land conveyed by the trust deed, arising out of an alleged defect in the title of Richard Hoomes, the grantor therein, to a part of the land embraced within the boundaries thereof. And if that equity can be established, it must be upon the supposition that the grantor and cestuis que trust in the deed are to be affected by such defect of title.

In this case, the question does not occur whether the purchaser at such a sale by the trustee, is entitled to the benefit of a clause or covenant of warranty in the conveyance from the grantor to the trustee. Here there is no clause or covenant of warranty in the deed: And if the purchaser is entitled to relief, it must be upon the ground of a mistake in regard to the subject-matter of the contract.

We need not consider whether there may not be cases of mistake, in respect to the identity of land sold by the trustee with that conveyed by the grantor, which would be proper for relief in a Court of equity. Here if there was any mistake, it was not of that nature. The property sold was the identical property conveyed by the deed; and there was no room for any mistake, unless in regard to the validity of the grantor's title. A mistake in respect to that matter, is no ground for relief to a purchaser, where he takes upon himself the risk as to the title, as he does when he purchases land without agreement, express or implied, for a conveyance with warranty of the title.

239 *The principle upon which equity relieves against a mistake in the estimated quantity of land sold, has no application to a case like this. The foundation of such relief is, that the price agreed upon by the parties must be presumed to have been influenced by the estimated quantity, unless it appears that they intended a contract of hazard; and the mistake is corrected not only in cases of deficiency, but also in cases of excess. Here there was no estimate of the quantity as between the trustee and the purchaser, but a mere statement thereof in the grantor's conveyance to the trustee. That statement was mere matter of description, and was no element of the contract between the grantor and the

trustee, for which the consideration enured not from the trustee, but the cestuis que trust, and was in no wise dependent upon the supposed quantity of the land. The purpose of the conveyance was, that the property should be sold by the trustee, at all events, for whatever it would bring, and the grantor undertook no responsibility either as to title or quantity. If the quantity had turned out after the sale by the trustee to be greater than that mentioned in the deed, neither he, nor the grantor, nor the cestuis que trust, could have exacted from the purchaser compensation for the excess; and by parity of reason, they are not responsible for a deficiency.

There is no principle, therefore, whether of defective title or deficient quantity, upon which the appellee is entitled to relief; and it is unnecessary to consider the other questions of law and fact which have been discussed at the bar. And the Court is of opinion, that the decree of the Circuit court is erroneous.

Decree reversed with costs, restraining order set aside, and bill dismissed with costs.

240 *Dixon v. Myers & Co.

January Term, 1851, Richmond.

(Absent CABELL, P., and BROOKE, J.)

1. **Sales—Something Remaining to Be Done by Seller—When Title Passes.***—Where a contract is made for the purchase of an article hereafter to be delivered and paid for, so long as any act remains to be done by the vendor in order to put it in a state of readiness for delivery, or the amount of the purchase money remains yet to be ascertained, by the enumeration, measurement or weighing of the article, the general rule is, that the property does not pass to the buyer, but remains at the risk of the seller.

2. **Same—Same—Same—Case at Bar.**—D contracts to buy from M all the tobacco stems M shall make during the year, at a certain price per hundred and for storage. It is the right of M to weigh and mark the stems directly they are prized, and then to require payment; but for the convenience of D the stems are not weighed or marked until D is ready to take them away, but D is charged the storage. During the year the factory of M is burned, and in it is burned fifty hogsheads of these stems, which had not been weighed or marked, though they had been put aside for D. **HELD:**

***Sales—Where Something Remains to Be Done by Seller—When Title Passes.**—The proposition laid down in the principal case, that where a contract is made for the purchase of an article hereafter to be delivered and paid for, so long as any act remains to be done by the vendor in order to put it in a state of readiness for delivery, or the amount of the purchase money remains yet to be ascertained, by the enumeration, measurement or weighing of the article, the general rule is, that the property does not pass to the buyer, but remains at the risk of the seller, is approved in *Morgan v. King*, 28 W. Va. 7; *Hood v. Bloch*, 20 W. Va. 251, 11 S. E. Rep. 912; *Haxall v. Willis*, 15 Gratt. 448. See *foot-note* to *Chapman v. Campbell*, 13 Gratt. 105; 2 Va. Law Reg. 58.

The property in the stems had not passed to D, and they remained at the risk of M.

This was a proceeding by foreign attachment instituted in March 1833, in the Circuit court of law and chancery for the county of Henrico and City of Richmond, by Samuel S. Myers & Co., against Thomas Dixon, an absent defendant, and John and Samuel Cosby. The pleadings and proofs make out the following case:

Samuel S. Myers & Co. were manufacturers of tobacco in the City of Richmond; and in the beginning of the year 1832, they made a contract with Thomas Dixon of the City of Boston, through his agent Charles Palmer, a commission merchant in the City of Richmond, by which they agreed 241 to sell to Palmer for *Dixon all the stems they should prize during that year, at 1 dollar 75 cents per 100 pounds, and 75 cents per hogshead storage; they reserving the right to send to their father in Baltimore fifteen or twenty hogsheads. Myers & Co. proceeded from time to time, as the stems were on hand, and the weather was suitable, to prize the stems in hogsheads averaging about 1300 pounds net; and they stored them in a separate part of their extensive factory, until such time as it was convenient for Palmer to ship them; and when he was about to remove them, they were weighed and marked.

It appears that according to the custom in Richmond, it was the right of the manufacturer to weigh and mark the hogsheads directly they were taken from the press, and then to present the bill for payment; but for the convenience of the shipper the large manufacturers seem not to have weighed or marked the hogsheads until he was ready to remove them; and in the mean time to consider them as on storage from the time the stems were prized.

Myers & Co. carrying on a large business, and being possessed of a large capital, seem to have permitted Palmer to consult his convenience as to the removal of the stems; and he removed them when an opportunity to ship them occurred. But reciprocating the spirit in which they dealt with him, he sometimes made advances to them on account of the stems prized, before they were weighed and marked, and therefore before they presented a bill; whilst on the other hand a bill was sometimes not presented until the stems were shipped. Both these acts were, however, a departure from what was understood to be the rule: That was, that the bill for the price of the stems and the storage might be presented at any time after the stems were prized; but the purchaser was not bound to pay until the bill was presented; and that necessarily involved the weighing and marking the hogsheads.

242 *On the 24th of November 1832, the factory of Myers & Co., with its contents, was consumed by fire. At that time there were in the factory fifty-six hogsheads of stems, besides seventeen hogsheads which had been set aside for Mr. Myers of

Baltimore. These fifty-six hogsheads had been stored away in the part of the factory building appropriated to storage; and a few days before the fire occurred Palmer was at the factory, and had, with one of the superintendents in the establishment, counted them; and then urged this superintendent to press on the work of prizing the stems, so that he might have one hundred hogsheads ready by the approaching Christmas: But these fifty-six hogsheads were not weighed or marked.

The plaintiffs in their bill stated that these hogsheads were of the average weight; and this was sustained by the proofs. They claimed that the sale to Palmer for Dixon had been perfected; that the stems were Dixon's stems, in their hands on storage; and that he was their debtor for the price of the fifty-six hogsheads of stems and the storage, amounting to 1266 dollars; for satisfaction of which they attached the effects of Dixon in the hands of the defendants John and Samuel Cosby. Dixon in his answer denied that the sale had been perfected, or that the stems were his property; and that was the only question in the cause.

The cause came on to be heard in June 1844, when the Court held that the sale of the fifty-six hogsheads of stems was complete so soon as the stems were prized and turned from under the screws; and were thenceforth, and when burned, at the hazard and risk of the defendant Dixon; and that he should bear the loss arising from their destruction: And taking the value of the stems upon the evidence, to be at least 1266 dollars, the Court gave the plaintiffs a decree against Dixon for that amount, with legal interest thereon from the 5th

243 day of February 1833, until paid, and their costs. *Whereupon Dixon applied to this Court for an appeal, which was allowed.

Lyons, Meredith and Young, for the appellant.

Myers and Morson, for the appellees.

DANIEL, J., delivered the opinion of the Court.

Where a contract is made for the purchase of an article hereafter to be delivered and paid for, so long as any act remains to be done by the vendor in order to put it in a state of readiness for delivery, or the amount of the purchase money remains yet to be ascertained, by the enumeration, measurement, or weighing of the article, the general rule is, that the property does not pass to the buyer, but still remains at the risk of the seller.

It does not seem to the Court that there is anything in the case before us to exempt it from the influence of this rule.

Here the contract was for the purchase of an article yet to be prepared. The appellant by his agent Palmer, contracted with the appellees, for the purchase of all the tobacco stems they might prize during the year 1832, (with the exception of a number of hogsheads not exceeding twenty,

which the appellees reserved to themselves the right to send to their father in Baltimore,) at one dollar and seventy-five cents per hundred pounds, and seventy-five cents per hogshead storage. There was nothing in the terms of the contract to bind the appellees to prepare any given quantity of stems, and had they at any time after the contract was made, consulting their own interests alone, discontinued the manufacture of tobacco and thus failed to have any stems prepared, the appellant, however much disappointed thereby, would have had no legal ground of complaint against them. And though it appears that Palmer

244 was in the habit of occasionally *advancing to the appellees money on account of stems before the bills were presented, there is nothing in the terms of the contract to shew that he was bound to do so, or could be called upon to make any payment, until notified in some way that stems were prepared, prized, weighed and ready for his acceptance.

At the time when the fire occurred fifty-six hogsheads of stems had been prepared, prized, and set apart in the storing room of the appellees attached to their factory, as stems designed for the appellant; and they had been pointed out to Palmer, as such, when on a visit to the factory a short time before the fire, which he made with a view to ascertain how far the preparation of the stems had progressed. The hogsheads however had not been marked as the stems of the appellant, nor had the stems been weighed.

What was the state of the accounts between the parties at the date of the fire does not appear. As, however, the demand is asserted only for the price of the fifty-six hogsheads, estimating them at a supposed average weight, and their storage, and there is no other reference in the pleadings and proofs to the state of accounts, the inference is, there was not any balance on account of the previous dealings in the stems on either side.

It appears that the wishes of Palmer were consulted, and the benefit of his principal to some extent promoted by the habit which seems to have prevailed with the appellees, of deferring the weighing of the hogsheads till Palmer might be ready to ship them. But there is nothing to shew that such habit originated in any obligation imposed by the terms of the contract, or that the appellees did not have a perfect right to have weighed the stems as soon as they were prized, and to have then demanded their price.

It thus seems to the Court that there is no feature in the case to distinguish it favourably for the pretensions
245 *of the appellees from the ordinary case of a contract for the purchase by weight of goods to be thereafter prepared and delivered and paid for on delivery, in which the weighing had not taken place at the period to which the questions of property and of consequent risk are to be referred.

The Court is therefore of opinion that at the date of the fire the stems in question were not the property of the appellant, remaining with the appellees on account of and at the risk of the appellant, but were still the property of the appellees; and consequently that the Circuit court erred in rendering a decree in favour of the appellees for the price.

Decree reversed with costs, and bill dismissed.

Holland v. Helm's Adm'r.

Three Cases.

(Absent CABELL, P., and BROOKE, J.)

January Term, 1851, Richmond.

Sheriffs—Deputies—Liability of Sheriff for Default of Deputy—Case at Bar.—M, a high sheriff, farmed the sheriffalty to S and T, and contracted with them that they were to have the management of the office, to perform or have performed the duties of it, to select and employ deputies, to control and have power to dismiss them. S and T qualified as deputies, and employed others who also qualified as deputies of the high sheriff; and by the directions of S and T, these other deputies paid over all moneys collected on executions to them. H, one of these deputies, collected money on executions in his hands, and paid it to S, but S did not pay it to the plaintiffs in the executions; and they proceeded against the high sheriff and obtained satisfaction from him; whereupon he proceeded against H. **HOLD:**

246 *1. **Same—Same—Right of Sheriff to Dismiss.**—

This contract did not and could not divest the high sheriff of his power to dismiss any of said deputies; or of his right to refuse to permit any person selected by S and T to qualify as a deputy.

2. **Same—Same—Powers of.**—But subject to this power, the contract constituted S and T the general agents of the high sheriff, with full authority to control the persons selected by them to the same extent he himself might have done.

3. **Same—Deputy—Liability to Sheriff.**—S and T having required the other deputies to pay over the moneys collected on executions to them, and H having done so, though he might in some cases be liable to the creditor in the execution, he is not liable to the high sheriff.

These were motions in the Circuit court of Franklin county, by the administrator of Samuel Helm, deceased, late high sheriff of that county, against Ebenezer M. Holland as one of his deputies, for the purpose of recovering certain sums of money which Samuel Helm had been compelled to pay for the alleged default of his said deputy in failing to pay over money which he had collected on executions which came into his hands; and for his failure to return the executions.

The first case was for the failure by Holland to pay over to the plaintiff money which he had collected on an execution; and for which a judgment had been recovered against Helm, upon his official bond, to the amount of 92 dollars 19 cents, with interest on 88 dollars 79 cents, a part thereof,

from the 20th day of July 1843 till paid, and 23 dollars 54 cents costs.

The second was for the like failure to pay to the plaintiff money which he had collected on the execution, and for failing to return it. And there had been a judgment against the high sheriff for 133 dollars 37 cents, with interest thereon at the rate of fifteen per cent. per annum, from the 7th day of August 1843 till paid, and 12 dollars 78 cents costs.

The third case was for the amount of a fine of 189 dollars 12 cents, which had 247 been imposed upon the *high sheriff for the failure of the deputy Holland to return an execution; which fine the plaintiff in the execution accepted in full satisfaction thereof.

It was proved by the plaintiff, in all the cases, that Samuel Helm was the high sheriff of Franklin county from March 1842 to March 1844; and that Holland qualified as one of his deputies. That during this period the executions went into the hands of Holland. That he collected the money on the two first; and that the third went into his hands; and that he did not return the two last to the office.

The defendant then proved that Helm farmed his office of sheriff to William A. Street and Stephen Turnbull, by a verbal agreement, by which they undertook to pay him 1650 dollars for the office. That they were to have the management of the sheriffalty; and to perform or have performed the duties of said office; to select and employ deputies, to control and to have power to dismiss them. And that they were to give bond and security to indemnify Helm; but never executed the bond. That Street and Turnbull qualified as the deputies of Helm; that they selected and employed all the deputies, one of whom was the defendant Holland; that they conducted by themselves, and by deputies employed and paid by them, the business of the sheriffalty during the term of office of Helm; who never concerned himself with the business of any deputy. That the deputies employed by Street and Turnbull were required by them to bring all process which came to their hands to them; to conform to their directions, and to pay over to and account with Street and Turnbull for all moneys collected by said deputies. That the said deputies did not pay out money to persons for whom it was collected, except when particularly directed by Street and Turnbull. That the defendant Holland paid over to

248 William A. Street the money he collected on the two *first executions.

That the third execution, for the failure to return which a judgment had been rendered against Helm, was given up by Holland to Street, before the return day thereof. That the property levied on was sold under said execution by Street, and the money collected by him. That the creditor in the execution agreed to look to Street for the amount of the execution, and wait with him for the money. That besides this there were other transactions between

Street and this creditor, and no settlement had been made between them; but upon a settlement Street would be debtor to him in a sum as large as the amount of the execution. That no bond was executed by Holland when he qualified as deputy of Helm.

The Court gave judgment against Holland in all of the cases; and he thereupon applied to this Court for a supersedeas to each of the judgments; which was awarded.

Grattan, for the appellant.

By the common law the high sheriff alone is responsible to creditors for the mode in which his office is administered, or for the money made upon the executions which go into the hands of his deputies; and it is only by virtue of some statute, and to the extent to which the statute authorizes it, that creditors have any remedies against the deputies. *Watson on Sheriffs* 33, 7 *Law Lib.* 24; *Cameron v. Reynolds*, Cowp. R. 403; *White v. Johnson*, 1 Wash. 159. Our statute gives the creditor a remedy against the deputy sheriff, in but a single case; and that is where the deputy has made a return upon the execution, which upon the face of the return, shews that the deputy is responsible for the money either made, or which he ought to have made, upon the execution. 1 Rev. Code, ch. 134, § 48, p. 542. In all other cases, the only remedy of the creditor is against the high sheriff;

and in this case the statute is
249 *intended not for the benefit of the creditor, but for the relief of the high sheriff; and it is still at the option of the creditor whether he will adopt it.

The high sheriff being the officer responsible to creditors, and having, by virtue of his office and of the relations which he sustains to his deputies, full authority and control over them, he of necessity has the right to require, and the power to compel them to discharge their duties according to his instructions; and to pay over to him all money made or received by them on executions which are placed in their hands. So far from its being the duty of the deputy to withhold from the high sheriff the money thus received by him, and to pay it to the creditor, formerly, at common law, a payment to the creditor by the sheriff, was not a satisfaction of the execution; but it was the duty of the sheriff to obey the writ and bring the money into Court, that the Court might direct the disposition of it. *Gilbert Ex. 16*; *Turner v. Fendall*, 1 Cranch 117, 136.

If indeed the creditor can have a right to proceed against the deputy who had received money on an execution, and paid it over to the high sheriff, (which it is not necessary to consider in this case,) there certainly can be no doubt that there is no liability to the high sheriff in such a case. 1 Rev. Code, ch. 78, § 30, p. 283; *Fletcher v. Chapman*, 2 Leigh 560; *Drew v. Anderson*, 1 Call 44. And the question is whether in these cases Holland has not in legal contemplation paid over the money which he collected on these executions to Helm.

It is true that Holland was the deputy of Helm, subject to be controlled by him in the execution of his office, or dismissed at his pleasure; and responsible to him for the faithful discharge of his duties. But it is equally true, we think, that Helm had the right to exercise this control in person, or by his agents, as to him was most agreeable; and that he did appoint Street

250 and *Turnbull his agents, with full authority to exercise this control over all the other deputies of Helm. Holland was a deputy of Helm with all the authority, and subject to all the responsibilities pertaining to the office of deputy sheriff, and none other. But Street and Turnbull were not only the deputies of Helm, with this same authority and responsibility; but they were also the agents of Helm for the management of his office of sheriff, with no other restraint upon their power but that which arose out of the duties pertaining to the office of high sheriff; the duty of seeing that they selected proper deputies, and that the duties of the office were faithfully executed. It is true that Helm could not, if he had tried, divest himself of the power to turn out an unfaithful deputy; that is a power inherent in the office of high sheriff. It is also true that he had the power to turn out all his deputies whether unfaithful or not, and to supersede his agents; and either manage the office himself or appoint other agents to manage it; and that their only remedy in such case, would have been by any action against him for a violation of his agreement. But within these limits the authority of these agents was ample. They were to manage the office. They were to select and control, and pay and dismiss the deputies. By virtue of this authority they did select and control the deputies. So far as these records shew, the selection of Holland was judicious, and no obligations of his office required the high sheriff to displace him. Nor was there anything in the control which these agents exercised over the other deputies, in requiring them to settle with the agents, and pay the money collected to them, which required the interposition of the high sheriff. It was a wise arrangement to enable them to supervise the action of their deputies, and to relieve themselves and their principal from responsibility by settling with the creditors in the executions themselves.

251 *I shall not cite authority to prove that payment to an agent who is authorized to receive it is as valid as a payment to the principal. We have already seen that a payment by a deputy to the high sheriff is proper; at least it is good against the claim of the high sheriff. Then the only remaining enquiry is, Can a deputy act as the agent of the high sheriff in the management of the office? The persons who are incapable of acting as agents are few indeed. A wife may be the agent of her husband. An infant may be an agent. A servant may be an agent. There are numerous cases in which it has been held that a deputy sheriff may be the agent

of the creditor in the execution placed in his hands to be served, so as to release the high sheriff from all responsibility for the acts of his deputy in relation to the execution. *Hamilton v. Dalziel*, 2 Wm. Bl. 952; *Corning v. Southland*, 3 Hill's R. 552; *Gorham v. Gale*, 7 Cow. R. 739; *Walters v. Sykes*, 22 Wend. R. 556; *Ford v. Leche*, 33 Eng. C. L. R. 184; *Fletcher v. Beadley*, 12 Verm. R. 22; *Downer v. Bowen*, Id. 452; *Strong v. Beadley*, 13 Id. 9; *Gwin v. Buchanan*, 4 How. Sup. Ct. R. 1. But if he may be the agent of the creditor the argument is a fortiori that he may be the agent of the high sheriff. Indeed in England he is regularly appointed the agent of the high sheriff. *Watson on Sheriffs*, p. 374, Law Libr.

In the case of *Salling v. M'Kinney*, 1 Leigh 42, the sub-deputy Salling was held responsible to the high sheriff for moneys he had paid over to the deputy who farmed the sheriffalty. But Salling had executed a bond to the high sheriff for the faithful discharge of the duties of his office; and he was held responsible by virtue of his bond. The case shews that if he had not executed the bond he would not have been liable.

252 *Patton, for the appellee.

The question in these causes is, whether Holland the deputy sheriff is liable to pay the high sheriff for money collected by him upon executions which went into his hands, and which he failed to pay over to the creditors in the executions; and to the payment of which the high sheriff has been subjected on account of his default.

It is true that Holland was selected by Street and Turnbull, but he qualified as one of the deputies of Helm. He took the oaths of office, and bound himself to perform the duties pertaining to that office. He was in fact a deputy of the high sheriff, and derived his authority to act as deputy from the high sheriff alone: And the high sheriff entered into no agreement, either with Street and Turnbull or the deputies, that the deputies should not be responsible to him.

The contract between Helm and Street and Turnbull must be construed with reference to the office which was the subject of the contract. The office imposes on the sheriff duties both to the public and individuals; duties of which he cannot divest himself. One of these duties is to provide proper deputies for the execution of the office. Another is to take care that these deputies do faithfully execute the office. If the contract between Helm and Street and Turnbull is to be construed to deny to the high sheriff the right and the duty to see that the deputy is a suitable person; if under it he is to have no control over the officer, to turn him out of office if necessary, then the contract is null and void, as contrary to the policy of the law, and violative of the duties and obligations of the sheriff.

But this is not the true construction of the contract. By that contract, according

to its true intent and meaning, the high sheriff said to Street and Turnbull, "I will sanction your choice of deputies, and 253 allow them *to qualify as such, provided they are proper persons: but I must be entitled to turn them out if the circumstances demand it, and to hold them responsible to me." In truth there is not in this contract a word which imports that the deputies are absolved from liability to the high sheriff for their misconduct; and it may as well be said that they are not responsible to creditors. If a deputy at all, he must perform all the duties and incur all the liabilities of the office.

If indeed the high sheriff had covenanted to release the deputy from liability for a consideration, then no doubt the deputy would be released: but this could only be by express contract. The high sheriff is responsible for the acts or the failures of the deputy, and the deputy must therefore be liable to him, unless by the express contract of the parties he is released. This is the principle decided in *Salling v. M'Kinney*, 1 Leigh 42. And on the principle involved in that case, Holland is liable to the high sheriff. The bond given by Salling did not create or import any new liability; but only a security: the liability existed before, and arose out of his office.

No man can become a deputy sheriff, whether by contract with the high sheriff or another deputy, except by authority of law. And by law too every deputy is subject at all times to be removed from office by the high sheriff. These are guards intended for the security of the public; and of which the public cannot be deprived by any act or contract of the high sheriff. These principles are sustained and illustrated by the case of *Orear v. Kiger*, 10 Leigh 622.

We say then that every contract for farming the sheriffalty must be taken subject to the right of the high sheriff to displace a deputy, and to hold every deputy responsible to him: And therefore, when Street and Turnbull selected a deputy and he was appointed, he became responsible to the high sheriff. As deputy sheriff

254 *Holland had no right or authority to make his returns to Street and Turnbull, or to pay over money collected by him upon executions to them: And if he did so, it was upon his own responsibility. Neither had Street and Turnbull any right to require the deputies to pay over the money to them: but the deputy might have insisted upon his right, as it was his duty, to pay the money to the plaintiffs in the executions. If this was not the right of the deputy, then he cannot be responsible either to the creditor or the sheriff. What right indeed has the high sheriff to require the deputy to pay money to him? The deputy is directly responsible to the creditor; and a payment to the high sheriff cannot relieve him of that responsibility. It is true that if he paid the money to the high sheriff he could not be further liable to him, but it would not relieve him from his liability to

the creditor. Nor can his payment to Street and Turnbull relieve him from his liability to the creditor and the high sheriff. Our statutes on this subject will be found in 1 Rev. Code, ch. 78, § 15, p. 279; § 33, p. 283; and ch. 134, § 47, 48, p. 541.

The statutes referred to prescribe the liabilities of the deputy, and give the remedies of the creditor and the high sheriff. In the cases now under consideration the remedies provided for creditors against the high sheriff have been pursued; and he has been subjected for the default of this deputy. That default has been proved, and his only excuse is, that he paid the money to Street, another deputy. Now what contract Holland had with Street which required the payment of the money to him, does not appear. But the high sheriff was not privy to any such contract, and cannot be affected by it. But if there was such a contract it is obnoxious to the objection before stated. The deputy is a sworn public officer, with defined duties to be performed

by him; and he can make no contract
255 which *will absolve him from the performance of these duties, as to third parties not cognizant of the contract.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion that the responsibility of the plaintiff in error in this case is to be ascertained and determined by the contract between the high sheriff and Street and Turnbull, to whom he farmed the sheriffalty; in pursuance of which contract the plaintiff in error was selected and employed as a deputy by the said Street and Turnbull, and permitted to qualify as a deputy sheriff by the high sheriff.

That by the terms of the contract referred to, the said Street and Turnbull were to have the management of the sheriffalty, to perform or have performed the duties of the office, to select and employ deputies, to control and have power to dismiss them. This contract construed with reference to the subject matter thereof, did not and could not divest the high sheriff of his power to dismiss any of said deputies, or of his right to refuse to permit any person so selected and employed by Street and Turnbull to qualify as a deputy: But subject to such power, the contract constituted Street and Turnbull his general agents, with full authority to control the persons selected by them to the same extent he himself might have done. If the sheriff requires his deputy to return process or pay over money collected to him, though in certain cases provided for by statute, the creditor might have a remedy against the deputy, notwithstanding such payment to the high sheriff, the latter if made responsible, could on no ground claim to subject the deputy to a liability, when so far as respected the sheriff, he had been guilty of no default. In accordance with the agreement and understanding of the parties, the plaintiff in error was selected and employed by Street and Turnbull, and was permitted by

256 the high sheriff to *qualify as his deputy without executing any bond to indemnify the high sheriff; and in pursuance of the directions of Street and Turnbull delivered to them or one of them process, and paid over the money collected by him; thus doing what the high sheriff had agreed he should do when he constituted Street and Turnbull his general agents in relation to the office, with power to select and employ, to control and dismiss, the deputies. In the case of *Salling v. M'Kinney*, 1 Leigh 42, it was agreed that the sub-deputy was to be accountable to the deputy who had farmed a particular bailiwick of the county to him, but the sheriff was not privy to such agreement, and permitted the sub-deputy to qualify at the instance of the deputy; the sub-deputy giving to the sheriff a bond to indemnify him against any loss arising from his acts. In the present case the sheriff must be treated as privy to the arrangements between Street and Turnbull and their sub-deputies, for it grew out of the contract which he had made. He looked to Street and Turnbull as the parties responsible to him, and therefore required no bond from the plaintiff in error when he qualified as deputy.

Reversed with costs, and this Court proceeding to render such judgment as the Court below ought to have rendered—Judgment for defendant, with costs.

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*Gaines' Adm'r v. Alexander.

January Term, 1851, Richmond.

(Absent CABELL, P., and BROOKE, J.)

Executors and Administrators—Evidence—Paper Executed by Administrator before Qualification—Case at Bar.—In an action of debt against an administrator on a bond alleged to be the bond of his intestate, the issue was upon the plea of *non est factum*; and on the trial the plaintiff, after calling the attesting witness, to corroborate him, offered in evidence a paper signed by the defendant, in which the bond was referred to. This paper was executed by the defendant in the lifetime of his intestate, and did not purport on its face to have been executed by the defendant as the agent of his intestate, nor was there any proof of such agency. **HELD:**

1. **Same—Same—Same—Admissibility.**—The paper having been executed by the defendant before he qualified as administrator, it is not competent evidence as the admission of a party on the record.

2. **Same—Same—Agency—Proof of.**—The paper not purporting to be executed as agent of his intestate, is not of itself evidence of agency so as to render it competent evidence.

This was an action of debt in the Circuit court of Fauquier county, brought in 1839, by John Alexander against Richard H. Gaines, as administrator of Seth Gaines deceased, upon the bond of Seth Gaines for 135 dollars, bearing date the 16th of May 1823, and payable the 25th September following. The defendant filed the plea of

payment and several pleas of non est factum.

Upon the trial of the cause the defendant took a bill of exceptions to an opinion of the Court, which is as follows:

Upon the trial of this cause the plaintiff's counsel, in his opening remarks, read in evidence to the jury, without objection, a paper in these words:

Whereas Seth Gaines, of Stafford county, became indebted to John Alexander, 258 of Frederick, by bond, for *the sum of one hundred and thirty-five dollars, bearing date the 16th May 1823, and due the 25th September of the same year; and whereas the said Alexander hath agreed to take a certain mare which said Seth purchased of said Alexander, and the said Alexander agrees to sell said mare for the best price that he can, and credit the above named bond by the proceeds of such sale. And by mutual agreement between the said Alexander and Richard H. Gaines, the surviving executor of William Gaines, of Stafford, the said Richard Gaines agrees to give Mr. J. Alexander notice (before he relinquishes his claim on the property as executor, of said Seth's proportion of his father's estate,) to make the balance of the bond that may be unpaid, and that the said Richard H. Gaines will not put in any plea to prevent the said Alexander from making the balance on said bond, after the estate of his father is settled up and debts paid. In witness whereof, we have — set our hands and seals, this 25th day of December 1823.

John Alexander, [Seal.]

Richard H. Gaines, [Seal.]

Teste, James Wigginton,

Samuel Botts.

And the defendant's counsel, in his opening statement to the jury, also read the said paper and commented upon it; whereupon one of the plaintiff's counsel remarked audibly, that he (the defendant's counsel) had made the said paper evidence by reading it to the jury and commenting upon it. The counsel for the defendant then remarked, that the said paper was not evidence. The plaintiff then examined the subscribing witness to the bond in the declaration mentioned, who proved the execution thereof by the obligor, the intestate of the defendant. The plaintiff's counsel proceeded to read the paper before men-

259 tioned, *and the defendant's counsel then moved the Court to exclude it, upon the ground that it was not competent evidence upon the issues joined in this cause; but the Court being of opinion that it was evidence upon the issue of non est factum, in corroboration of the testimony of the subscribing witness, refused to exclude it. It was admitted that the paper first mentioned was executed in the lifetime of Seth Gaines, but the Court instructed the jury, that the said paper was not to be regarded as evidence on any question in the cause but the sealing and delivery, by the intestate of the defendant, of the bond, the execution of which had been pre-

viously proved by the subscribing witness. It was admitted that the paper was executed by the defendant.

There was a verdict and judgment for the plaintiff for 122 dollars 16 cents, with interest thereon from the 25th September 1823 until paid, and his costs. And thereupon the administrator Gaines applied to this Court for a supersedeas, which was awarded.

Stanard and Bouldin, for the appellant.

Morson, for the appellee.

DANIEL, J. It appears from the bill of exceptions, that the counsel for the defendant in error, in opening his case, read to the jury, without objection, and commented on, a certain paper which is set out in the said bill. This paper which purports to be executed by the plaintiff and defendant, recognizes as the bond of the intestate the instrument, the execution of which was the matter in issue. It also appears that the counsel of the plaintiff in error, in his opening statement likewise read and commented on the paper; whereupon it was remarked by the counsel of the defendant in error that the said paper was thereby made evidence in the cause. This claim was however denied by the counsel of the plaintiff in error, who insisted that 260 the *said paper was not evidence.

Subsequently the counsel of the defendant in error, having first introduced the subscribing witness to the bond in the declaration mentioned, who proved its execution by the obligor the intestate of the plaintiff in error, proceeded to read the paper first above mentioned. The counsel of the plaintiff in error then moved the Court to exclude said paper upon the ground that it was not competent evidence upon the issues joined in the cause; but the Judge of the Circuit court being of opinion that it was evidence on the issue of non est factum, in corroboration of the testimony of the subscribing witness, refused to exclude it. It was admitted that the said paper was executed by the plaintiff in error; but it was also further admitted that it was executed by him in the lifetime of his intestate.

It is, I think, quite clear from the bill of exceptions, that whilst the Judge of the Circuit court regarded the course of the counsel in regard to the paper as a part of the history of the proceedings in the cause proper to be certified, he did not intend to rest the correctness of his decision in any measure on that ground; but simply on the ground that the paper was, of itself, legal and competent evidence in corroboration of the testimony of the subscribing witness. For what purpose the counsel of the plaintiff in error referred to the paper does not appear; but it is seen that so soon as warned by the opposing counsel that it would be relied on as evidence in the cause, he promptly resisted the pretension. And even if, through inadvertence, the paper had been permitted to go to the jury without any show of opposition, it would, I appre-

hend, have been the duty of the Court, on the motion of the plaintiff in error, to have instructed the jury to disregard it, if the Court was of opinion that it was not legal testimony.

261 *The question of law involved in the refusal of the Court to exclude the paper, is I think, therefore fairly presented, unembarrassed by any considerations arising out of the conduct of the counsel of the plaintiff in error in regard to it previous to his motion to the Court to exclude it.

In Phillips on Evidence, vol. 1st, page 90, it is announced in general terms, that admissions are evidence in favour of the other side, whether made by the real party on the record, or by a nominal party who sues as a trustee for the benefit of another, or whether made by the party who is really interested in the suit, though not named on the record. The universality of expression used by the Judges in delivering their opinions, in the cases referred to as authority for the rule, might seem at first view to sanction such a doctrine. If we look however to the reasons upon which the rule is founded, it becomes very obvious that as so announced it must be subject to very important qualifications. In the case of the King v. The Inhabitants of Hardwick, 11 East. R. 578, Lord Ellenborough sets forth as the foundation of the rule, "the reasonable presumption that no person will make any declaration against his interest unless it be founded in truth." This rule of evidence was one of the matters of consideration in the case of Burton v. Scott, 3 Rand. 399. The case was one of probat, and the question turned upon the capacity of the testator. The wife of the testator was one of the legatees and interested in establishing his will, and it was sought by those who contested its validity, to rely on her declarations, as to the incapacity of her husband to make a will, made by her in his lifetime and before the date of the will. It was decided by this Court that the reason of the rule did not reach the case of such declarations; and that the rule did not

extend to admissions and declarations made by *parties before their interest in the subject matter of controversy arose.

The reasons for denying the extension of the rule to the admissions and declarations of representatives, made before they are clothed with their representative rights and duties, would seem to be equally obvious: And all the cases which I have been able to find deny the competency of such evidence. Thus in Webb v. Smith, 21 Eng. C. L. R. 392, the declarations of a prochein amie made before the institution of the suit, were decided to be not admissible for the defendant. And in Fenwick and others v. Thornton, 22 Eng. C. L. R. 246, which was the case of a suit by the assignees of a bankrupt, it was decided that the defendant could not rely on the admissions of one of the plaintiffs made before he was appointed

assignee. The precise question before us arose in the case of Plant v. M'Ewen, 4 Conn. R. 544, and under circumstances very similar to those in which it is presented here.

That was a suit against William M'Ewen as the executor of his father. The plaintiffs in their declaration alleged that the testator had in his lifetime, for a valuable consideration, assigned to the plaintiffs, and warranted as due and owing, a note on one William Walker; whereas the defendant, before the said assignment, acting for and as the agent of his father, had received of Walker a note on one Hawley, payable to said Walker under an agreement, as agent of his father, to endorse said last mentioned note as a credit on the first:—that there had been a failure to comply with the agreement, in consequence of which the estate of the father in the hands of the defendant as executor had become liable to the plaintiffs for the amount of the note from Hawley to Walker. On the trial the Judge admitted evidence proving that the defendant did receive the note against

263 Hawley, and that he agreed to *endorse it on the note of his father against Walker. No other evidence was offered to shew that the defendant was in the transaction the authorized agent of his father. In the Supreme court the effort was made by counsel to vindicate the correctness of the decision of the Judge on two grounds. 1st. That the act of the defendant in receiving the note against Hawley, and his agreement to credit it on the note against Walker, were admissible as the acts and declarations of a party to the record. And 2d. That his conduct in the matter was competent evidence as tending to shew that he was acting in the transaction as the agent of his father. But the Court decided that on neither ground could the legality of the evidence be sustained. The Judge delivering the opinion of the Court said, that whilst it was true as a general rule, that the declarations of a party to the record were evidence against him, there was no principle which would authorize the proof of an act or contract of the defendant, antecedent to his acceptance of the trust of executor, to affect the estate committed to his care: And that the naked act and engagement of the defendant, without the exhibition or actual pretence of any authority, implied no proof of agency; nor did they constitute premises from which any such inference could be deduced. To apply these remarks, with slight modification, as I think we may properly do, to the case before us, is to decide its fate. The certificate of the Judge negatives the existence of any proof in the cause, except what is to be inferred from the paper heretofore mentioned, tending to shew that the plaintiff in error was the agent of his intestate Seth Gaines: And the paper on its face shews no claim or assertion on the part of the plaintiff in error that he was acting in the matter under any authority derived from the said Seth.

264 *I am therefore of opinion, that the Circuit court erred in refusing to exclude the paper last mentioned; and that the judgment ought to be reversed.

The other judges concurred in Judge Daniel's opinion.

Judgment reversed.

Sheldon & als. v. Armstead's Adm'r & als.

January Term, 1851, Richmond.

(Absent CABELL, P., and BROOKE, J.)

Executors and Administrators†—Case at Bar.—G died in 1762, making W his executor. In 1784 bill by legatees of G against administrators of W for an account. The administrators having turned over the estate of W to D the husband of S the only child of W, he attends to the settlement of the account before the commissioner, which is returned in 1798. After the death of D, S the executrix of D, and her second husband, in 1804, upon a rule for counter security, surrender the office, and L another ex'or of D qualifies, to whom S and her husband pay over the assets in their hands. In 1805 bill amended, and S and her husband and L executor of D made parties, and they answer contesting the claim of plaintiffs, and except to the report. After the revival of the suit against L, he pays over to the legatees of D a large amount of the assets in his hands; and in 1814 he dies, when the suit is revived against the administrator *de bonis non* of D; and in 1816 there is a decree against him based upon the report of 1798. He takes an appeal, and in 1821 the decree is reversed for a matter of form, but affirmed in other respects, and the Court below is directed to enter a decree accordingly. In 1822 the Court below enters the decree in favor of all the legatees of G except B, as to whom her marriage is suggested, and the entry of the decree is postponed until the husband is made a party. Afterwards B's husband dies;

265 and then in 1826 all the legatees *of G, including B, file their bill against the administratrix of the administrator *de bonis non* of D and his legatees, and the representative of L, to have satisfaction of the decrees of 1816 and 1822. In 1829 the bill is dismissed as to the administratrix of the administrator *de bonis non* and the representative of L, which on appeal, is reversed in 1836. In 1838 the plaintiffs make the sureties of the administrator *de bonis non* of D and the legatees of L parties. **Held:**

1. **Same—Decrees—Conclusiveness.**—That the decrees of 1816, 1821 and 1822, taken in connexion with the decree of the court of appeals of 1836, conclusively establish against D and all his representatives, the indebtedness of W's estate to the legatees of G; that they had a right to follow the assets in the hands of D; that a sufficiency of such assets had come to his hands; and that his representatives who have received his assets are accountable to said legatees for the assets so received.

*For monographic note on Multifariousness (in Equity), see end of case.

†See monographic note on "Executors and Administrators."

2. **Same—Judgment against Administrator d. b. n.†—Effect.**—**QUÆRE:** What would be the effect generally of a judgment against an administrator *de bonis non* in establishing a debt against the estate, so as to conclude a former executor or administrator, and thereby subject him to a *devastavit*?

3. **Same—Same—Same—Case at Bar.**—Under the circumstances of this case, the decree against the administrator *de bonis non* of D in 1822, in pursuance of the decree of the Court of appeals of 1821, and substantially affirming the decree of 1816, must be held as conclusive upon L the prior executor of D, upon the question of the indebtedness of the estate of W; the right to follow his assets in the hands of D; the receipt of sufficient assets by D for the payment thereof; and the liability of his estate for the amount.

4. **Same—Devastavit—What Constitutes.**—That L having paid over to the legatees of D the assets, with full notice of the claim of G's legatees, and after the suit was revived against him, such payment constituted a *devastavit*.

5. **Same—Credits—Case at Bar.**—A part of the assets of D's estate having been retained by L, and recovered by suit from his executor after his death, by the administrator *de bonis non* of D, L is to be credited for the amount so recovered.

6. **Chancery Practice—Multifariousness—Case at Bar.**—As the legatees of G claimed by force of the same decrees ascertaining the rights of all; and having a common interest, are seeking satisfaction out of a common fund, it was proper to unite in one suit to get the benefit of the former decrees in their favor; and the bill is not multifarious.

7. **Same—Same—Same.**—The right of the plaintiff B to prosecute the suit to enforce the previous decrees, is not to be distinguished from that of the other plaintiffs.

266 *8. **Fiduciaries—Statute Limiting Actions against—Effect on Case at Bar.**—As the decree of 1816 was suspended by the appeal, and no definite decree establishing the debt against the estate of D, was made until 1822, and as until then the claimants had no right to proceed against the representative of L for his *devastavit*, the statute of 1826 was no bar to the suit commenced in that year; nor was the suit barred by the delay of the plaintiffs.

9. **Executors and Administrators—Liability—Case at Bar.**—The personal representative of L having paid over the assets to the devisees and legatees of L, without notice of the plaintiffs' claim, it was proper to subject them in the first instance, instead of the personal representative.

10. **Same—Credits—Case at Bar.**—That the amount paid over by the administrator of L to the administrator *de bonis non* of D, under the decree of the Court, should be applied as a credit to L, to the principal of the debt due from D to G, for which L was held responsible.

11. **Case at Bar.**—That some of the legatees of G having abandoned the prosecution of their claim, the liabilities of the parties who are responsible for W are diminished to the amount of the shares of these legatees.

†Death of Executor—Administrator d. b. n.—Revival of Suit.—See principal case cited in foot-note to Braxton v. Harrison, 11 Gratt. 30.

12. *Same*.—The wife of the personal representative of L, was a legatee for life of L, and had died, and the property had been transferred to those entitled in remainder, before any recovery in the case. B having no assets of his wife, cannot be held responsible on account of such life estate which had previously terminated; and the assets of L which the claimants were entitled to follow, had passed into the hands of those entitled in remainder.

13. *Same*.—Under the circumstances of this case, the plaintiffs should proceed first against the legatees of D for the recovery of the amount due them; and should only recover from the legatees of L so much of their claims as cannot be recovered from the legatees of D.

14. *Same*.—Statute Limiting Actions against Fiduciaries.—As the decree of 1822 ascertained the right of the plaintiffs to proceed against the sureties of the administrator *de bonis non* of D, and they were not made parties until 1838, the act of 1826 is a good defence for them against the claim of the plaintiffs.

Gill Armstead and William Armstead were brothers and partners in business, residing in the county of New Kent. Gill Armstead died in the year seventeen hundred and sixty-two, having first made his will which was duly admitted to record, by which

he gave his slaves and personal estate to be equally divided among his six children as they should come of age or marry; and he appointed his wife Betty, his brothers William and John Armstead, and his friends Richard Allen, sen., Richmond Allen, and Dudley Williams, sen., his executrix and executors; all of whom qualified.

Previous to April 1784, Betty Armstead the widow and executrix of Gill Armstead, had married John Lewis, and William and John Armstead and Richard Allen, sen., the executors of Gill, had died. On the 7th of that month a bill was exhibited in the high Court of chancery at Richmond, by William Armstead, Miles Seldon, jr., and Betty his wife, John Cary and Susanna his wife, Mary Burwell, John Ambler and Frances his wife, and Martha Armstead, the said William Armstead and the female plaintiffs being the children and legatees of Gill Armstead, against Dudley Williams and Richmond Allen surviving executors of Gill Armstead, William Clayton, administrator, and Mary Armstead, administratrix of William Armstead the brother and executor of Gill, and William Armstead administrator of John Armstead, who was also a brother and executor of Gill Armstead, the object of which suit was to procure a settlement and distribution of the estate of Gill Armstead in the hands of his executors.

Dudley Williams and Richmond Allen, the surviving executors, filed their answer, stating that the management of the estate had been wholly left to William and John Armstead and the widow Betty, and that the respondents never interfered with the estate until after the death of William and John Armstead, when they possessed them-

selves of such of the testator's books and papers as they could find; and although the books shewed large balances in some instances, due the testator, yet they could collect none of them; they having been paid either to Gill Armstead in his lifetime, or to their co-executors William and John Armstead, after his death. The bill

was also answered by Clayton and 268 *Mary Armstead, executor and executrix of William Armstead, stating their willingness to account as the Court should direct: And John Armstead's administrator answered, claiming that his intestate was in advance to the estate of his testator; and saying that he was ready to account.

In 1786, Betty Lewis the executrix of Gill Armstead, was made a defendant, and filed her answer: and in November of the same year a decree was made directing, 1st. That Betty Lewis, Dudley Williams and Richmond Allen, render an account of the administration of their testator's estate. 2d. That William Clayton and Mary Armstead render an account of their intestate William Armstead's administration on Gill Armstead's estate. 3d. That William Armstead, administrator of John Armstead, render an account of the administration of said John upon the estate of Gill Armstead.

Under the foregoing decree commissioner Hay made a report in March 1798, shewing due from the estate of William Armstead the executor, to the estate of Gill Armstead, the sum of £ 2168. 18. 6¼.; and from the estate of John Armstead the sum of £ 422. 9. 3½. The commissioner then proceeded to state accounts between the executors and the legatees of Gill Armstead, based on these balances, shewing the amount due to each legatee.

The balance found against William Armstead seems to have arisen out of the transactions of the partnership which had existed between himself and Gill Armstead; of which partnership no mention was made in the bill or in any of previous proceedings.

In June 1799, all the defendants being dead, subpoenas to revive the suit against the representatives of William and John Armstead, were awarded; and leave was given the plaintiffs to amend their bill by making William Dandridge a defendant. William Dandridge was the husband of Susanna, the only child of William Armstead

the executor of Gill Armstead; and

269 although *not a party in the cause when the accounts were taken, was in fact the party principally interested, and was the party who attended to the settlement of the accounts. Although he seems to have acknowledged the service of a subpoena upon him, he was not made a party by an amended bill during his lifetime. In the early part of the year 1803 he died, having by his will appointed his wife Susanna and William Langborne and John Bassett his executrix and executors; and Susanna Dandridge alone qualified, in June 1803.

In 1804 or 1805, Susanna Dandridge having intermarried with David Dorrington,

the plaintiffs filed a bill of revivor and supplement, in which were recited the previous proceedings in the cause, the leave to amend the bill by making William Dandridge a defendant, granted in 1799, the issuing of subpoenas to revive under that order, the death of William Dandridge, the qualification of his widow as executrix and her intermarriage with Dorrington, and the appointment of William Langborne and John Bassett as executors of Dandridge. The bill charged the existence of the partnership between Gill and William Armstead; that at the death of Gill, William was indebted to the concern; and that after Gill's death, he possessed himself of the partnership effects to a considerable amount, and took upon himself the entire management of the said Gill's personal estate, as executor. That he kept open the partnership store for twelve months after Gill Armstead's death, receiving the profits; at the end of which time he sold off the stock, and took into his possession all the books, papers, bonds, &c., of the partnership, and of Gill Armstead. That after the marriage of William Dandridge with Susanna, the only child of said William Armstead, the administrators paid over and delivered up to Dandridge, in right of his wife, all the property of William Armstead, and whatever

270 was due from them as his administrators, before they had accounted *for any of said William Armstead's transactions either as surviving partner or as executor of Gill Armstead. That there was then no personal representative of the estate of William Armstead; and that under these circumstances the complainants had a right to follow the personal assets of William Armstead in the hands of William Dandridge and his representatives, for satisfaction of their claims against him as surviving partner and executor of Gill Armstead. They therefore made Dorrington and wife, Bassett and Langborne defendants, and asked for satisfaction out of the estate of William Dandridge.

On the 12th of May 1804, on the motion of the sureties of Mrs. Dorrington as executrix of Dandridge, the Court made an order on Dorrington and wife for counter security; and on the 3d of June 1805, Dorrington appeared, and for himself and his wife consented that the estate of William Dandridge should be delivered to the sureties; and the same was ordered accordingly: whereupon William Langborne qualified as executor of William Dandridge.

Dorrington and wife answered the amended and supplemental bill, resisting the pretensions of the plaintiffs on various grounds. There was also a subpoena to answer the bill, issued in November 1805, and returned served on Langborne; and an attachment was issued against him in July 1806, the service of which he acknowledged; and in October 1806, he filed his answer, in which he relied on the great lapse of time since the death of Gill Armstead as furnishing a presumption that all matters of the partnership had been duly settled, and

the plaintiffs satisfied all proper demands; and in aid of this presumption he relied on the facts that the plaintiffs had many years before received their proportions of Gill Armstead's estate without any reservation as to the partnership; that several of the plaintiffs afterwards gave their bonds to William Armstead, which they 271 *would not have done if there had been no settlement; and that John Armstead, the acting executor, actually received a large portion of the goods, from which a settlement of the partnership should be inferred. He further denied the right of the plaintiffs to call the defendant, or the estate of his testator, to account concerning the matters mentioned in the bill; and he pleaded the statute of limitations.

It appears that on the 29th of December 1806, Dorrington and wife paid over to Langborne assets of the estate of William Dandridge to the amount of 20,698 dollars 17 cents; and on the same day he paid to the legatees of Dandridge 20,529 dollars 48 cents: and it also appears that he received other assets, amounting to upwards of 10,000 dollars; and that his payments to the legatees amounted to upwards of 27,000 dollars of principal.

In 1815 William Langborne died, and John Bassett having refused to qualify as executor of William Dandridge, the estate was committed to Thomas H. Prosser, high sheriff of the county of Henrico. The cause came on to be heard on the 1st day of June 1816, when it was revived in the name of Abraham A. Green and Elizabeth A. A. Cocke, children of Martha Green, who was Martha Armstead, and by consent of the plaintiffs was dismissed as to the representatives of John Armstead; the plaintiffs not wishing to prosecute their claim against his estate: And the Court, holding that it was not necessary to bring the representatives of the deceased executors of Gill Armstead, or of the deceased administrators of William Dandridge, before the Court, and reciting that it appeared that William Armstead, whose representatives, Mary Armstead and William Clayton, were originally parties to this suit, was the principal acting executor of Gill Armstead, and surviving partner of said Gill and William; and that he received the greater part of the debts of said partnership, as well as

272 *those of said Gill in his individual right, and that after his death all the estate of the said William Armstead, as well as the books, papers and evidences of debts, belonging as well to the said partners as to the said Gill Armstead, came into the hands of William Dandridge, formerly a party in this cause, who intermarried with Susanna, the only child of said William Armstead, now the wife of David Dorrington, both of whom are defendants; and overruling all the exceptions of the defendants, was of opinion that the plaintiffs had a right to follow the estate of William Armstead which came to the hands of William Dandridge, who it appears possessed himself of a sufficiency of that estate, as

well as of the debts due to Gill Armstead's estate, to pay the claims of the plaintiffs found to be due to them respectively. It was therefore adjudged, ordered and decreed, that the defendant Thomas H. Prosser, committee of the estate of William Dandridge, out of the estate of the said William which had or might come to his hands to be administered, should pay to the plaintiff William Armstead, £ 490. 4. 8½., with interest at five per cent. per annum on £ 361. 9. 9., part thereof, from the 11th day of May 1778, till paid; to the plaintiff Betty Selden, in her own right, £ 245. 7. 10¼., with like interest on £ 243. 10. 11. from the 29th of October 1774, till paid; to the plaintiff Susanna Cary, in her own right, £ 348. 13. 8., with like interest from the 16th of March 1777; to the plaintiff William Selden, administrator de bonis non of Joseph Selden, £ 188. 6. 7½., with like interest from the 26th November 1774, in right of his deceased wife Mary; to John Ambler, surviving husband of his deceased wife Frances, £ 361. 9. 9., with like interest from the 25th October 1767; to Abraham A. Green and Elizabeth A. A. Cocke, children of Martha Green, who survived her husband, £ 361. 9. 9., with like interest from the 25th of October 1767; and their costs.

273 *On the 3d of June 1816, administration de bonis non on the estate of William Dandridge, was granted to Bartholomew Dandridge his son, who executed a bond in the penalty of £ 20,000., with Thomas H. Terrill and three others as his sureties; and thereupon took an appeal from the foregoing decree of the 1st of June 1816. On the 11th of December 1821, the cause was decided in the Court of appeals, when the Court, for reasons stated in the decree, approved the decree of the Court of chancery affirming the report of the commissioner, and overruling the exceptions thereto; notwithstanding some of the plaintiffs had not strictly entitled themselves to a decree by taking administration on the estates to which they were so respectively entitled; and it was held that under the circumstances of the case the Chancellor would have been justified in decreeing payment to these appellees respectively, of the sums mentioned in the decree, on their giving bond with security to the satisfaction of the Court, to the appellant to indemnify him from any claim which might be made by any legal representative of the person in whose right such payment was decreed. The decree was therefore reversed, with costs, and the cause was remanded to the Court of chancery to have a decree entered according to the foregoing principles; and in case of a failure to give such bonds, to have the suit revived in the name of the legal representative of the party in whose right the claim is, and proceeded in to a final decree.

On the 18th of July 1822, a decree was made in the Chancery court in conformity with the decree of the Court of appeals, in favour of the plaintiffs respectively, against Bartholomew Dandridge, administrator de

bonis non of William Dandridge, for the sums mentioned in the decree of the 1st of June 1816, except as to Elizabeth A. A. Cocke. As to her, the decree was, that "it being suggested that Elizabeth A. A. Cocke, one of the plaintiffs, hath intermarried with — Booth, this cause 274 *is retained for further proceedings as to that plaintiff; and leave is given the said Booth and wife to file a bill of revivor and supplemental bill. At the time this decree was entered Bartholomew Dandridge's powers as administrator had been revoked, and David Dorrington and his wife had been allowed, at the September term of the County court of Henrico, in 1821, to give the counter security required in 1805, and to resume the administration of William Dandridge's estate. And thus terminated this suit of Armstead v. Armstead.

In the month of September 1826, the bill in the present suit of Armstead v. Dandridge was exhibited in the District Court of chancery then held in Williamsburg, by Gill Armstead and Thomas B. Allen, administrators of William Armstead deceased, one of the children of Gill Armstead deceased, and one of the plaintiffs in the former suit of Armstead v. Armstead, Betty Selden, Susanna Cary, William Selden, administrator of Joseph Selden, John Ambler and Abram A. Green, being the same plaintiffs as in the former suit (except Elizabeth A. A. Booth, who had obtained no decree, but as to whom the cause was retained and leave to amend the bill given,) against David Dorrington and his wife Susanna, executrix of William Dandridge deceased, William Duval, the administrators of John Pendleton, and the committee and administrator of John Adams, securities of said Susanna as executrix aforesaid, Burwell Bassett administrator of William Langborne, who was one of the executors of William Dandridge, Bartholomew Dandridge administrator de bonis non of William Dandridge deceased, and in his own right as heir and devisee of said William Dandridge, John Williams and Scianna his wife, Eleanor Dandridge, John B. Richardson and Lavinia his wife, and Robert F. Dandridge, heirs and devisees of the said William Dandridge. The object of this bill is to carry into effect the decree obtained in the same Court by the plaintiffs

275 against Bartholomew *Dandridge, as administrator de bonis non of William Dandridge; to which decree and to all the proceedings on which it is founded, reference is made by the bill as part thereof.

The bill avers, that the said decree has been unavailing, because the estate of William Dandridge has been all wasted or sold, so that no execution can reach it, although his estate is fully able to pay all the demands against it; that Susanna Dandridge, the widow of William, qualified as his executrix, and soon thereafter intermarried with Dorrington, who received considerable estate of said William into their hands, which they wasted and converted to their

own use; that William Langborne also qualified as executor of said William Dandridge, on the 3d of June 1805, and received a large estate into his possession, which he also wasted or misapplied; that Bartholomew Dandridge qualified as administrator de bonis non of William Dandridge, and received a large estate into his hands of the said William Dandridge, which he also wasted and misapplied; that the said William Dandridge left a large real estate, which is in the hands of his heirs and devisees, and which may be liable to the plaintiffs' demands, in the event that the personal estate was expended in the payment of specialty debts, or to the extent that it was so consumed; that some or all of the defendants are liable for the plaintiffs' said decree, and relief is accordingly prayed against them.

The administrators of John Pendleton, one of the sureties of Susanna Dorrington as executrix of William Dandridge, answered, averring their ignorance of the matters charged, and calling for proof of them, and insisting that the claims of the plaintiffs should be regarded as stale demands, their intestate Pendleton having been dead more than twenty years, and no demands ever before made.

276 *William Duval, another surety of Mrs. Dorrington, answered the bill to the same effect.

Burwell Bassett, administrator of William Langborne, also answered the bill, admitting that Langborne was executor of William Dandridge, and calling for proper and legal proof of the plaintiffs' demands. He denies that Langborne ever wasted the estate of William Dandridge, or any part thereof, and avers that the said estate was duly and fully administered by Langborne in his life, and his administration duly settled by the respondent, since his death, under an order of the Richmond Chancery court; upon which settlement the balance, and divers bonds, &c., for the payment of money found among the papers of Langborne, and appearing to be due to William Dandridge's estate, were paid and handed over to Bartholomew Dandridge, the administrator de bonis non of William Dandridge, under the decree of said Court; that since the death of Langborne, the heirs or devisees of William Dandridge had divided among themselves, by sale under a decree of said Court, a large real estate, amounting to about 60,000 dollars; that the complainants had prosecuted their claims against Langborne, in his lifetime, and failed to establish them against him, and should not now be permitted to disturb the respondent. He exhibits with his answer, Bartholomew Dandridge's receipt for sundry bonds, certificates of stock, &c., handed over to him.

In 1827 the death of Susanna Dorrington was suggested, and the cause was revived against Mosby Sheppard, sheriff of Henrico and committee of her estate, and of the estate of William Dandridge; also the death of Bartholomew Dandridge was suggested,

and the cause revived against Catharine Dandridge, his administratrix.

At the January term 1828, a decree was rendered for the settlement of the following accounts, viz: 1st. An account of Bartholomew Dandridge's administration

277 of *William Dandridge's estate. 2d.

Of Catharine Dandridge's administration of Bartholomew Dandridge's estate.

3d. Of William Langborne's administration of William Dandridge's estate, taking as

prima facie true, liable to be surcharged and falsified by the plaintiffs, the account

settled under the decree of the Richmond Chancery court, and relied on in the answer

of the defendant Bassett; and in taking this account the commissioner was directed

"to separate the payments made to the heirs and legatees of William Dandridge deceased, and the credits arising from rents."

4th. An account of Burwell Bassett's administration of Langborne's estate, unless

he shall admit assets, &c. 5th. An account of all the real estate in the possession of

the heirs or devisees of William Dandridge, derived by devise or descent from him, and

if aliened, to whom, at what time, and for what price. 6th. An account of all the

specialty debts, if any, of William Dandridge, paid out of his personal estate.

In January 1829, the commissioner, Anderson, returned his report under the said decree:

First. An account of Bartholomew Dandridge's administration of William Dandridge's estate, shewing due to the estate

of William Dandridge the sum of 2095 dollars 12 cents, on 14th February 1821, interest

added to the 31st December 1828, 989 dollars 93 cents, total 31st December 1828, 3085

dollars 5 cents. This account is settled from an audit of Henrico County court, returned

in the lifetime of Bartholomew Dandridge.

Secondly. An account of Catharine Dandridge's administration of Bartholomew

Dandridge's estate, shewing due to the estate of Bartholomew Dandridge, on 31st

December 1828, the sum of 1244 dollars 84 cents.

Thirdly. An account of payments by Langborne to William Dandridge's devisees

and legatees, and rents received, shewing principal paid over to William Dan-

278 dridge's *children and widow, 23,249 dollars 57 cents, over and above the

rents credited in said account. This account is taken from the account rendered

under the order of the Richmond Chancery court before referred to, of Langborne's

administration of William Dandridge's estate, by separating the items of payment

to the legatees, and rents of real estate therein contained.

The commissioner reports, that Bassett had settled no account of his administration

of Langborne's estate, nor had he admitted assets, and that none of the

defendants, heirs and devisees of William Dandridge, had rendered the accounts

required of them as to the real estate devised or descended.

Various exceptions are filed to the said

report by the plaintiffs and the defendant Bassett, administrator of Langborne.

These exceptions of Bassett were for failing to credit the estate of William Dandridge and to charge Bartholomew Dandridge's estate with various sums of money which it was alleged Bassett, as administrator of Langborne, had paid over to Bartholomew Dandridge, as administrator de bonis non of William Dandridge, under a decree of the Chancery court. After the death of Langborne and qualification of Bartholomew Dandridge, the latter filed a bill in the Chancery court at Richmond against Burwell Bassett, as the administrator of William Langborne, to compel Bassett to pay over to him the assets of William Dandridge's estate which were in the hands of Langborne at the time of his death. The commissioner to whom the accounts were referred reported the sum of 2872 dollars 66 cents as in the hands of Langborne, as executor of William Dandridge; and this sum was paid over to Bartholomew Dandridge under the decree of the Court. Of this sum 777 dollars 54 cents was expended in a due course of administration, leaving a balance in the

279 hands of Bartholomew *Dandridge of 2095 dollars 12 cents, as due the 14th of February 1821. The commissioner also reported two bonds given by Bartholomew Dandridge to Langborne, one for purchases at a sale of the personal estate of William Dandridge made by Langborne, for 2087 dollars 50 cents, due 15th January 1807, and the other for 2000 dollars, for money of William Dandridge's estate loaned by Langborne to Bartholomew Dandridge the 15th of July 1814. There was also 2228 dollars due from Dorrington for purchases at the sale, with interest, also 600 dollars for rent of real estate, and some other bonds of third persons due to William Dandridge's estate and held by Langborne, the obligors in which the commissioner reported to be insolvent. These debts were charged to Bartholomew Dandridge, administrator of William Dandridge, in the commissioner's report; and the Court, approving the report, decreed in his favour against Bassett, as administrator of Langborne, for the balance so ascertained to be due, and he paid over the amount and transferred the bonds to Bartholomew Dandridge.

At the July term, 1829, the cause, which was then dismissed as to Betty and William Selden, came on to be heard on the said report, &c., when the Court of chancery, being of opinion that the powers of Susanna Dorrington, as executrix of William Dandridge, never were revoked or annulled in her lifetime, and that the grant of administration de bonis non to Bartholomew Dandridge was a nullity, and that the estate of William Langborne was not bound by the decree against Bartholomew Dandridge, the administrator de bonis non, being no party or privy thereto, adjudged and decreed, that the plaintiffs' bill be dismissed as to the defendants Catharine Dandridge, administratrix of Bartholomew Dandridge,

and Burwell Bassett, administrator of William Langborne, without prejudice to any other or further claim which the plaintiffs in any other suit may *properly assert against said estates. And it was then further ordered and decreed, that the defendant Mosby Sheppard render before one of the commissioners of the Court an account of Susanna Dorrington's administration of William Dandridge's estate, and an account of his own transactions as committee of said Susanna Dorrington; and that the defendant David Dorrington render an account of his actings as husband of said Susanna Dorrington, and thereby executor of said William Dandridge.

From so much of this decree as dismissed the bill as to the defendants Dandridge and Bassett, the plaintiffs obtained an appeal; and on the 16th February 1836, the decree was reversed and annulled, and the cause remanded to the Court of chancery for further proceedings to be had. The opinions delivered by the Judges, copies of which are in the record, shew the grounds of reversal. As to Bartholomew Dandridge they say, that whether his appointment as administrator de bonis non of William Dandridge was legal or illegal, neither he nor those representing him could be received to deny that he was such administrator; that as such he had instituted a suit against the administrator of Langborne, the former executor, and had received a large amount of assets which he should be held liable for; he and his sureties being alone responsible therefor. As to Langborne's estate, they say it was error to dismiss the bill as to him, merely because he was no party to the decree.

The cause came back from the Court of appeals in 1836, when the plaintiffs, Gill Armstead and Thomas B. Allen, administrators of William Armstead, being dead, it was revived in the name of John Tabb, sheriff, and committee of William Armstead's estate, and in the name of Gill A. Cary, administrator of Susanna Cary, who had also died.

281 *On the 3d July 1837, and the 24th November 1837, the complainants, together with Elizabeth A. A. Booth, (who had obtained no decree,) filed two amended bills, without having obtained the leave of the Court to do so; and on the 14th May 1838, the said amended bills, and all the proceedings thereon were ordered to be set aside. And thereupon leave was granted the plaintiffs to file a supplemental and amended bill, and to make new parties defendants.

In pursuance of the leave thus given, the plaintiffs in the bill of 1826, (except Betty Selden and William Selden, as to whom the suit was dismissed in 1829,) together with Elizabeth A. A. Booth, exhibited their supplemental and amended bill, on the 14th of May 1838, reciting the decree of the 1st June 1816, (as a decree rendered against Bartholomew Dandridge, as administrator de bonis non of William Dandridge,) the decree of the Court of appeals of the 11th

December 1821, and the decree of the Chancery court of the 18th July 1822, and charges that the same has been unavailing; that the complainant Elizabeth A. A. Booth, when under age, intermarried in 1813, with Josiah H. Cocke, who soon thereafter died, she surviving, and in 1817 she intermarried with William Booth, and soon after removed to the state of Tennessee, where she has remained ever since under coverture, until the 23d October 1833, having no knowledge of said decree and the pendency of this suit, until very recently, &c. This bill charges that Bartholomew Dandridge received a very large amount of assets, and wasted and converted the same to his own use, having given bond in the penalty of £ 20,000 with security; that Burwell Bassett received a large estate of William Langborne, which he delivered over to his only son and distributee, William Langborne, junior, who soon died, leaving a will, by which he gave his whole estate to certain persons named in the bill, and made Burwell Bassett

his *executor, who distributed the estate amongst the legatees; that these assets of William Langborne, the elder, thus distributed to the legatees of the younger Langborne, are liable to the payment of the plaintiffs' demands. To this bill are made defendants Burwell Bassett, executor of William Langborne, the younger, Robert M'Candlish, administrator de bonis non of William Langborne, the elder, Catharine Dandridge, administratrix of Bartholomew Dandridge, the representatives of the deceased sureties of Bartholomew Dandridge, as administrator de bonis non of William Dandridge, Thomas H. Terrell, the surviving security of said Bartholomew Dandridge, and all the legatees of William Langborne, the younger, deceased.

To this supplemental and amended bill Burwell Bassett, in his lifetime, filed his answer, setting up the following grounds of defence, viz:—1st. He calls for proof of the decrees referred to in the bill, especially the decree which the bill seeks to enforce. 2dly. He calls for proof of the execution of the bonds required by the decree of 1822. 3dly. He insists that the said decrees and proceedings are not binding on him, or the estate of his intestate William Langborne, they being neither parties nor privies thereto, and cannot be used even as evidence against them. 4thly. If the suit shall be entertained, he denies that the plaintiffs have any just claim or right to recover against the estate of William Armstead, or William Dandridge, and insists that they be held to proof of such claim, and that the accounts be referred anew to be re-taken upon legal evidence. 5thly. That he is advised there is great doubt whether William Langborne was ever the true legal executor of William Dandridge, and calls for the proof. 6thly. He denies the right of John Ambler to recover choses in action due to the wife, not being the personal representative of the wife. 7thly. Denies that William Langborne wasted or misapplied the assets

283 *of William Dandridge, and avers that

he retained in his hands assets sufficient to satisfy the plaintiffs' demands, if established, which assets, being in Langborne's hands at his death, came to the hands of said Bassett, as his administrator, and were subsequently delivered and paid over to Bartholomew Dandridge, as administrator de bonis non of William Dandridge, under a decree pronounced by the Chancery court of Richmond, in a suit brought against him by the said Bartholomew Dandridge, as administrator de bonis non afore-said; that to the extent of the assets thus paid over the complainants can never look to the estate of Langborne, or to the defendant Bassett, but must resort to Bartholomew Dandridge and his sureties. 8thly. That he has been informed refunding bonds were required by Langborne, and given when he made payments to the legatees of Dandridge and wife. He insists that the plaintiffs be compelled to resort to them. 9thly. That William Dandridge left a large real estate, and as his heirs and devisees are before the Court on the bill of 1826, he insists that resort should be compelled to them. 10thly. That he, the said Bassett, has no assets of William Langborne in his hands, having legally and fully administered all that ever came to his hands as administrator of said Langborne, and paid over the balance to William Langborne, junior, the sole distributee, before he had notice of this suit, or the claims of the plaintiffs; that the same estate subsequently came to his hands as executor of the younger Langborne, and was distributed according to his will, by decree rendered in the suits of "*Taliaferro v. Bassett*," depending in this Court, which are referred to as part of the answer, together with the refunding bonds executed on such distribution; that if the plaintiffs have any claim against him as representative of Langborne, they should be compelled to resort to the legatees of the younger Langborne. 11thly.

284 He denies *the right of Elizabeth A. A. Booth, to unite with the plaintiffs in this cause in filing the supplemental bill referred to, and insists that the bill be dismissed as to her; but if the bill should be entertained as to her, he requires proof of the allegations touching her infancy, coverture, non-residence, and ignorance of her rights and the decree in her favour. 12thly. Pleads the act of limitations against the claim of Elizabeth A. A. Booth. 13thly. Insists that the said claim of Elizabeth A. A. Booth should be presumed to be settled, and regarded as a stale demand. 14thly. That all the claims of the plaintiffs should be regarded as stale demands. 15thly. That the complainants, if entitled to recover, should first resort to the assets in the hands of Bartholomew Dandridge, and pursue him and his sureties therefor; and if their claims exceed the assets paid over to him, for the excess they should resort to the legatees and devisees of William Dandridge; and if they prove insufficient, then to the legatees of Langborne, unless the Court shall be of opinion that Langborne is not

responsible at all for the payment over of the assets of Dandridge. And lastly. Bassett claims the benefit of any and every act of limitations applicable to the circumstances of the case.

The legatees of William Langborne, the younger, all answered the bill, relying upon the same matters set forth in the answer of the defendant Burwell Bassett, except that they were not, under any circumstances, to be made liable for any part of the plaintiffs' demands. And especially they insist, that if any question shall arise involving liability for the assets paid over by Burwell Bassett under the decree of the Richmond Chancery court to Bartholomew Dandridge, they are not to be held responsible therefor, but the said Bassett personally should be held liable, if that payment shall not be held good.

285 *The defendant Thomas H. Terrill demurred and answered. The demurrer was overruled. His answer denies the justice of the plaintiffs' demands, and calls for proof of them. He pleads the act of limitations of 1826, in his defence; also avers that the powers of Bartholomew Dandridge were revoked in September 1821, before the rendition of the decree of the Court of appeals; denies that Bartholomew Dandridge ever was legally the administrator of William Dandridge, or that he ever received any assets as such; says that the receipt filed with the answer of Bassett was executed after his powers as administrator were revoked, and that the bonds, &c., received were worthless.

On the 10th day of November 1843, several of the parties having died, there were revivals entered against certain of their representatives, and the case was argued and time taken for consideration.

Afterwards, on the 17th of November 1845, a decree was pronounced, ordering these, among other enquiries, before a commissioner, to wit:—1st. As to the value of the property, real and personal, of William Langborne, deceased, received by his devisees and legatees, and whether it was sufficient to pay the demands of the plaintiffs. 2d. As to the proportions in which such devisees and legatees should make payment to the plaintiffs; ascertaining also the contribution from Burwell Bassett's estate, on account of the life estate of his wife in one fourth of the property of William Langborne, junior. 3d. As to the amount of the demands of the plaintiffs; taking the decree of 1822 as a guide—but deducting, as of the 14th of February 1821, 2095 dollars 12 cents, as the sum for which Bartholomew Dandridge's estate would be responsible, in case Burwell Bassett's exceptions (which were left undecided) should be overruled. The same decree dismissed the bill as to the defendant Terrill, but

286 without costs; but did not pass upon the claim of *the plaintiff Elizabeth A. A. Booth. Under this decree, the commissioner returned a report, to which exceptions were taken by Bassett and by Langborne's devisees and legatees. After-

wards the devisees and legatees of Langborne filed exceptions to the report of commissioner Anderson, filed in 1828, similar to the above mentioned exceptions of Burwell Bassett, as to which the above mentioned decree gave no decision.

The exceptions to the report of 1828 have been already stated. The exceptions to the last report, which it is material to notice, are 1st. For applying the amount due from the estate of Bartholomew Dandridge to the interest of the debt due from the estate of William Dandridge, instead of applying it to the principal. 2d. For diminishing the portion of that sum applicable as a credit upon the amounts due to the respective plaintiffs, by dividing it among not only the plaintiffs, but Betty Selden and Joseph Selden, as to whose claims the bill had been dismissed. 3d. For charging the defendants with the sum of 2762 dollars 60 cents as due Elizabeth A. A. Booth; she not having obtained a decree for any amount in the decree of the 18th of July 1822. 4th. For charging the defendants, the legatees of William Langborne, jr., with interest upon the appraised value of the slaves received by them from the time they were received. 5th. For charging them with interest upon the value of land received by them from the time received.

When the cause came on to be finally heard in May 1847, the Court directed a special statement to be made, which was adopted as the basis of the decree, and is referred to in the decree of this Court as marked XX. This statement disregards the exceptions of the defendants to the report of 1828; but is conformed to the first and second exceptions above mentioned. It retains the charge in favour of Mrs. Booth;

287 and the fourth and fifth exceptions are not passed upon, as the *principal of the estate of William Langborne, jr., received by the defendants, his legatees and distributees, was more than the amount of the decrees against them respectively, except Mrs. Burwell Bassett, to whom he gave the one fourth of his estate for her life. The commissioner in his report charged her with interest on the personal estate received by her, 2922 dollars 70 cents, and on real estate, 1173 dollars 15 cents, = 4095 dollars 85 cents, and charged her with a proportionate share of the debt imposed upon the legatees and devisees of William Langborne, jr. In the statement "XX" she is charged with one fourth of the debt. Mrs. Bassett died in the year 1834; and in the same year the legatees and devisees in remainder of William Langborne, jr., filed their bill against Burwell Bassett for a division and distribution of the estate of their testator which had been allotted to her for life; and in that suit the property was sold, and the proceeds were divided among the complainants in 1835 and 1836.

Statement XX ascertained the amount due from the estate of Bartholomew Dandridge on the 1st day of June 1846, to be 5400 dollars 50 cents, of which 2095 dollars 12

cents was principal. It ascertained that there was due to the plaintiff, William Armstead's representative, 5795 dollars 39 cents, of which Bartholomew Dandridge's estate was charged with 1348 dollars 69 cents, leaving 4446 dollars 70 cents to be paid by the legatees of Langborne; and it was apportioned among them. The statement ascertained the debt due to Susanna Cary's estate to be 5395 dollars 21 cents, of which Bartholomew Dandridge's estate was charged with 1255 dollars 56 cents, leaving 4139 dollars 65 cents to be paid by Langborne's legatees; and which was apportioned among them. The debt due John Ambler's estate was 6007 dollars 78 cents, of which Bartholomew Dandridge's estate was charged with 1398 dollars 12 cents,

leaving 4609 dollars 66 cents to be paid by *Langborne's legatees; which was also apportioned among them. The debt due Abraham A. Green was 3003 dollars 89 cents, of which Bartholomew Dandridge's estate was charged with 699 dollars 6 cents, leaving 2304 dollars 83 cents to be paid by the legatees of Langborne. And the debt due Elizabeth A. A. Booth was the same in all respects with that of Abraham A. Green.

The decree of the Court overruled in terms the exceptions filed by the defendants to the report of 1828, and adopting the statement XX, decreed in favour of the respective plaintiffs against Bartholomew Dandridge's administrator, for the sums above mentioned, as applied to their respective debts in statement XX. The Court also decreed in favour of the respective plaintiffs, against each of the legatees of Langborne, jr., separately for his proportion of the debt due to each plaintiff according to said statement, holding Burwell Bassett as the husband of Mrs. Bassett, liable for one fourth of the amount for which the estate of William Langborne was subjected. And the decree required Ambler's administrator, Abraham A. Green and E. A. A. Booth to execute bonds to indemnify the defendants against the claim of the personal representative of the party under whom they claimed. From this decree the legatees and devisees of William Langborne applied to this Court for an appeal, which was allowed.

The case was elaborately argued by Morson and Southall for the appellants, by Griawold and R. T. Daniel for Bassett, and by Harrison and Robinson for the other appellees, but the reporter was absent during a part of the argument, and therefore cannot give it.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that the amount and validity of the claim of Gill Armstead's legatees against *the estate of William Armstead deceased, were ascertained and adjudged by the decree of the Chancery court of the 1st of June 1816. That although the said decree was reversed

by the decree of this Court, pronounced on the 11th of December 1821, for formal errors, yet the mode of settling the accounts between said William Armstead and the estate of Gill Armstead was directly passed upon by the Court of appeals, and so much of the decree of the 1st June 1816, as ascertained the amount of the debt and adjudged it to be due by William Armstead's estate, was substantially affirmed, and the Court of chancery was instructed to enter a decree according to the principles so settled by the decree of the Court of appeals; in pursuance whereof the said Chancery court did, on the 18th July 1822, enter up a decree for the amount of the debt so ascertained to be due from William Armstead's estate to the legatees of Gill Armstead.

The Court is further of opinion, that said decrees did in effect adjudge and establish that as William Dandridge, who intermarried with the only daughter of William Armstead, being best acquainted with, and having laboriously attended to the taking of the accounts, being de facto administrator of William Armstead, had possessed himself of the assets and credits of the estate, the payment of the debt so ascertained and established against William Armstead's estate must ultimately fall on said Dandridge. The Court is therefore of opinion, that said decrees taken in connection with the decree of the Court of appeals of the 16th February 1836, reversing a decree of the Chancery court pronounced on the 3d of August 1829, dismissing the bill as to the representatives of Bartholomew Dandridge and William Langborne, conclusively establish against said William Dandridge and all his representatives the indebtedness of William Armstead's estate

to the legatees of Gill Armstead; that they had a right to follow *the assets in William Dandridge's hands; that a sufficiency of such assets had come to his hands, and that his representatives, who have received his assets, are accountable to said legatees for the assets so received.

And the Court, without deciding what would be the effect in all cases of a judgment against an administrator de bonis non in establishing a debt against the estate so as to conclude a former executor or administrator, and thereby subject him to a devastavit, is of opinion, that under the circumstances disclosed in this case, the decree pronounced against Bartholomew Dandridge, administrator de bonis non of William Dandridge deceased, on the 18th of July 1822, in pursuance of the decree of the Court of appeals of the 11th December 1821, substantially affirming the decree of the 1st June 1816, should be treated and held as conclusive upon the said William Langborne, the prior executor of said William Dandridge deceased, upon the question of the indebtedness of William Armstead's estate, the right to follow his assets in the hands of William Dandridge, the receipt of sufficient assets by William Dandridge for the payment thereof, and the liability of

his estate for the amount: It sufficiently appearing that said claim was controverted by said William Dandridge in his lifetime, who, according to the decree of the Court of appeals, was best acquainted with and laboriously attended to the taking of the accounts; and it furthermore appearing that after the death of said William Dandridge, the suit was regularly revived against Susanna Dorrington and David Dorrington her husband, the said Susanna having qualified as executrix of William Dandridge, and against John Bassett and William Langborne who were named as executors; that the said Dorrington and wife filed their answer making full defence, and that after the order of the County court of June 3d, 1805, treated by the Court of appeals by the decree of the 16th February 1836, as a

291 revocation of her authority *as executrix, the said William Langborne qualified as executor, and thereafter filed his answer controverting the justness of the claim; that exceptions were taken to the report of the commissioners, and the case matured for a decision on the merits during his lifetime. Under such a state of facts where the claim was controverted by the party sought to be charged in his lifetime, the suit revived against his executor who made a vigorous and full defence, and the case was ready for a decision on the merits when he died, and the cause was revived against the administrator de bonis non, against whom the decree was pronounced, there can be no hazard of injustice to the executor in treating the decree against the administrator de bonis non, as conclusively establishing the debt against the estate, both as regards the administrator de bonis non and the previous executor; and Langborne is properly responsible for the assets he paid over to the legatees of William Dandridge to the prejudice of Gill Armstead's legatees who were creditors of the estate as ascertained and adjudged by the decrees hereinbefore referred to.

The Court is further of opinion, that as it appears said William Langborne, executor of William Dandridge, paid over to his legatees the assets, with full notice of said claim, and after the suit to assert and establish the same against the estate of his testator, had been duly revived against him; and as the decree establishing said claim is, under the circumstances aforesaid, conclusive as it respects him, in establishing the validity of the debt against his testator's estate, such payment constituted a devastavit, and the liability arising from such devastavit resting on him at his death, in equity and by virtue of the official bond, created a debt which his representative was bound to discharge before making distribution of his estate; to be credited, however, by the amount of assets he retained in his hands, and which were

292 afterwards paid over in invitum, by the *decree of the Chancery court to Bartholomew Dandridge, the administrator de bonis non.

The Court is further of opinion, that as the legatees of said Gill Armstead claimed by force of the same decrees ascertaining the rights of all, and having a common interest, are seeking satisfaction out of a common fund, it was proper to unite in one suit to get the benefit of the former decrees in their favour; and the bill filed is not liable to the objection of being multifarious.

The Court is further of opinion, that there is nothing to distinguish the case of E. A. Booth from that of the other claimants. She was a party in whose favour the decree of 1st of June 1816, was pronounced, which as to her right to recover, was substantially affirmed by the decree of the Court of appeals of the 11th of December 1821. And though by the decree of the 18th of July 1822, there was an omission to enter a decree in her favour in consequence of the suggestion of her intermarriage with — Booth, yet, by the principles of that decree, purporting to be entered in conformity with the decree of the Court of appeals, her right to recover, which was a joint and common one with the other legatees, was in effect established; and the decree for her proportion was merely suspended to bring in a formal party in whose name the same could be entered; and the suit never having abated as to her, and she having survived her husband, she stands in the same position with the other claimants, with a decree establishing their rights jointly, and entitled equally with them to carry it into effect.

And the Court is further of opinion, that as the decree of the 1st June 1816, was suspended by the appeal, and no definitive decree establishing the debt was rendered until the decree of the Chancery court of the 18th July 1822, was entered in conformity with the instructions contained in the decree of the Court of appeals of the 11th December 1821; and as the claimants

293 *had no right to proceed against the representatives of William Langborne for his devastavit until their debt was established against the estate of said William Dandridge, their bill filed in February 1826, against the representative of said Langborne and the representatives and legatees of said William Dandridge, to get the benefit of said decrees, and charge the estate of said Langborne for his devastavit, was not barred by any statute limiting actions against fiduciaries; nor was there any such delay as to require a Court of equity to refuse relief upon the ground of laches.

The Court is further of opinion, that as it appears that Burwell Bassett, the representative of William Langborne the elder and of William Langborne, jr., had passed over the assets of said estates before he had notice of the claim now in controversy, as he alleges in his answer, to the proper distributees and legatees of said Langbornes, it was proper to throw the burthen on the distributees and legatees instead of the per-

sonal representative; they having the fund out of which the claim should be satisfied, and which in any event, must be held as being ultimately subject to the claim sought to be enforced, unless the same can be otherwise satisfied.

The Court is further of opinion, that as it respects the security of Bartholomew Dandridge, administrator de bonis non, the cause of action arose against him from the rendition of the decree of the 18th July 1822; as it would have been competent for the claimants, upon the return of nulla bona on said decree, to have proceeded against said administrator de bonis non and his securities in his official bond for his devastavit; and no proceeding having been commenced against such securities until they were made defendants by the amended bill filed on the 14th May 1838,

the act of March 8th, 1826, relied on 294 by the security Thomas H. *Terrill in his answer, barred a recovery against the securities.

The Court is further of opinion, that the statement XX referred to in the decree now appealed from, correctly ascertained the sums for which the representatives of B. Dandridge's estate, and the representatives of Langborne's estate were respectively responsible; that all exceptions inconsistent with said special statement XX were properly overruled, and all exceptions consistent therewith properly sustained; and said statement so confirmed and constituting a part of said decree, definitively ascertains the amount for which Bartholomew Dandridge's estate is liable, and for which a decree was properly rendered in favour of the claimants respectively, against Philemon Jones, committee and administrator of his estate; and the same also definitively ascertains the amount for which the estate of William Langborne is ultimately responsible and may be compelled to pay eventually unless otherwise discharged.

The Court is further of opinion, that as Mrs. B. Bassett was, under the will of William Langborne, jr., a legatee for life, and it appears that before any recovery she had departed this life, and the part held by her for life was passed over to those entitled in remainder, the surviving husband having no assets of his wife, could not be held responsible on account of such life estate which had previously terminated; and the assets of William Langborne which the claimants were entitled to follow had passed into the hands of those entitled thereto in remainder; and the decree subjecting said B. Bassett, on account of said life estate, to a portion of the amount for which the estate of Langborne was responsible was erroneous.

And the Court is further of opinion, that although as a general rule a creditor of an estate is not bound to look beyond the personal representative, who is immediately 295 *responsible to him, yet under peculiar circumstances it is proper

that a Court of equity should throw the burthen upon those ultimately liable, and that more especially when by the acts and conduct of the creditor the party who might in strictness have been primarily liable, may have been misled and induced to believe he was not looked to as responsible. In this case it is manifest that the representatives of Langborne have received no part of William Dandridge's estate, the assets of which should properly have been applied to the payment of this claim. The same have all been duly accounted for and passed over by Langborne and his representative to the legatees and administrator de bonis non of William Dandridge. On the death of Langborne the claimants revived their suit against the administrator de bonis non of William Dandridge, and dropped the representatives of Langborne from the cause; thus indicating an intention to look to and pursue the estate of William Dandridge. In the meantime the representative of Langborne turned over to the administrator de bonis non of William Dandridge, in obedience to a decree of Court, the assets of William Dandridge remaining in the hands of Langborne at his death; and thereafter without any notice, as he alleges in his answer, of the claim now sought to be enforced, he proceeded to distribute the estate of Langborne in the mode disclosed by the record. The claimants, by their bill of 1826, still looking to the estate of Dandridge for satisfaction, made the legatees and representative of that estate parties; and the Court having them before it, was bound in the exercise of a sound discretion under the circumstances aforesaid, to have required the claimants to proceed in the first place against the legatees of William Dandridge, holding Langborne's estate ultimately responsible for the sum so as aforesaid ascer-

296 tained to be a proper charge against it, or for so much thereof *as could not be made by proceeding against the legatees of William Dandridge; and it was error to dismiss the bill as against the representatives and legatees of William Dandridge, or any of them, and to decree against the representatives of Langborne until such effort had been made to procure satisfaction out of the assets of William Dandridge's estate in the hands of his representatives.

It is therefore ordered and decreed, that said decree in the particulars in which it is herein declared to be erroneous, be reversed with costs; and that the same, so far as it conforms to the principles above declared, and is not herein declared to be erroneous, be and the same is hereby affirmed. And the cause is remanded with instructions to require the plaintiffs in the Court below to revive, if necessary, against the legatees, and also the devisees, if so advised, of William Dandridge, and for all proper accounts, in order to a final decree according to the principles above declared, which is ordered to be certified.

his estate for the amount: It sufficiently appearing that said claim was controverted by said William Dandridge in his lifetime, who, according to the decree of the Court of appeals, was best acquainted with and laboriously attended to the taking of the accounts; and it furthermore appearing that after the death of said William Dandridge, the suit was regularly revived against Susanna Dorrington and David Dorrington her husband, the said Susanna having qualified as executrix of William Dandridge, and against John Bassett and William Langborne who were named as executors; that the said Dorrington and wife filed their answer making full defence, and that after the order of the County court of June 3d, 1805, treated by the Court of appeals by the decree of the 16th February 1836, as a
 291 revocation of her authority *as executrix, the said William Langborne qualified as executor, and thereafter filed his answer controverting the justness of the claim; that exceptions were taken to the report of the commissioners, and the case matured for a decision on the merits during his lifetime. Under such a state of facts where the claim was controverted by the party sought to be charged in his lifetime, the suit revived against his executor who made a vigorous and full defence, and the case was ready for a decision on the merits when he died, and the cause was revived against the administrator de bonis non, against whom the decree was pronounced, there can be no hazard of injustice to the executor in treating the decree against the administrator de bonis non, as conclusively establishing the debt against the estate, both as regards the administrator de bonis non and the previous executor; and Langborne is properly responsible for the assets he paid over to the legatees of William Dandridge to the prejudice of Gill Armstead's legatees who were creditors of the estate as ascertained and adjudged by the decrees hereinbefore referred to.

The Court is further of opinion, that as it appears said William Langborne, executor of William Dandridge, paid over to his legatees the assets, with full notice of said claim, and after the suit to assert and establish the same against the estate of his testator, had been duly revived against him; and as the decree establishing said claim is, under the circumstances aforesaid, conclusive as it respects him, in establishing the validity of the debt against his testator's estate, such payment constituted a devastavit, and the liability arising from such devastavit resting on him at his death, in equity and by virtue of the official bond, created a debt which his representative was bound to discharge before making distribution of his estate; to be credited, however, by the amount of assets he retained in his hands, and which were

afterwards paid over in invitum, by
 292 the *decree of the Chancery court to Bartholomew Dandridge, the administrator de bonis non.

The Court is further of opinion, that as the legatees of said Gill Armstead claimed by force of the same decrees ascertaining the rights of all, and having a common interest, are seeking satisfaction out of a common fund, it was proper to unite in one suit to get the benefit of the former decrees in their favour; and the bill filed is not liable to the objection of being multifarious.

The Court is further of opinion, that there is nothing to distinguish the case of E. A. Booth from that of the other claimants. She was a party in whose favour the decree of 1st of June 1816, was pronounced, which as to her right to recover, was substantially affirmed by the decree of the Court of appeals of the 11th of December 1821. And though by the decree of the 18th of July 1822, there was an omission to enter a decree in her favour in consequence of the suggestion of her intermarriage with — Booth, yet, by the principles of that decree, purporting to be entered in conformity with the decree of the Court of appeals, her right to recover, which was a joint and common one with the other legatees, was in effect established; and the decree for her proportion was merely suspended to bring in a formal party in whose name the same could be entered; and the suit never having abated as to her, and she having survived her husband, she stands in the same position with the other claimants, with a decree establishing their rights jointly, and entitled equally with them to carry it into effect.

And the Court is further of opinion, that as the decree of the 1st June 1816, was suspended by the appeal, and no definitive decree establishing the debt was rendered until the decree of the Chancery court of the 18th July 1822, was entered in conformity with the instructions contained in the decree of the Court of appeals of the 11th
 December 1821; and as the claimants

293 *had no right to proceed against the representatives of William Langborne for his devastavit until their debt was established against the estate of said William Dandridge, their bill filed in February 1826, against the representative of said Langborne and the representatives and legatees of said William Dandridge, to get the benefit of said decrees, and charge the estate of said Langborne for his devastavit, was not barred by any statute limiting actions against fiduciaries; nor was there any such delay as to require a Court of equity to refuse relief upon the ground of laches.

The Court is further of opinion, that as it appears that Burwell Bassett, the representative of William Langborne the elder and of William Langborne, jr., had passed over the assets of said estates before he had notice of the claim now in controversy, as he alleges in his answer, to the proper distributees and legatees of said Langbornes, it was proper to throw the burthen on the distributees and legatees instead of the per-

sonal representative; they having the fund out of which the claim should be satisfied, and which in any event, must be held as being ultimately subject to the claim sought to be enforced, unless the same can be otherwise satisfied.

The Court is further of opinion, that as it respects the security of Bartholomew Dandridge, administrator de bonis non, the cause of action arose against him from the rendition of the decree of the 18th July 1822; as it would have been competent for the claimants, upon the return of nulla bona on said decree, to have proceeded against said administrator de bonis non and his securities in his official bond for his devastavit; and no proceeding having been commenced against such securities until they were made defendants by the amended bill filed on the 14th May 1838, the act of March 8th, 1826, relied on 294 by the security Thomas H. *Terrill in his answer, barred a recovery against the securities.

The Court is further of opinion, that the statement XX referred to in the decree now appealed from, correctly ascertained the sums for which the representatives of B. Dandridge's estate, and the representatives of Langborne's estate were respectively responsible; that all exceptions inconsistent with said special statement XX were properly overruled, and all exceptions consistent therewith properly sustained; and said statement so confirmed and constituting a part of said decree, definitively ascertains the amount for which Bartholomew Dandridge's estate is liable, and for which a decree was properly rendered in favour of the claimants respectively, against Philemon Jones, committee and administrator of his estate; and the same also definitively ascertains the amount for which the estate of William Langborne is ultimately responsible and may be compelled to pay eventually unless otherwise discharged.

The Court is further of opinion, that as Mrs. B. Bassett was, under the will of William Langborne, jr., a legatee for life, and it appears that before any recovery she had departed this life, and the part held by her for life was passed over to those entitled in remainder, the surviving husband having no assets of his wife, could not be held responsible on account of such life estate which had previously terminated; and the assets of William Langborne which the claimants were entitled to follow had passed into the hands of those entitled thereto in remainder; and the decree subjecting said B. Bassett, on account of said life estate, to a portion of the amount for which the estate of Langborne was responsible was erroneous.

And the Court is further of opinion, that although as a general rule a creditor of an estate is not bound to look beyond the personal representative, who is immediately 295 *responsible to him, yet under peculiar circumstances it is proper

that a Court of equity should throw the burthen upon those ultimately liable, and that more especially when by the acts and conduct of the creditor the party who might in strictness have been primarily liable, may have been misled and induced to believe he was not looked to as responsible. In this case it is manifest that the representatives of Langborne have received no part of William Dandridge's estate, the assets of which should properly have been applied to the payment of this claim. The same have all been duly accounted for and passed over by Langborne and his representative to the legatees and administrator de bonis non of William Dandridge. On the death of Langborne the claimants revived their suit against the administrator de bonis non of William Dandridge, and dropped the representatives of Langborne from the cause; thus indicating an intention to look to and pursue the estate of William Dandridge. In the meantime the representative of Langborne turned over to the administrator de bonis non of William Dandridge, in obedience to a decree of Court, the assets of William Dandridge remaining in the hands of Langborne at his death; and thereafter without any notice, as he alleges in his answer, of the claim now sought to be enforced, he proceeded to distribute the estate of Langborne in the mode disclosed by the record. The claimants, by their bill of 1826, still looking to the estate of Dandridge for satisfaction, made the legatees and representative of that estate parties; and the Court having them before it, was bound in the exercise of a sound discretion under the circumstances aforesaid, to have required the claimants to proceed in the first place against the legatees of William Dandridge, holding Langborne's estate ultimately responsible for the sum so as aforesaid ascertained to be a proper charge against 296 it, or for so much thereof *as could

not be made by proceeding against the legatees of William Dandridge; and it was error to dismiss the bill as against the representatives and legatees of William Dandridge, or any of them, and to decree against the representatives of Langborne until such effort had been made to procure satisfaction out of the assets of William Dandridge's estate in the hands of his representatives.

It is therefore ordered and decreed, that said decree in the particulars in which it is herein declared to be erroneous, be reversed with costs; and that the same, so far as it conforms to the principles above declared, and is not herein declared to be erroneous, be and the same is hereby affirmed. And the cause is remanded with instructions to require the plaintiffs in the Court below to revive, if necessary, against the legatees, and also the devisees, if so advised, of William Dandridge, and for all proper accounts, in order to a final decree according to the principles above declared, which is ordered to be certified.

and inconsistent causes of action, upon two different policies of insurance, one actually issued, upon which premiums were not paid, the nonpayment being excused by the alleged insolvency of the company; the other, which ought to have been issued, because the first had been surrendered and receipted in full to the company, is bad on demurrer because multifarious. *Universal Life Ins. Co. v. Devore*, 88 Va. 267, 2 S. E. Rep. 433.

Bill to Enforce Judgment against Administrator, to Sell Land, Establish a Devastavit, Convene Heirs and Creditors, and Give Various Other Specified Relief.—A bill which seeks to enforce payment of a small judgment for costs against an administrator *d. b. n.* out of funds in his hands; to sell the real estate of the decedent to pay such judgment; to establish a devastavit against the administrator, and surcharge and falsify his accounts; to convene the heirs and creditors of said administrator, now deceased; to settle the accounts of his administrator, and sell his real estate; to convene the heirs, settle the accounts of the administrator, and distribute the estate of the third decedent; to convene the devisees, settle the accounts of the executor, and distribute the estate of a fourth decedent,—is multifarious and inequitable. *Crickard v. Crouch*, 41 W. Va. 503, 23 S. E. Rep. 727.

Bill to Establish a Trust, Recover Rents, Profits, and Purchase Money, and Assess Dower.—A bill to establish a trust in certain lands, and to recover rents and profits, and to assess dower, and to recover purchase money alleged to be due, is held in *Bailey v. Calfee* (W. Va. 1901), 30 S. E. Rep. 642, to be multifarious.

Asking Specific Performance, Damages for False Representations, for Receiver, and Other Specified Relief.—A bill is filed (1) against one defendant, for specific performance of a contract; (2) in default of this, to obtain a decree against other defendants, for damages for breach of warranty; (3) against some of the defendants last referred to, for damages for false representations in regard to the title; (4) against one of the defendants last referred to, for breach of his promises to save plaintiff harmless in case the defendant referred to in first clause refused specific performance; (5) for a receiver; (6) for a decree against one of the defendants for payment of his subscription to the stock of the defendant company; (7) to have the assets of the company administered for the benefit of its creditors. To say nothing of the demand for damages and for administration of the assets, as not constituting good grounds for a suit in equity, there remained several other demands against several other defendants which cannot be properly joined in the same suit. The bill is multifarious, and was rightly dismissed on demurrer. *Wells v. Sewell's Point Guano Co.*, 89 Va. 708, 17 S. E. Rep. 2.

Bill against Grantor of One Heir, and Other Heirs, to Set Aside Deed, and Establish Resulting Trust as an Alternative.—And a chancery suit, brought by one heir of a decedent against the person to whom heirs of the decedent had voluntarily conveyed all his real estate, and the other heirs of the decedent, to set aside the deed as fraudulent and void because procured by undue influence, and because the grantor was *non compos mentis*, and, if this should not be proven, then to set up a resulting trust to a portion of this real estate, because the plaintiff had paid a certain amount of the purchase money when the land was conveyed to the decedent, is multifarious. *Shaffer v. Fetty*, 30 W. Va. 248, 4 S. E. Rep. 278.

Bill by Heirs—Settlement of Decedent's Partnership Affairs, Appointment of Receiver, Accounts, etc.—In *Porter v. Robinson* (Va.), 22 S. E. Rep. 843, a bill by heirs alleged their heirship; partnership of their decedent in a firm; sale of all the assets of the firm to a corporation in consideration that the vendee paid all the debts of the firm; completion of the sale by themselves, as heirs, and the surviving partners; sale by the vendee of the same property to a second corporation, in which the purchase price was partly secured by bonds, for the payment of which a vendor's lien was reserved, and subsequently cancelled by the president of the first corporation without authority; execution of a trust deed of all the property by the last vendee to secure a fraudulent issue of bonds; the assumption and nonpayment of the debts of the partnership by the first vendee; stock taken by plaintiffs in the second corporation on representations of the president of the first corporation, also a promoter of the second corporation that the lands would be sold to the latter company for \$300,000, whereas they were sold at \$330,000. The bill asked for the appointment of a receiver, and settlement of the accounts of the partnership; cancellation of the stock taken in the second corporation; a decree against it and its promoters for the full value of the stock, and against the president of the first corporation for the \$30,000 profits made by him for the sale of the land; for the restoration of the vendor's lien, and the cancellation of the trust deed. It was held, that the bill was multifarious.

PARTIES NOT CONNECTED IN INTEREST.

Charges against Officers of Company, Individual Officers, Groups of Officers, and President and Directors.—A bill which charges various acts of maladministration against the officers of a company, some of which are attributable to individual officers, some to different groups of officers, and some to the president and directors as a whole, would seem to present a combination of causes of action so hopelessly diverse as to be incapable of adjustment in one suit. *Brown v. Bedford City L. & I. Co.*, 91 Va. 31, 20 S. E. Rep. 968.

II. FORMS OF MULTIFARIOUSNESS.

1. IN GENERAL.—Multifariousness may appear in two general forms. It may be a joinder of claims of such different characters, that the court will not permit them to be litigated in one record; or it may be where a party is brought as a defendant upon a record, with a large portion of which and of the case made by which he has no connection whatever. *Brown v. Buckner*, 86 Va. 612, 10 S. E. Rep. 882; *Washington City Sav. Bank v. Thornton*, 83 Va. 157, 2 S. E. Rep. 193; *Oney v. Ferguson*, 41 W. Va. 563, 23 S. E. Rep. 710.

2. AS TO MATTER.—Thus, where debts are assigned to a party who sues for an accounting between the assignor and his several debtors, plea by and of the latter, that the former had made other and conflicting assignments of the same debts, is bad for multifariousness and uncertainty. *Porter v. Young*, 85 Va. 49, 6 S. E. Rep. 803.

But it is not multifarious for a bill to seek to subject a judgment debtor's interest in lands, chattels, etc., to the payment of plaintiff's debt. *Thomas v. Sellman*, 87 Va. 683, 18 S. E. Rep. 146. For illustrations, see cases throughout this note.

3. AS TO PARTIES.—In *Carey v. Coffee Stemming Mach. Co.*, 1 Va. Dec. 863, 20 S. E. Rep. 778, it is held that a bill by a number of stockholders against a

corporation, alleging fraud in obtaining subscriptions, etc., is not multifarious because each complaint sets forth a different claim. See *Hutchison v. Mershon*, 89 Va. 624, 16 S. E. Rep. 874; *Rader v. Bristol Land Co.*, 94 Va. 766, 27 S. E. Rep. 590.

III. TERMINOLOGY.

The word "multifariousness" is more generally applied to chancery proceedings, although it is sometimes used as applicable to actions at law. Thus, in *Va. F. & M. Ins. Co. v. Saunders*, 86 Va. 909, 11 S. E. Rep. 794, the term is used in an action at law in discussing the rule against duplicity.

The word most applicable to actions at law is "misjoinder," though this word is also used to designate an error of form in equitable proceedings. Thus, the court in *Brown v. Buckner*, 86 Va. 615, 10 S. E. Rep. 882, in the course of its opinion remarks, that, "Although the books speak generally of demurrers for multifariousness, such demurrers may be divided into two kinds. (1) The objection raised to a bill, which though termed 'multifariousness,' is, in fact, properly speaking, a misjoinder of causes of suit; that is to say, the cases or claims asserted in the bill are of so different a character that the court will not permit them to be litigated in one record. Story, Eq. Pl. sec. 271, 284. It may be that the plaintiffs and the defendants are parties to the whole transactions which form the subject of the suit, but nevertheless those transactions may be so dissimilar that the court will not permit them to be joined together, but will require distinct records. (2) But what is more familiarly understood by 'multifariousness,' as applied to a bill, is where a party is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatsoever. * * * And the objection for misjoinder does not apply when all the parties plaintiff have an interest in the suit, although it is not a coextensive interest."

IV. REASON FOR RULE.

Convenience—Expense.—Generally, it is held that the reason for the rule which governs a court in sustaining or overruling a demurrer, which sets out multifariousness as an objection, is the question of convenience to all parties concerned.

In *Alexander v. Alexander*, 85 Va. 353, 7 S. E. Rep. 335, the court says: "The cases upon the subject are extremely various, and the court in deciding them, seems to have considered what was convenient under the particular circumstances, rather than to have laid down any absolute rule." After setting forth some of the cardinal rules for testing whether in a particular case multifariousness exists, it seems that the reason assigned why in a given instance it would be multifarious, is, that it would render the proceedings oppressive because it would tend to load each defendant with an unnecessary burden of costs; thus, giving an additional reason for objection to the fault.

Discussing the question in *County School Board v. Parish*, 92 Va. 156, 23 S. E. Rep. 221, it was held that a bill would not be declared multifarious if it proposed to accomplish the end in view in a manner and by a proceeding convenient to all concerned, unless the course so pursued was so injurious to one or more of the parties as to render it inequitable to accomplish the general convenience in that manner. See *Stande v. Keck*, 92 Va. 544, 24 S. E. Rep. 227; *Dillard v. Dillard*, 97 Va. 484, 34 S. E. Rep. 60.

V. APPLIES TO WHAT PLEADINGS.

Bill—Answer—Plea.—The fault of multifariousness may exist either in the bill, answer or plea. If the plea contains distinct points it will be bad. Thus, a plea is bad for multifariousness that sets up the statute of limitations, and also alleges that the plaintiff who sued as the personal representative of a decedent was not such representative. See *Barrett v. McAllister*, 85 W. Va. 103, 12 S. E. Rep. 1106; *Miller v. Miller*, 93 Va. 196, 23 S. E. Rep. 232; *Porter v. Young*, 85 Va. 49, 6 S. E. Rep. 808. As to the bill, see cases cited throughout the note.

VI. MULTIFARIOUSNESS AS DETERMINED BY PRAYER FOR RELIEF.

1. **IN GENERAL.**—It is said by the court in *Washington, etc., Bk. v. Thornton*, 83 Va. 157, 2 S. E. Rep. 193, that "whether or not a bill is multifarious depends, it is said, upon its allegations, and not upon its prayer." See *Nunnally v. Strauss*, 94 Va. 255, 26 S. E. Rep. 580.

2. **ALTERNATIVE PRAYER.**—A bill is not necessarily bad by reason of multifariousness because it contains an alternative prayer for relief. But in order, to avoid the fault they should, in general, be consistent. Still a bill in chancery is not multifarious, and therefore demurrable, simply because it contains a prayer for alternate relief, inconsistent with its prayer for specific relief. *Korne v. Korne*, 80 W. Va. 1, 8 S. E. Rep. 17. See *Garrison v. Hall*, 75 Va. 150; *Carskadon v. Minke*, 26 W. Va. 729.

And where the principal object of the bill is to have the profits of a lease collected and applied to pay certain decrees against complainant and insolvent defendant, a prayer that accounts be taken to ascertain the right of the parties under the lease, and the profits applied to pay the decrees and the balance according to the rights of the parties, does not make the bill multifarious, but the decree creditors should be made parties. *Yates v. Law*, 86 Va. 117, 9 S. E. Rep. 508.

Also, it is permissible for a bill to be framed in a double aspect, but the alternative case stated must be the foundation for precisely the same relief. Thus, stockholders who come into a court of equity and seek to have their contracts of subscription rescinded on the ground that they were fraudulently obtained, cannot in the same bill complain of the malfeasance and misfeasance of the corporate directors in the management of the corporate property, and seek relief which rests upon their relation as stockholders of the defendant company. Such relief must be considered a distinct act of affirmance and ratification of the very transaction which they, in another part of their bill, sought to repudiate. *Brown v. Bedford City L. & I. Co.*, 91 Va. 31, 20 S. E. Rep. 968.

3. **IMPOSSIBLE OR IMPROPER RELIEF ASKED.**—Moreover, a bill is not rendered multifarious because it contains averments and prays relief respecting them which could not in any event be granted.

Thus, in *Snaveley v. Harkrader*, 29 Gratt. 112, infants by their next friend filed their bill against their guardian, first to surcharge and falsify the settled account of their guardian, and to have him removed; and second, to have a sale of their lands. The guardian demurred to the bill on the ground that it was multifarious. It was held that as the court could not sell the infants' land on a bill filed by them, and no relief on that part of the bill could

be given, the court would consider the case as if that part of the bill was not in it; and the demurrer was properly overruled.

VII. AT WHAT STAGE OBJECTION RAISED.

In Answer.—In Virginia the demurrer may be embodied in the answer. *Dunn v. Dunn*, 26 Gratt. 291.

On Motion to Dissolve Injunction.—But if a bill, which is in part a bill of injunction, be multifarious, that objection cannot be made on a motion to dissolve the injunction. It must be made at the final hearing. *Shirley v. Long*, 6 Rand. 764; *Beall v. Shaul*, 18 W. Va. 268.

VIII. METHOD OF RAISING OBJECTION.

Demurrer.—In Virginia and West Virginia the objection that pleadings in chancery are multifarious is usually raised by demurrer. *Dunn v. Dunn*, 26 Gratt. 291; *Wells v. Sewell's, etc., Co.*, 89 Va. 708, 17 S. E. Rep. 2.

And a demurrer in the form prescribed by the statute, and assigning no grounds, inserted in the answer, is sufficient. *Dunn v. Dunn*, 26 Gratt. 291; *Matthews v. Jenkins*, 80 Va. 468; *Cook v. Dorsey*, 88 W. Va. 196, 18 S. E. Rep. 468.

And the demurrer may not only be general but, as stated above, may be embodied in the answer. *Dunn v. Dunn*, 26 Gratt. 291.

IX. BY WHOM RAISED.

Party Prejudiced or Court Sua Sponte.—It is well settled, that the defence of multifariousness may be made by demurrer by the party prejudiced, or by the court at the hearing *sua sponte*. But where a defendant is liable for each one of the amounts decreed in a suit, he cannot object on the ground of multifariousness. *Wells v. Sewell's, etc., Co.*, 89 Va. 711, 17 S. E. Rep. 2; *Dunn v. Dunn*, 26 Gratt. 291.

X. WAIVER.

Though a bill be multifarious, and but vaguely state the matter on which relief is sought, consent by the parties, to an interlocutory decree that the cause be referred to a commissioner, to audit, state and settle an account of the amount due each of the plaintiffs, is a waiver of any objection to such irregularity; and a demurrer thereafter, for such cause, should be disallowed. *Rittenhouse v. Harman*, 7 W. Va. 380.

XI. EFFECT AND REMEDY.

1. **IN GENERAL.**—It is difficult to apply the rule against multifariousness in practice. The instances are numerous and inharmonious. A suit is not thrown out of court for this fault except in a plain case. *Oney v. Ferguson*, 41 W. Va. 568, 23 S. E. Rep. 710. An amendment may be allowed. See *Shaffer v. Fetty*, 30 W. Va. 248, 4 S. E. Rep. 278.

2. **AMENDMENT.**—But in West Virginia an amendment is not allowed as a matter of course. *Shaffer v. Fetty*, 30 W. Va. 248, 4 S. E. Rep. 278.

3. **DISMISSAL.**—When there is a dismissal it should as a rule, be without prejudice. *Shaffer v. Fetty*, 30 W. Va. 248, 4 S. E. Rep. 278.

297 *Shiflett &c. v. The Orange Humane Society.

January Term, 1851, Richmond.

(Absent CABELL, P., and BROOKE, J.)

Action on Bond—Plea of Failure of Consideration—When Inadmissible under Statute of Equitable Defences.*—In an action on a bond given for the pur-

*The proposition laid down in the principal case is

chase money of land, the act of 1831 does not authorize a plea of failure of consideration upon equitable grounds which would require a rescission of the contract out of which the bond originated, and a reinvestment of the obligee with the interest in the land alleged to have been sold to the obligor.

This was an action of debt brought in 1845 in the Circuit court of Albemarle county, by the Orange Humane Society, a chartered institution, against Isaac Shiflett and George Martin, upon a bond executed by the latter to the former on the 29th of March 1839, in the penalty of 2077 dollars 18 cents, with condition to pay the sum of 1038 dollars 89 cents.

The defendants appeared and pleaded payment, on which issue was joined. They also offered a special plea under the act of 1831. This plea was very informal, but in substance it stated, That in 1787 one Monroe of the county of Orange bequeathed his estate, real and personal, for the purpose of educating poor children. That William Bell, his executor, sold the estate, and that Richard Bruce, of Albemarle county, purchased to the amount of somewhat upwards of £100. Virginia currency. That in 1789 Bruce executed a deed of trust to secure this sum upon two tracts of land, one of three hundred, and the other of two hundred, acres. That the tract of three hundred acres was sold under this deed for £50., and purchased by Watson, who paid the amount, principal and interest, to *Bell prior to 1797; and he and those claiming under him, had ever since held the land. That one moiety of the two hundred acre tract was held by Nelson Barksdale by a prior and better title; and of the remainder the defendant Shiflett was in possession of fifty acres as one of the heirs at law of Bruce. And that Bruce had before his death satisfied the trust in full as to this tract of two hundred acres.

They further stated that the Orange Humane Society had succeeded to the rights and liabilities of William Bell as executor of Monroe. That in 1839 this society advertised that they would close the deed of 1789 (Bruce's deed of trust), by a sale at Orange courthouse on the 25th of March 1839. That the defendant Shiflett attended the sale with the sole view of saving his land; and was induced by the opinions and representations of the president and directors of the society to bind himself to pay off their claim under the old trust. That at the sale on the 25th of March 1839, the two tracts of land were sold, and were purchased by the defendant Shiflett, for the sum of 1038 dollars 58 cents; being the amount of the principal and interest due under the deed of 1789, without any credits whatever, for which he had executed his bond with the defendant Martin as his

reaffirmed in *Mangus v. McClelland*, 98 Va. 789, 23 S. E. Rep. 364. See also, the principal case cited in *Watkins v. Hopkins*, 18 Gratt. 745, and *foot-note*, and distinguished in *Strickland v. Graybill*, 97 Va. 604, 24 S. E. Rep. 475. See also, 1 Va. Law Reg. 543, 544.

surety. That the defendant Shiflett had then no conception of the true nature of the case: and that the defendants were totally and wholly deceived by the said Orange Humane Society, and especially by Reynolds Chapman and James Barbour, members thereof, in whom the defendants had the most implicit confidence; and who must have been themselves deceived as to the nature of the claim. And that defendants believe that it was known to some of the members of said society when the sale was made, that a large portion or the whole of the debt had been paid. They therefore say that there has been a total failure of the consideration of the said writing obligatory, &c.

299 *The Court rejected the plea and the defendants excepted: And they then withdrew the plea of payment, and there was a judgment for the plaintiff. Whereupon the defendants applied to this Court for a supersedeas, which was awarded.

Stanard and Bouldin, for the appellants.
Patton, for the appellee.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that if the plaintiff in error was entitled to any relief on account of the matters averred in his plea, such relief could only be afforded in a Court of equity, where upon a rescission of the contract the defendant in error could be reinvested with the interest alleged to have been sold to the plaintiff in error: It was, therefore, not competent to set up such matter in defence to the action at law brought to recover the purchase money agreed to be paid on such a contract touching the realty, by a plea under the statute in the nature of a plea of set-off; and the rejection of the plea does not preclude the party from applying to a Court of equity for such relief as he may shew himself entitled to on account of the matters alleged in the plea. It therefore seems to the Court here, that there is no error in the judgment of the Circuit court rejecting the plea. It is therefore considered that the same be affirmed, with costs.

300 *Snead v. Coleman & Wife.*

April Term, 1851, Richmond.

(Absent CABELL, P.)

1. **Executors and Administrators—Judgments†—Case at Bar—Quære.**—S the executor of C executes a note to M for a debt of his testator, which he signs S ex'or of C. On this note M brings an action against S and declares against him as executor of C; but the count is in the *debit* and *debit*, and the breach is laid in his failure to pay. Upon a judg-

*For monographic note on Amendments, see end of case.

†Executors and Administrators—Judgments against. —See monographic note on "Executors and Administrators."

ment by default; **QUÆRE**, If it should be against S as executor or *de bonis propriis*.

2. **Pleading and Practice—Clerical Errors—How Amended.**†—If it is error to enter a judgment *de bonis propriis*, it is a clerical error to be amended upon motion to the Court; and is not a ground for an appeal.

This was an action of debt in the Circuit court of Henrico county, by Hawes Coleman and Mary G. his wife against Jesse Snead. The language of the writ was, "We command you that you take Jesse Snead executor of John G. Crouch deceased," &c. And the endorsement on the writ was, "An action of debt on a promissory note, and no bail required."

The declaration was in the name of Hawes Coleman and Mary G. his wife, who before her intermarriage with said Coleman, was Mary G. Crouch, and complained of Jesse Snead as executor of John G. Crouch deceased, defendant, in custody, &c., of a plea that the said defendant render to the said plaintiffs the sum of 617 dollars 16 cents with interest thereon from the 1st day of January 1840, till paid, which to the said plaintiffs he owes, and from them unjustly detains. For this, that the said defendant heretofore, &c., made his certain promissory note, his name being thereto subscribed with his own proper hand, by the name and style of Jesse Snead executor of John G. Crouch deceased, which, 301 &c., whereby *the said defendant on, &c., promised as executor of John G. Crouch deceased, to pay, &c. Wherefore and by force, &c., right of action hath accrued to the said plaintiffs to demand and have of the said defendant the said sum, &c.

The action was founded on a note, of which the following is a copy:

"\$617 16. On demand, with interest from the 1st day of January 1840, I promise, as ex'or of John G. Crouch, to pay to Mary G. Crouch six hundred and seventeen dollars and sixteen cents, being a balance due her on settlement of her claims against Thomas, Richard and John G. Crouch, which she held jointly against them, and is now surrendered on each paying to her their proportions. Witness my hand this 22d day of January 1840.

Jesse Snead,
ex'or of John G. Crouch dec'd."

Snead did not enter his appearance to the action, so that there was a judgment by default; and the clerk in entering up the judgment entered it against him personally, and not as executor of Crouch. Whereupon Snead applied to this Court for a supersedeas, which was allowed.

The Attorney General and Cabell, for the appellant, insisted,

1st. That the action was against Snead as executor, and therefore that it was error to enter a judgment against him personally. *Eppes v. Dudley*, 5 Rand. 437.

†Amendment of Record.—See principal case cited in foot-note to *Price v. Com.*, 33 Gratt. 819.

2d. That the note was executed by Snead as executor, and that the action should have been against him in that character. 2 Lomax Ex'ors 272; Dawse v. Coxe, 11 Eng. C. L. R. 12; Ashby v. Ashby, 14 Eng. C. L. R. 77; S. C. 17 Id. 235; Powell v. Graham's ex'or, 2 Eng. C. L. R. 223; Kayser v. Disher, 9 Leigh 357.

302 *3d. That the declaration did not set out a consideration which would sustain a personal judgment. Rann v. Hughes, 7 T. R. 350, in note; Taliaferro v. Robb, 2 Call 258.

John Thompson, jr., for the appellees, submitted the case.

MONCURE, J. The appellant complains that the judgment of the Court below was erroneously entered against him in his own right; instead of being entered against him as executor of John G. Crouch. I think the judgment was rightly entered, *de bonis propriis*. An executor may bind himself personally to pay the debt of his testator. But to make him liable the common law requires that the promise shall be on sufficient consideration; and the statute requires that it shall be in writing. The promise in this case is in writing, and the requisition of the statute is therefore satisfied. Was there a sufficient consideration to support the promise, according to the requisition of the common law? Under our statute an action of debt may be brought upon a note in writing; and in such action it need not be averred or proved that there was any consideration for the note. Peasley v. Boatwright, 2 Leigh 195. The note itself imports consideration, as does a bond; the only difference being, that in the case of a bond the consideration cannot be enquired into, but in the case of a note it may. The defendant in this case, therefore, might have defended himself on the ground of want of consideration; and, if he had sustained such a defence by proof, would have defeated the action. Having made no such defence, the judgment was rightly rendered against him for the amount of the note. Assets in the hands of the executor, constitute a sufficient consideration for a promise by him to pay the debt of his testator. So

303 does forbearance to sue, &c. In an *action against an executor personally on a promissory note given by him for a debt of his testator, the defendant may shew an insufficiency of assets to pay the debt; and if the plaintiff cannot shew that there was other sufficient consideration for the promise, he must fail in his action: In this way the defendant can sustain no injury. If there be any other consideration for the promise than a sufficiency of assets, then it is consistent alike with justice and the intention of the parties that the executor should be personally liable for the debt. If the consideration depends upon the sufficiency of assets, the executor has the same defence in an action against him personally as he would have in an action against him as executor.

In this case, there is not only a promise

in writing by the executor; which in an action of debt upon it imports a sufficient consideration; and there is not only an absence of any evidence of want of consideration, which is necessary to defeat such an action on such a promise; but the note itself furnishes express evidence of sufficient consideration. It furnishes evidence of a sufficiency of assets. It contains a promise to pay "on demand." In the language of Dallas, C. J., in Childs v. Monins, &c., 6 Eng. C. L. R. 201, suppose a demand had been made immediately; does not the executor by subjecting himself to such a demand admit he has assets to satisfy it. If he meant to limit his liability why did he not add to the words as executor, the words out of the estate of John G. Crouch? It also furnishes evidence of forbearance. It contains a promise to pay interest on the debt; which in the language of the same Judge in the same case, "necessarily imports a payment at a future day; and an executor promising to pay a debt at a future day makes the debt his own." The case thus far is parallel with that of Childs v. Monins just referred to; in which it was

304 unanimously decided by the Court of common pleas *that "a promissory note by which the makers as executors jointly and severally promise to pay on demand, with interest, renders them personally liable." But the note in this case furnishes affirmative evidence of other consideration, which was not furnished by the note in that; and which renders it more reasonable that the executor should be personally liable. It shews that the plaintiff having a joint claim against Thomas, Richard and John G. Crouch, "surrendered it on each paying to her his proper proportion." Instead of payment in money of the proper proportion of John G. Crouch, his executor, the defendant, executed the promissory note in question, promising to pay it on demand, with interest. The joint claim against the three debtors was thus extinguished. The original obligation of the testator for the whole claim was discharged; and in lieu thereof a new security was taken from the executor for the payment of his testator's proportion on demand, with interest. Was not this surrender of the original claim, this extinguishment of a joint debt of three, a sufficient consideration for a promise by the executor of one of them to pay one third of the amount of the debt? The original debt may have been a debt of higher dignity against the testator's estate than the note would be. It may have been due by judgment or bond. At all events it was a joint debt of three. Would the plaintiff have surrendered such a debt without being assured of the certain payment of the different proportions of the parties? Would she have taken a security for the proportion of one of them which might embarrass her with a future enquiry as to the sufficiency of assets? Her subsequent conduct proves that she reposed with confidence on the promise of the defendant to pay his testator's proportion with inter-

est, on demand. She waited more than four years before she made the demand. Would she have so waived if the demand had been against a decedent's estate?

305 In the language *of the same Judge whose language I have before quoted, "if executors were not liable on such a promise, they would be enabled by making such a promise to defraud any individual among their testator's creditors." The case of Childs v. Monins was cited with approbation by Chief Justice Sharkey in delivering the opinion of the Court in Sims v. Stilwell, 3 How. Miss. R. 176. See also Bradly v. Heath, 3 Simons 543, 5 Cond. Eng. Ch. R. 241; Bank of Troy v. Topping, 9 Wend. R. 273.

The note in this case being a good cause of action against the executor personally, the declaration is sufficient to charge him personally, though it complains of him "as executor," and charges the promise to have been made by him as such. "Where the nature of the debt is such as necessarily to make the defendant liable personally, the judgment will be de bonis propriis, although he be charged as promising as executor." 2 Wms. on Ex'ors 1096. The naming the defendant executor in the declaration in such case is surplusage. Id. 1101. In this case not only is the nature of the debt such as to charge the executor personally, but it would seem from the declaration that it was intended thereby so to charge him. The words "as executor of John G. Crouch," seem to have been used therein as matter of description. The declaration is in the debet and detinet. And the breach is charged against the "defendant," without any addition to that term.

But suppose the judgment ought to have been de bonis testatoris, would it be proper to reverse the judgment on that account? I think not. The judgment in the case was an office judgment, which not having been set aside, became, by operation of law, a judgment of the succeeding term. In such a case the only entries usually made after the declaration is filed and before the execution issues, are two short entries in the rule book, one in the words "common
306 order," and the *other, "common order confirmed." These entries are identical, whether the suit be against the defendant in his own right, or en autre droit. The execution is issued upon the judgment as if it had been rightly entered in full. The clerk afterwards at his leisure enters a formal judgment in the case in a book kept for the purpose. The error, if any, in running out these short entries into form when the record is made up, is nothing but a clerical error, the correction of which belongs to the Court whose officer committed it. The remedy is by motion to that Court, and not by appeal to this. Eubank v. Rall's ex'or, 4 Leigh 308; Shelton's ex'ors v. Welsh's adm'rs, 7 Leigh 175; Digges' ex'or v. Dunn's ex'or, 1 Munf. 56. I am for affirming the judgment.

DANIEL, J., concurred in the opinion of Moncure, J.

BALDWIN, J., thought the judgment of the Circuit court ought to have been de bonis testatoris; but that the error was a clerical misprision which should have been corrected in the Court below; and therefore that the appeal ought to be dismissed.

ALLEN, J., concurred with Judge Baldwin in the opinion that the judgment should have been de bonis testatoris; and that the error was a clerical misprision which might have been corrected in the Court below; but thought that as the case was in this Court it might be corrected here.

AMENDMENTS.

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See monographic note on "Amended Bills" appended to Belton v. Apperson, 26 Gratt. 207.

2. Of Pleas.

3. Of Replications.

4. Of Answers.

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a. Errors Cured.

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Cross References to Monographic Notes.

Amended Bills, appended to *Belton v. Apperson*, 26 Gratt. 207.

Decrees, appended to *Evans v. Spurgin*, 11 Gratt. 615.

Elections, appended to *West v. Ferguson*, 16 Gratt. 270.

Judgments, appended to *Smith v. Charlton*, 7 Gratt. 425.

I. OF EQUITY PLEADINGS.

A. IN GENERAL.—No invariable rule can be laid down with reference to the amendments of equity pleadings. Their allowance rests largely in the discretion of the court, to be determined by the special circumstances of the case. On application to amend, justice should not be sacrificed to form or too rigid an adherence to rules of practice. Great caution should be exercised, however, when the application has been long delayed, or when the granting it would cause serious inconvenience or expense to the opposite side; and an amendment should rarely, if ever, be permitted where it would materially change the very substance of the case made by the bill, and to which the parties have directed their proofs. *Glenn v. Brown*, 99 Va. 322, 38 S. E. Rep. 189; *Alsop v. Catlett*, 97 Va. 364, 34 S. E. Rep. 48.

Discretion of Court.—"The whole matter of amendments rests in the sound discretion of the court. In general, however, the indulgence is confined to cases of mere mistake or surprise; and a distinction is also made between the allowance of an amendment as to a matter of fact, and as to a conclusion in law, an amendment as to the latter being much more freely allowed." 4 Min. Inst. (3d Ed.) p. 1443; *Vashon v. Barrett*, 99 Va. 344, 38 S. E. Rep. 200.

Compared with English Practice.—The practice in this country in allowing amendments is said to be much more liberal than in England. *Belton v. Apperson*, 26 Gratt. 207.

Verified Pleadings.—Where pleadings are verified by the oath of the party, the court will not easily suffer an amendment. *Matthews v. Dunbar*, 3 W. Va. 188.

Effect of Statute Dispensing with Affidavit.—But as Code of W. Va., ch. 125, sec. 38, does not require the defendant to verify his answer by affidavit, it is obvious that one of the principal reasons for the courts being so reluctant to permit answers to be changed or amended, has been removed, and no doubt answers may be amended or changed with the leave of the court, now, under circumstances wherein they could not be formerly so amended or changed. *Depue v. Sergeant*, 21 W. Va. 326.

Effect of Laches.—Moreover, a defendant should be permitted to amend his pleadings, or add to his pleas whenever justice requires it, provided unreasonable delay be not thereby occasioned, or good reason be shown for not having done so sooner. But he will not be permitted so to do where he has had ample opportunity for earlier action, and has, without sufficient excuse, delayed until trial is at hand. *Keckley v. Bank*, 79 Va. 458; *Perkins v. Hawkins*, 9 Gratt. 653.

1. OF BILLS.—See monographic note on "Amended Bills" appended to *Belton v. Apperson*, 26 Gratt. 207.

2. OF PLEAS.—Where an improper plea is filed by an attorney through inadvertence, and for want of information, it may be amended, after a trial and verdict for the plaintiff. *Richardson v. Johnson*, 2 Call 528.

Amendment by Personal Representative.—And a personal representative may, on motion, without an affidavit, amend his plea by pleading *plene administravit* at any time before the trial of a suit against him, provided the court is satisfied that the motion is not made merely for the sake of delay. *Chisholm v. Anthony*, 1 H. & M. 27.

3. OF REPLICATIONS.—Where, in an action of detinue, the replication to the defendant's plea of the statute of limitations is insufficient, but the declaration contains the averments for lack of which the replication is defective, the plaintiff should be allowed to amend his replication. *Morris v. Lyon*, 1 Va. Dec. 615, 2 S. E. Rep. 515.

Terms.—But the declaration being in the name of two plaintiffs, if the replication purport to be in behalf of one only, it is a departure in pleading; and on demurrer, judgment ought to be entered for the defendant, unless the plaintiffs move the court to amend their replication, which in that case should be allowed, on their paying costs. *Graham v. Graham*, 4 Munf. 205.

Withdrawal of Joinder in Demurrer.—An attorney for the commonwealth, who has joined in the defendant's demurrer to his replication, it being defective in mere form, may have leave, before judgment is entered on the demurrer, to withdraw his joinder in demurrer and amend his replication. *Com. v. Jackson*, 3 Va. Cas. 501.

4. OF ANSWERS.

a. In General.—The cases are exceptional where amended or supplemental answers are allowed. In small matters, however, the defendant may amend, but not in a material one, unless upon evidence to the court of surprise. The most common case of amending an answer is, where, through inadvertence, the defendant has mistaken a fact, or a date; then the court will give leave to amend to prevent the defendant from being prosecuted for perjury. In general, however, this indulgence is confined to cases of mere mistake or surprise in the answer. *Elder v. Harris*, 76 Va. 187.

The following general rules were established by the court in *Liggon v. Smith*, 4 H. & M. 407, for the amending of answers in chancery:

1. To allow a defendant to amend his answer must, from the nature of the case, be always at the discretion of the court.

2. It may be done in a small matter, on motion, at any time before issue joined.

3. But, in a material point, the motion must be made upon an affidavit of the facts, which make it necessary; and after reasonable notice thereof to the plaintiff or his counsel, that the court may take care that no injury be produced to the other party. And, the affidavit ought to state, that, at the time of putting in the answer, the defendant did not know the circumstances upon which he makes the application, or any other circumstances upon which he ought to have stated the fact otherwise.

But the provision of the statute (Va. Code 1873, ch. 167, sec. 35), allowing a defendant to file his answer at any time before final decree, has no reference to an amended or supplemental answer. *Elder v. Harris*, 76 Va. 187.

Answer in Nature of a Cross Bill.—Where an amended answer is filed by a defendant in the nature of a cross bill, praying affirmative relief, such amended answer should be confined to the matters contained in the original bill and answer, and should not introduce new and different matters

not embraced therein. *Radcliff v. Corrothers*, 33 W. Va. 682, 11 S. E. Rep. 228.

Setting Up Statute of Frauds and Limitations.—After issue joined, and the cause set for hearing, the defendant in chancery may be permitted, for good cause shown, to amend his answer, and to plead the statute of frauds and limitations. *Jackson v. Cutright*, 5 Munf. 308. See *Henderson v. Hudson*, 1 Munf. 514, opinion of TUCKER, J., in which he says: "In an amended answer, which he was permitted to file, he insists upon the benefit of the statute of frauds and perjuries." This shows that the amendment was permitted, though not at what stage of the cause.

In *White v. Turner*, 2 Gratt. 502, a defendant in equity was allowed to amend his answer for the purpose of setting up the statute of limitations in bar of the plaintiff's claims.

Irrelevant and Immaterial Matter.—But an amended answer, presenting as new matter, only matter immaterial and irrelevant, ought to be rejected. *McKay v. McKay*, 33 W. Va. 724, 11 S. E. Rep. 218; *Union Bank of Richmond v. Richmond*, 94 Va. 316, 23 S. E. Rep. 831; *Tracewell v. Boggs*, 14 W. Va. 254.

Substituting New Answer.—Where a defendant has filed an answer to the bill, which has been replied to, and the cause comes on for hearing, the defendant will not be permitted to withdraw his answer for the purpose of substituting another, on the ground that he had forgotten to present a material matter of defence in his first answer; but he may be permitted to amend his answer setting up such new matter, but in no wise to delay the hearing of the cause. *Tracewell v. Boggs*, 14 W. Va. 254; *Wyatt v. Thompson*, 10 W. Va. 645.

b. Grounds.

Surprise, Ill Advice—Inadvertency.—There are no certain rules, however, for the amendment of answers; but they are in the discretion of the courts; the admission of a fact is never suffered to be struck out, but on affidavit of surprise, or the defendant being ill-advised. But, where an amendment is admitted in the bill, where through inadvertency, a mistake is made as to a fact or date, *where there is no danger of perjury*, where the case depends upon old documents, etc., the courts have allowed amendments to be made, either by striking out passages, or making new facts, and this after issue joined, or upon the hearing of a cause. *Jackson v. Cutright*, 5 Munf. 312.

Negligence.—But an amended answer should not be allowed, raising new issues, where it appears that the party knew the facts when he filed his first answer, and is thus guilty of negligence. *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. Rep. 266, citing *Foutty v. Poar*, 35 W. Va. 70, 12 S. E. Rep. 1006.

Before a court of equity should allow an amended answer to be filed, it should be satisfied that the reasons assigned for it are cogent and satisfactory; that the mistakes to be corrected or facts to be added are made highly probable if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence, and that the mistakes have been ascertained, and the new facts have come to the knowledge of the party since the original answer was filed. *Matthews v. Dunbar*, 8 W. Va. 138; *Foutty v. Poar*, 35 W. Va. 70, 12 S. E. Rep. 1006. See also, *Sturm v. Fleming*, 26 W. Va. 59.

Infants.—An answer, filed by an infant, may be

amended on motion, when he attains his age. *Campbell v. Winston*, 4 H. & M. 477.

c. Rule When Answers Were under Oath.—When an answer was always sworn to and when it not only served the purpose of pleading, but was also regarded as evidence, the general rule was that an answer would not be permitted to be amended after the evidence had been taken, because to permit that would allow the defendant to change his evidence to suit the exigencies of the case, which would be unjust to the plaintiff and would tend to the encouragement of perjury. But even then, an answer was sometimes allowed to be amended, or supplemented, or to be withdrawn, and a new answer filed, when the amendment was in some small matter not material, unless the defendant by evidence showed to the court, that he had been surprised. As for instance, where a mistake was made in a date from inadvertency. But in general, very cogent circumstances had to appear before a court would permit an answer to be changed though even then where it was manifest that the purposes of substantial justice required it, the court in its discretion might permit an answer to be changed; but when the new facts sought to be let in by the answer were wholly dependent on parol testimony, the reluctance of the court to permit the answer to be changed was greatly increased. *Depue v. Sergeant*, 31 W. Va. 343.

In Furtherance of Justice.—But the court ought not to permit answers to be changed or amended at the option of the defendant, but should only permit it when substantial justice requires that it should be done. *Depue v. Sergeant*, 31 W. Va. 336.

Improperly Refusing Amendment.—Though if the inferior court refuse leave to a party to amend his pleadings where it should be allowed, the appellate court will reverse for that, as error. *Cooke v. Beale*, 1 Wash. 313.

d. At and after Hearing.—Upon the hearing of a cause, the court may grant the same indulgence to a defendant as it would to a plaintiff. If it has appeared, that the defendant has not put in issue facts, which he ought to have put in, and which must necessarily be in issue to enable the court to determine the merits of the case, he will be allowed to amend his answer for the purpose of stating these facts. But the courts have been always very cautious in permitting such amendments at the hearing. *Depue v. Sergeant*, 31 W. Va. 336.

II. OF PLEADINGS AND PROCEEDINGS AT COMMON LAW.

A. DEMURRER TO DECLARATION.—In Virginia and West Virginia, the usual course, where the opinion of the court is in favor of the defendant on a demurrer to the whole declaration, is to allow the plaintiff to withdraw his joinder in the demurrer, and amend his declaration, if the ground upon which the demurrer is sustained be of such a nature as can be removed by an amendment. And there is no difference as to the doctrine of amending at common law, between penal, and other actions. *Hart v. B. & O. R. Co.*, 6 W. Va. 336.

Amendments Favored.—Statutes allowing amendments are favored, and although resting in the sound discretion of the court, the authorities without exception it is said, declare that such statutes are remedial and must be construed liberally. *Langhorne v. Richmond City R. Co.*, 91 Va. 364, 23 S. E. Rep. 357, citing with approval 1 Enc. Pl. & Pr. 516-517.

B. INTRODUCING NEW CAUSE OF ACTION.—After the appearance of the defendant the court should be liberal in allowing such amendments to the declaration, as tend to promote the fair trial and determination of the subject-matter of controversy, upon which the action was originally based, but no amendment should be allowed against the protest of the defendant, which introduces into the case a new substantive cause of action different from that declared upon, and different from that which the party intended to declare upon when he brought his action, though the amendment be such, as would, in another count have been properly inserted in the original declaration and the new cause of action was such, as could, if the plaintiff had so chosen, been united in the same suit with the original cause of action actually sued upon. *Snyder v. Harper*, 24 W. Va. 206; *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. Rep. 519; *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 20 S. E. Rep. 696.

Inconsistent Amendments—Amendments are not to be allowed which are inconsistent with the nature of the pleadings or change the cause of action. Allegations may be changed and others added, provided the identity of the cause of action is preserved. *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. Rep. 519; *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 20 S. E. Rep. 696.

C. MISDESCRIPTION.

1. EXPRESS AND IMPLIED CONTRACT.—In an action against a physician for malpractice, alleging breach of an express contract, an amendment may be made setting forth the breach of an implied contract. *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. Rep. 519.

2. IDENTITY OF TWO CORPORATIONS.—If one corporation is sued for a personal injury, and the evidence of the defendants tends to show that the injury was committed by another corporation, the plaintiff upon request, should be allowed to amend his declaration so as to charge that the two corporations were one and the same corporation known by both names, because sec. 3384 of the Va. Code of 1887, was clearly intended to provide for such a case, and, being remedial in its character, should be liberally construed. *Langhorne v. Richmond City R. Co.*, 91 Va. 364, 22 S. E. Rep. 357.

3. ACTION IN NAME OF WRONG PLAINTIFF.—Where an action is brought in the name of the wrong plaintiff, it is not error to allow the declaration to be so amended as to show the party beneficially interested. *National Bank of Virginia v. Nolting*, 94 Va. 263, 26 S. E. Rep. 826.

If a jury find for the plaintiff the slaves in the declaration mentioned, and, proceeding to state the several values, recites the name of one of them erroneously, such an error should be corrected by reference to the declaration. *Boatright v. Meggs*, 4 Munf. 145.

D. VARIANCE.

Materiality of Amendments.—An immaterial variance between the *allegata* and *probatum* may be amended at the trial, but after all the evidence has been introduced on the trial of an action at law an amendment cannot be made that is material to the merits. *Harman v. Cundiff*, 82 Va. 239; *Hansbrough v. Stinnett*, 25 Gratt. 495; *Richmond & D. R. Co. v. Rudd*, 88 Va. 648, 14 S. E. Rep. 361.

Variance between Writ and Declaration.—But a variance between the writ and declaration may be amended at any time before judgment, if substan-

tial justice may be done thereby. *Courson v. Parker*, 39 W. Va. 521, 20 S. E. Rep. 583.

Omission of a Condition in Policy.—Where, in an action on a life insurance policy, the declaration omits one of the conditions endorsed upon it; and on the trial when the policy is offered in evidence, it is objected to for the variance, the court may allow the plaintiff to amend the declaration by inserting the omitted condition, and proceed with the trial. *The New York Life Ins. Co. v. Hendren*, 24 Gratt. 536.

Ejectment.—And, in ejectment, if the term laid in the declaration expires before the decision of the cause, the practice is to grant leave to amend the declaration by enlarging the term. *Hunter v. Fairfax*, 1 Munf. 218.

To Conform to Proof.—If the evidence in the trial of a case before a jury fails to prove substantially the plaintiff's case as stated in the declaration, though it shows that the plaintiff has a good cause of action, the court should permit the plaintiff to amend his declaration so as to correspond with his proof at the trial. *Hutchinson v. Parkersburg*, 26 W. Va. 227.

Under Statute.—Va. Code 1880, ch. 177, sec. 7, provides that: "If at the trial of any action, there appears to be a variance between the evidence and the allegations or recitals, the court, if it consider the cause not material to the merits of the case, and that the opposite party cannot have been prejudiced thereby, may allow the pleadings to be amended on such terms as to payment of costs or postponement of trial, as it may deem reasonable." See Code 1887, sec. 3384. See *Beasley v. Robinson*, 24 Gratt. 325; *R. & D. R. Co. v. Rudd*, 88 Va. 648, 14 S. E. Rep. 361. See Va. Code 1887, sec. 3259.

Time of, and Terms for, Amendment.—The plaintiff during the trial of the cause, and before verdict found, may at the discretion of the court be permitted to amend his declaration, in order that a material variance between its allegations and the proofs may be avoided, upon the terms, if the defendant so request, that the jury shall be discharged and the cause continued with leave to the defendant to amend his pleas, or plead anew to the declaration so amended. *Travis v. Peabody Ins. Co.*, 28 W. Va. 583; *Tabb v. Gregory*, 4 Call 225.

E. FILING A BLANK.—The rule seems to be well settled that the circumstance that the damages are left blank in the declaration is unimportant, but if the gist of the action be blank, it is fatal. *Blane v. Sansum*, 3 Call 495; *Stephens v. White*, 2 Wash. 203; *Taylor v. M'Clean*, 3 Call 557; *Craghill v. Page*, 2 H. & M. 446; *Digges v. Norris*, 3 H. & M. 203.

Cured by Act of Jeofails.—And the omission to lay damages in the declaration, though in an action sounding in damages, is cured, after verdict, by the statute of jeofails. *Stephens v. White*, 2 Wash. 203.

But if the damages be laid high enough in the writ, though the jury find for more than are laid in the declaration, the writ may be referred to for the purpose of amendment, and the judgment will be sustained. *Palmer v. Mill*, 3 H. & M. 502.

Omission of Ad Damnum.—The omission of an *ad damnum* in the declaration will be considered as amended. *Hook v. Turnbull*, 6 Call 85.

Illustrations.—After verdict in an action for breach of a promise to marry, judgment ought not to be reversed on the ground that the time when the marriage was to be solemnized is left blank in the declaration. *Milstead v. Redman*, 3 Munf. 219.

Count in Assumpsit.—Thus, a count for money had

and received was adjudged good after verdict, although the sum received was left blank. *Hall v. Smith*, 3 Munf. 550.

F. AT WHAT STAGE OF PROCEEDINGS.

Common-Law Rule.—At common law amendments seem to have been always readily obtained, at any time before issue, either in law or fact, was joined, or while the proceedings continued in paper, but, after the record was made up, and the pleadings were entered on the roll, there was a reluctance to admit of any alteration, through fear of defacing the record. *Tabb v. Gregory*, 4 Call 228.

Furtherance of Justice.—So that to promote justice on one hand, and prevent injury on the other, seems to be all that is requisite, for if they can be effected the amendment will be allowed at any time before final judgment. *Tabb v. Gregory*, 4 Call 228; *Travis v. Peabody Ins. Co.*, 28 W. Va. 594.

After Demurrer Sustained.—After a demurrer has been sustained to a declaration which states a good cause of action, the court may allow the declaration to be amended, though the statement is defective with regard to the matters in which it is amended. *Guarantee Co. v. Bank*, 95 Va. 490, 28 S. E. Rep. 909; *Baylor v. B. & O. R. R. Co.*, 9 W. Va. 270.

Refusal to Allow Amendment.—Where the inferior court properly sustains a demurrer to a declaration, and enters judgment in the action for the defendant, without giving leave to the plaintiff to amend, the supreme court will, if the defect in the declaration appears to be amendable, reverse the judgment, and remand the case, with directions to grant leave to the plaintiff to amend if he elects to do so. *Rigg v. Parsons*, 29 W. Va. 522, 2 S. E. Rep. 81; *Norris v. Lemen*, 28 W. Va. 336.

Cannot Be Forced to Amend.—But, if in such case, the record shows that the plaintiff declined to amend his declaration, the supreme court will not reverse the judgment, although it distinctly appears that the defect in the declaration could have been readily amended if the plaintiff had chosen to do so, but the judgment will be affirmed. *Rigg v. Parsons*, 29 W. Va. 522, 2 S. E. Rep. 81; *White v. Railway Co.*, 26 W. Va. 800.

Technical Defect in Replication.—It is proper to allow an amendment, after demurrer is sustained, to cure a purely technical defect in a replication, when it occasions no surprise to the defendant, produces no delay nor inconvenience, and is necessary to the justice of the case. "It is fully authorized by the practice and decisions of Virginia." *Bowles v. Elmore*, 7 Gratt. 385; *Hart v. B. & O. R. Co.*, 6 W. Va. 336.

After Demurrer and Argument.—After demurrer and argument upon the issue in law, either party will be permitted to amend. *Tabb v. Gregory*, 4 Call 228.

Statutory Rule.—Under Va. Code 1887, sec. 3384, providing that, if at the trial there appears to be any variance between the evidence and pleadings, the court, if it considers that substantial justice will be promoted, may allow the pleadings to be amended on such terms as it may decree reasonable, it is proper to allow a declaration to which a demurrer has been sustained to be amended at bar by striking out immaterial words, and to refuse to remand the case to rules. *Alexandria & F. R. Co. v. Herndon*, 87 Va. 193, 12 S. E. Rep. 289.

After Issue Joined.—If the plaintiff be permitted to amend his declaration, by consent of parties, after issue joined on a plea to the action, the defendant ought not to be permitted to plead in abatement

any variance between the amended declaration and the writ, which equally existed between the writ and the original declaration. *Moss v. Stipp*, 3 Munf. 159; *Payne v. Grim*, 2 Munf. 297.

Nul Tiel Record.—Upon the trial of the issue *nul tiel record*, the court may allow an amendment of the declaration, and, if the defendant consents, may proceed with the trial. Thus, in an action of debt, brought on a judgment recovered for £144. 17. 2¼. and costs, but declared on for £144. 7. 2¼. and costs, the plaintiff, upon the trial of the issue joined upon the plea of "no such record" filed by the defendant, was allowed to amend his declaration by inserting the correct sum. *Anderson v. Dudley*, 5 Call 529.

Before Verdict—Terms.—The circuit courts of West Virginia, in the exercise of their general common-law jurisdiction, in the absence of any statute prohibiting them from doing so, and independently of any statute authorizing them to do so, may, in their discretion, permit the pleadings to be amended at any time before verdict found whenever justice will be promoted thereby, and the same can be done without injury to the opposite party, but in every such case, if the opposite party requests it, the jury should be discharged, and the cause continued with leave to the opposite party to amend his pleadings or to plead anew to the pleadings, so amended. *Travis v. Peabody Ins. Co.*, 28 W. Va. 583.

After Verdict.—Even after the verdict is returned if there is anything by which it can be done, or the justice of the case requires it, amendments will be allowed. *Travis v. Peabody Ins. Co.*, 28 W. Va. 594; *Tabb v. Gregory*, 4 Call 228.

After Submission to Jury.—The case was submitted to the jury, who not agreeing, a juror was by consent withdrawn. In this stage of the proceedings, the plaintiff was permitted to amend his declaration, the cause being in paper, notwithstanding the jury had been sworn, as no verdict was rendered; during which time amendments, in favor of justice, are within the discretion of the court. *Syme v. Jude*, 3 Call 521; *Tabb v. Gregory*, 4 Call 228.

Amendments before Final Judgment.—But the rigor of the common law has been gradually departed from, until it has become the settled doctrine, that amendments, at the discretion of the court may be allowed at any time before final judgment, provided they produce no injury to the opposite party. *Tabb v. Gregory*, 4 Call 228; *Travis v. Peabody Ins. Co.*, 28 W. Va. 594.

Amendments of Judgment Entered on Order Book and Signed by Judge.—But a district court has no power or jurisdiction to reverse, alter or amend a judgment given at a former term of that court, which has been entered on the order book and signed by a judge in open court. *Halley v. Baird*, 1 H. & M. 25; *Freeland v. Field*, 6 Call 12.

If an entry be made in a minute book of the clerk of the district court and a part of it be omitted in the order book, signed by the judge, the order book cannot be amended from the minutes after the term at which the proceedings were had. *Cogbill v. Cogbill*, 2 H. & M. 467.

During Trial of Appeal.—If a party during the trial of an appeal from a justice is entitled to amend his pleadings, that right cannot be made to depend solely on whether the adverse party is then ready to proceed with the trial. If such an amendment would be a surprise to the other party, a continuance will obviate that objection. *Powell v. Love*, 36 W. Va. 96, 14 S. E. Rep. 405.

1. IN APPELLATE COURT.—Amendment of the record in the supreme court is not permissible, because the supreme court tries the case by the record as made up in the lower court. Resort must be had to the lower court for such amendment. *McClure-Mable Lumber Company v. Brooks*, 46 W. Va. 732, 34 S. E. Rep. 921, citing 1 Enc. Pl. & Pr. 607.

Remand with Directions to Amend.—Where an appellate court reverses the judgment of the lower, the cause will be sent back with directions that the plaintiff shall have leave to amend the declaration. *Strange v. Floyd*, 9 Gratt. 474; *Liggatt v. Withers*, 5 Gratt. 24, 50 Am. Dec. 95; *Hale v. Crow*, 9 Gratt. 268; *Creel v. Brown*, 1 Rob. 265; *White v. Toncray*, 5 Gratt. 180.

So also, where there is a demurrer to a declaration which is overruled, but upon appeal the judgment is reversed, the cause will be remanded with directions that the plaintiff be allowed to amend his declaration if he elects to do so. *Hansbrough v. Stinnett*, 25 Gratt. 495.

Proceedings after Leave to Amend Declaration.—When an order of court has been entered, granting the plaintiff leave to amend his declaration, and remanding the cause to the rules, the case, after the amended declaration is filed, ought to be regularly proceeded in at the rules to an issue or office judgment, unless by consent an issue be made up in court; and if, without such proceedings at the rules, judgment be entered up in court against a defendant because he has not appeared and pleaded to the amended declaration, such judgment will be erroneous. *Couch v. Fretwell*, 10 Leigh 578.

G. EFFECT OF AMENDMENT.

1. **STATUTE OF LIMITATIONS.**—When an amendment to a declaration is not inconsistent with the nature of the pleadings, and does not introduce a new cause of action, then so far as regards the statute of limitations, it will have the same effect as if it had been originally filed in the amended form at the commencement of the term, and the cause not then barred will not be treated as barred at the time of the amendment by reason of such amendment. *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. Rep. 519; *Lamb v. Cecil*, 28 W. Va. 653.

2. **AMENDMENT AS WAIVER OF ERROR IN PREVIOUS RULINGS.**—By amending his declaration, however, and going to trial on the merits, the plaintiff waives his right to assign for error that a demurrer to the declaration, as originally filed, was improperly sustained. *Darracott v. C. & O. R. R. Co.*, 83 Va. 288, 2 S. E. Rep. 511; *Hopkins v. Richardson*, 9 Gratt. 485; *Harris v. N. & W. R. R. Co.*, 83 Va. 560, 14 S. E. Rep. 535; *Birckhead v. C. & O. R. Co.*, 95 Va. 648, 29 S. E. Rep. 678; *Connell v. C. & O. R. Co.*, 98 Va. 44, 24 S. E. Rep. 467.

Amendment of Complaint after Demurrer Sustained.—If a special demurrer is filed to a declaration, which is afterwards amended in the points specified in the demurrer, issues made up on pleas filed before the amendment, a verdict rendered on those issues, and no further notice taken of the demurrer, the demurrer must be considered as abandoned. *Vaiden v. Bell*, 8 Rand. 448.

3. **ORIGINAL PLEADING SUPERSEDED.**—When the plaintiff files an amended declaration, which is complete in itself, and does not refer to, or in any manner adopt the former as part of the same, and to which amended declaration the defendant replies and issues joined thereon, the former shall

be considered as withdrawn or abandoned. *Roderick v. Railroad Company*, 7 W. Va. 54.

4. **RIGHT TO PLEAD DE NOVO.**—Where one party is permitted to amend, or amends without leave in a material matter, the other has a right to plead *de novo*, whether the new plea be material or not to his defence. *Cosby v. Hite*, 1 Wash. 365; *Travis v. Peabody Ins. Co.*, 28 W. Va. 583.

Right to Elect.—Where the defendant's plea to the original declaration is applicable to the amended declaration filed by the plaintiff, and which plea is not withdrawn, the defendant must be understood to have still rested his defence on the same plea, and the verdict on the original issue will stand; but the defendant might have pleaded *de novo* if he had elected to do so. *Power v. Ivie*, 7 Leigh 147.

5. **EFFECT OF ADDING NEW PARTIES.**—Whenever new parties are made, both parties have liberty, if they desire it, to amend and modify their pleadings, so as to exhibit the case as they may desire respectively to present it. *Dabney v. Preston*, 25 Gratt. 838.

H. LEAVE TO AMEND.

1. **AMENDMENT AS MATTER OF RIGHT.**—The plaintiff may, as a matter of right, amend his declaration at any time before appearance by the defendant if substantial justice will be promoted thereby, and in such case it is not necessary to summon the defendant to plead to the amended declaration. *Phelps v. Smith*, 16 W. Va. 522; *Baylor v. B. & O. R. Co.*, 9 W. Va. 270.

Suggestion by the Court.—But a plaintiff cannot be compelled to amend after the sustaining of a demurrer to a declaration. *Rigg v. Parsons*, 29 W. Va. 522, 2 S. E. Rep. 81.

I. METHOD OF MAKING AMENDMENTS.

1. **ACTUAL AND IMPLIED AMENDMENTS.**—If a party obtains leave to amend his plea, he may elect to make the amendment or not as he pleases; but if he fails to make the amendment, and the former plea is not withdrawn, the issue made by the original pleading should be tried. *Fox v. Cosby*, 2 Call 1.

J. OTHER MATTERS SUBJECT TO AMENDMENT.

Contested Elections—Grounds of Contest.—In *Halstead v. Rader*, 27 W. Va. 818, it was held that a notice which does not state some substantial ground of contest cannot be amended. See also, *Ralston v. Meyers*, 34 W. Va. 737, 12 S. E. Rep. 783.

See monographic *note* on "Elections" appended to *West v. Ferguson*, 16 Gratt. 270.

And where the proceedings are before a body which has no common-law jurisdiction, but becomes *functus officio* as soon as the cause is determined, it cannot permit amendments of notices and specifications after the time has passed within which the parties themselves may correct omissions, and supply defects. *Loomis v. Jackson*, 6 W. Va. 613.

Misnomer in Christian Name.—Under W. Va. Code 1887, sec. 14, ch. 125, "No plea in abatement for a misnomer shall be allowed in any action; but in a case wherein, but for this section, a misnomer would have been pleadable in abatement, the declaration and summons may, on the motion of either party, and on the affidavit of the right name, be amended by inserting the same therein." Thus, under this statute, where the writ named the plaintiff as "Collohan" Hoffman, and in declaration he is named as "Collahill" Hoffman, such misnomer in the plaintiff's christian name was amended. Hoff-

man v. Dickinson, 81 W. Va. 142, 6 S. E. Rep. 53. See also, Va. Code 1887, §§ 3258 and 3300.

Where the jury find a conveyance to *James*, the lessor of the plaintiff, whereas his name is *Jacobus*, this is a plain mistake, which may be corrected by the other part of the finding, *that he is lessor of the plaintiff*. Pendleton v. Vandevier, 1 Wash. 381.

Misnomer of Corporation.—The misnomer of a corporation cannot be taken advantage of by plea in abatement, but where formerly pleadable in abatement, the declaration and summons may, on the motion of either party, on affidavit of the right name, be amended by inserting the same therein. W. Va. Code, ch. 125, sec. 14; First Nat. Bank of Ceredo v. Huntington, etc., Co., 41 W. Va. 580, 23 S. E. Rep. 792.

Striking Out Plaintiffs.—Where a married woman, over the age of twenty-one years, sues for a personal injury in her name by a next friend, the declaration may be amended by striking out her next friend, and by inserting her own as plaintiff. Richmond Railway & Electric Company v. Bowles, 92 Va. 738, 24 S. E. Rep. 388. The court, in this case, further said: "No reason can be perceived why, if a married woman may amend her bill by inserting the name of a next friend, she may not with equal propriety be permitted to amend her declaration by striking from it the wholly needless and superfluous shadow, rather than to permit the substance to be sacrificed."

Of Scire Facias.—But a *scire facias* returnable to a day which is not a proper return day, is void and cannot be amended. Kyles v. Ford, 2 Rand. 1.

Of Bill of Particulars.—When a cause is called for trial, and substantial justice requires that the court should have allowed the plaintiff to amend his bill of particulars, and if it be clear, that such amendment cannot operate a surprise to defendant, the cause ought not to be continued because of such amendment. Anderson v. Kanawha Coal Co., 18 W. Va. 526. See Code of W. Va., ch. 125, sec. 12, p. 601.

Of Record—Upon What Based.—The amendments authorized by the act, Va. Code, ch. 181, sec. 5, p. 681, in relation to amendments of a record by a judge in vacation, are to be based upon something in the record, and not upon the recollection of the judge who presided at the trial, or evidence *alibis*; and the amendments authorized are amendments to support the judgment, not amendments to give ground for reversal. Powell v. Com., 11 Gratt. 823, and *note*; Barnes v. Com., 92 Va. 794, 23 S. E. Rep. 784.

When Writ Part of Record.—For the purpose of amendment, the writ is a part of the record only where issue has been joined upon a plea to the action. Payne v. Grim, 2 Munf. 297.

Amendment after Term.—After the term at which a judgment is entered, the court cannot amend a record. Sydnor v. Burke, 4 Rand. 161.

III. OF PROCESS.

By the common law, process made returnable to a day which is not a return day, is void, and hence cannot be amended; though it seems that a *scire facias* may be amended in the *teste* or *return*. Kyles v. Ford, 2 Rand. 1; Coda v. Thompson, 39 W. Va. 67, 19 S. E. Rep. 548.

A. OF SHERIFF'S RETURN.—After a judgment by default, the court may allow the sheriff to amend his return so as to show a proper service. Commercial Union Assurance Co. v. Everhart, 88 Va. 952, 14 S. E. Rep. 836; Railroad Co. v. Ashby, 86 Va. 232, 9 S. E. Rep. 1008; Stotz v. Collins, 83 Va. 423, 2 S.

E. Rep. 737; Walker v. Com., 18 Gratt. 18; Stone v. Wilson, 10 Gratt. 539. See also, Laidley v. Bright, 17 W. Va. 779; Wardsworth v. Miller, 4 Gratt. 99; Smith v. Triplett, 4 Leigh 500.

It is proper on the hearing of a motion to reverse a judgment by default for a defective return of the summons in the action, to allow the sheriff to amend his return, and then overrule the motion to reverse, if the amended return be good. Anderson v. Doolittle, 38 W. Va. 633, 18 S. E. Rep. 726; Capehart v. Cunningham, 12 W. Va. 750; Shenandoah Valley R. Co. v. Ashby, 86 Va. 232, 9 S. E. Rep. 1008.

Application in Vacation.—Where a judgment by default has been rendered on a defective return of service of summons, and the defendant, after the term, applies to the judge in vacation to reverse the judgment, and remand the cause to trial under Va. Code 1873, ch. 172, sec. 5, on the ground that it does not appear from the sheriff's return that the writ has been served as prescribed by law, the court may, on the plaintiff's motion, allow the return to be amended so as to show a proper service, and dismiss the motion. Stotz v. Collins, 83 Va. 423, 2 S. E. Rep. 737; Goolsby v. St. John, 25 Gratt. 146.

Where under Va. Code 1873, ch. 172, sec. 5, defendant moves the judge in vacation to reverse the judgment by default upon defect of return of substituted service of the summons, and to remand the case to trial, the court will then allow the sheriff to amend his return so as to show a proper service, and dismiss the defendant's motion. Stotz v. Collins, 83 Va. 423, 2 S. E. Rep. 737; Laidley v. Bright, 17 W. Va. 779.

Application to Circuit Judge in Term.—Moreover, it is competent for the circuit court, whence the writ issued, to permit an amendment of the return, if the application to reverse the judgment is made to the court in term instead of to the judge thereof in vacation; and in this particular the authority of the judge in vacation is the same as that conferred upon the court. Stotz v. Collins, 83 Va. 423, 2 S. E. Rep. 737.

And the judge in vacation may allow the sheriff to amend his return on the first execution, upon a motion to quash a second execution in vacation. Walker v. Com., 18 Gratt. 18; Goolsby v. St. John, 25 Gratt. 160.

Amendment of Summons by Clerk.—But on the trial of a motion to reverse the judgment by default, made in a circuit court under the fifth section of chapter 184 of the W. Va. Code, the court ought not to permit the clerk to correct the summons itself, though he has made a mistake by inadvertence in issuing it. Laidley v. Bright, 17 W. Va. 779.

Objections in Appellate Court.—After judgment by default, a party cannot object in the appellate court, to the truth of a sheriff's return. Cunningham v. Mitchell, 4 Rand. 189.

Return on Notice.—An amendment of the return made by an officer on a notice, does not permit him in any wise to change or amend the notice itself, and if he does, the changed or amended notice is a nullity. White v. Sydenstricker, 6 W. Va. 46.

Justice's Court.—Return of service of a summons from a justice's court, defective in failing to show that service on a corporation's agent was made in the county of his residence, may be amended, either before the justice or in the circuit court upon an appeal. Hopkins v. B. & O. R. Co., 42 W. Va. 535, 26 S. E. Rep. 187.

Certiorari to Justice.—And upon a writ of *certiorari* from a judgment of a justice, the circuit court may

allow the return on the summons, issued by the justice, to be amended. *McClure-Mable Lumber Co. v. Brooks*, 46 W. Va. 732, 34 S. E. Rep. 921.

Pendency of Suit on Original Return.—A court from which process is issued may permit the sheriff's return thereon to be amended at any time, even though a suit or motion founded on the original return be then pending, and even though the proposed amendments be inconsistent with the original return, and take away the foundation of the suit or motion. *Stone v. Wilson*, 10 Gratt. 529; *Stotz v. Collins*, 83 Va. 423, 2 S. E. Rep. 737.

Not Ground for Continuance.—The allowance of an amendment to the sheriff's return on a writ of summons is not ground for a continuance, though, before the amendment, there was nothing to show a valid service of the writ, especially where the case had previously been set for trial by consent. *Atlantic & D. R. Co. v. Peake*, 87 Va. 180, 13 S. E. Rep. 348.

Amendment as Affecting Liability of Sureties.—Where a sheriff has made a return on an execution and on that return, in part, a decree has been entered, in a subsequent proceeding against him and his sureties, he will not be permitted to amend his return, so as to explain it away and enable his sureties to escape liability for his default. *Carr v. Meade*, 77 Va. 142.

Effect on Subsequent Mortgagees.—It is immaterial that subsequent mortgagees of a corporation may be injured by an amendment, it not being shown that they were aware of the irregularity in the judgment, which was duly docketed, when they took their mortgages, and if they were, they would nevertheless acquire their lien subject to the plaintiff's right to have the record perfected. *Shenandoah Valley R. R. Co. v. Ashby*, 86 Va. 232, 9 S. E. Rep. 1003.

Extent of Right to Amend.—If two writs of *scire facias* be successively issued, the returns on which are both defective, and the defendant, after pleading specially, obtains leave to withdraw his plea, as having been improvidently pleaded, the court ought not thereupon to permit the sheriff to amend both his returns, but only that on the first writ quashing the second writ, and remanding the cause to rules for further proceedings. *Lee v. Chilton*, 5 Munf. 408.

Amended Return Relates Back to Original Return.—When an officer's return of process is amended by leave of court, the amended return relates back to, and takes place of the original return, as if it had been the first return; and any pending proceeding founded on the first return is, after the amendment, tested and tried by the amended return. *McClure-Mable Lumber Co. v. Brooks*, 46 W. Va. 732, 34 S. E. Rep. 921, citing *Capehart v. Cunningham*, 13 W. Va. 750; *Stone v. Wilson*, 10 Gratt. 533; *Stotz v. Collins*, 83 Va. 423, 2 S. E. Rep. 737; *Railroad Co. v. Ashby*, 86 Va. 232, 9 S. E. Rep. 1003. See *Anderson v. Doolittle*, 38 W. Va. 633, 18 S. E. Rep. 726.

Time for the Amendment.

In General.—The extensive power with which every court is ordinarily clothed, to permit an amendment of a return of its own process, whether original, mesne or final, for the correction of a casual and honest mistake or omission, may be exercised in all cases where it exists at all as well after judgment as before. In some cases it has been exercised even to the extent of taking away altogether a cause of action, growing out of the original return, and even though a suit or motion founded on the original

return was pending at the time. And it makes no difference that the officer by whom the return was made, has gone out of office or is dead; there being no specific limitation of time within which the power may be exercised, although after a considerable lapse of time, it should be exercised with caution, and in no case ought it to be exercised, unless the court can see that it will be in furtherance of justice. *S. V. R. R. Co. v. Ashby*, 86 Va. 232, 9 S. E. Rep. 1003.

Before Judgment.—The court ought to permit the sheriff to amend his return upon a writ of *ad quod damnum*, at any time before the judgment upon it. *Dawson v. Moons*, 4 Munf. 535.

Any Time after Return Day.—And a sheriff may be permitted, by order of court, to make a return upon an execution, or to amend it, according to the truth of the case, at any time after the return day. *Bullitt v. Winstons*, 1 Munf. 269.

After Verdict.—Also, where execution is awarded on a forthcoming bond against the principal and surety therein, but the sheriff makes his return only as to the surety, the court after trial and verdict may allow the sheriff to amend his return. *Smith v. Triplett*, 4 Leigh 590.

After Action Commenced against Sureties.—Moreover, a sheriff will be permitted to amend his return on an execution, after an action has been commenced by the plaintiff in the execution against the sheriff and his sureties on his official bond, founded on the return. *Wardsworth v. Miller*, 4 Gratt. 99. See also, *Lathrop v. Lumpkin*, 3 Rob. 49.

Lapse of Seven Years.—A sheriff has been permitted by the court to amend his return after a lapse of seven years from its date. *Rucker v. Harrison*, 6 Munf. 181.

Lapse of Thirteen Years.—The court, in *Hopkins v. B. & O. R. Co.*, 42 W. Va. 535, 26 S. E. Rep. 187, said: "Under a statute like that involved here, it was held, in *Railroad Co. v. Ashby*, 86 Va. 232, 9 S. E. Rep. 1003, and the case is pointed authority in this case, that the return to a summons may be amended thirteen years after the judgment by default has been rendered, so as to show that the county in which service was had on the defendant corporation was the county in which the agent resided, and the judgment thereby validated."

Amended by Sheriff or Deputy.—The sheriff or his deputy will be permitted to amend his return of process, mesne or final, so as to make it conform to the facts. *State v. Martin*, 38 W. Va. 568, 18 S. E. Rep. 748; *Stone v. Wilson*, 10 Gratt. 529; *Wardsworth v. Miller*, 4 Gratt. 99.

Cause May Be Tried at Same Term.—It is not error to try a cause at a term at which a sheriff is permitted to amend his return, showing that a party was duly served with notice, when in fact such party had been actually served with notice to appear at that term. *Trimble v. Patton*, 5 W. Va. 482.

Liberality of Courts.—Courts are liberal in allowing officers to amend their returns, according to the truth, when a casual and honest mistake has occurred. 4 Min. Inst. (3d Ed.) 1042, and cases cited; *Hopkins v. B. & O. R. Co.*, 42 W. Va. 535, 26 S. E. Rep. 187; *S. V. R. R. Co. v. Ashby*, 86 Va. 232, 9 S. E. Rep. 1003.

"The law of amending returns is very liberal." *McClure-Mable Lumber Co. v. Brooks*, 46 W. Va. 732, 34 S. E. Rep. 921.

IV. OF AFFIDAVIT FOR ATTACHMENT.

An affidavit for an attachment cannot be amended

except as to merely clerical defects, and as to other facts relied on to show the existence of the grounds for attachment. W. Va. Code 1891, ch. 106, sec. 1, goes no further in allowing amendments than as to such additional facts. *Sommers v. Allen*, 44 W. Va. 120, 28 S. E. Rep. 787; *Bohn v. Zeigler*, 44 W. Va. 402, 29 S. E. Rep. 983.

When Additional Facts Must Exist.—But an amended affidavit in an attachment cause, stating additional facts to show the existence of the ground of attachment specified in the first affidavit, must show that such facts existed at the date of the first affidavit. *Sommers v. Allen*, 44 W. Va. 120, 28 S. E. Rep. 787.

Omission of Word "Justly."—The omission, from the affidavit for attachment, of the word "justly" cannot be cured by amendment. *Sommers v. Allen*, 44 W. Va. 120, 28 S. E. Rep. 787.

Mistake in Date.—A mistake in the date of an affidavit may be amended. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526.

V. IN CRIMINAL PROCEEDINGS—LOST INDICTMENT.

If, in a prosecution for a felony or misdemeanor the indictment is lost at any time before the trial, though after arraignment and plea, the accused cannot be tried upon it. *Bradshaw v. Com.*, 16 Gratt. 507, following *Ganoway v. State*, 23 Ala. 772, and *Harrison v. State*, 10 Yerg. (Tenn.) 542, and holding that the act, Va. Code, ch. 180, p. 69, authorizing the lost record or paper to be substituted by an authenticated copy or proof of its contents, applies only to civil cases, and does not extend to records or papers in criminal proceedings.

See monographic *note* on "Indictments, Informations, and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

A. OF VERDICT.

By Direction of Court.—The court may, for good reason, return a jury to its room to further consider and amend or alter its verdict, at any time before a verdict is received by the court and the jury discharged. *State v. Cobbs*, 40 W. Va. 718, 22 S. E. Rep. 310.

At Request of Jury.—In the case of *Sledd v. Com.*, 19 Gratt. 818, upon the rendition of the verdict, the defendant, for certain reasons then expressed, moved the court to set aside the verdict. One of the jurors, after hearing the discussion upon the motion to set aside, said that he desired to amend the verdict. Thereupon the court inquired of the jury whether they desired to amend their verdict and each of the jurors answered that he did. The jury were then allowed to amend their verdict, which proceeding was subsequently approved by the supreme court.

Period within Which Jury May Amend.—Where the jury has not been discharged or the verdict recorded it is a familiar practice to allow the jury to amend their verdict; but after they are discharged amendments are not allowable. *Sledd v. Com.*, 19 Gratt. 818; *Mills v. Com.*, 7 Leigh 751; *Com. v. Gibson*, 3 Va. Cas. 70.

1. NAME OF ACCUSED.—Where by mistake a wrong name is inserted in an indictment for a misdemeanor, though the record of the court and the endorsement on the indictment shows the correct name, the indictment cannot be amended by striking out the wrong name and inserting the name of the person intended. *Buzzard's Case*, 5 Gratt. 604.

Where defendants indicted jointly for a misde-

meanor, have been duly summoned, but fail to appear, the court may, in their absence, amend the indictment against "S. C.," and make it read "S. S. alias S. C." *Shiflett v. Com.*, 90 Va. 886, 18 S. E. Rep. 838. See Va. Code 1887, sec. 3099.

Where an indictment for a wilful trespass was against J. M., but the grand jury endorses it as against T. M., "a true bill," and it is so noted in the record, the court cannot alter or amend the record so as to make it conform to the indictment. *McKinney's Case*, 8 Gratt. 589.

Where the grand jury find an indictment against C & D, but the clerk, in making a minute of the finding, accidentally omits the name of D, the record cannot be amended at a subsequent term of the court, by inserting the name of D in the minutes. *Drake & Cochren's Case*, 6 Gratt. 665.

B. OF INFORMATION.

Where No Offence Charged.—If the offence charged in the presentment, upon which the information is based, does not amount to a misdemeanor, the court ought not to permit the attorney for the commonwealth to amend his information. *Com. v. Williamson*, 4 Gratt. 554.

After Motion to Quash.—But on an information for perjury, the attorney for the commonwealth may amend the information in accordance with the presentment on which it is founded, after the appearance of the defendant and a motion by him to quash it. *Com. v. Lodge*, 6 Gratt. 609.

VI. JEOPAILS.

A. AT COMMON LAW.—By the common law, if the issue joined be such as necessarily to require, on trial, proof of facts, defectively or imperfectly stated, or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict. *Laughlin v. Flood*, 3 Munf. 256; *Davis v. McMullen*, 86 Va. 256, 9 S. E. Rep. 1095; *Lincoln v. Iron Co.*, 103 U. S. 415.

See monographic *note* on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425, and subtitle "Judgments by Default."

Surplusage.—Surplusage in pleading does not, in any case, vitiate after verdict. Thus, in debt on a judgment for £50 19s. 10d. the verdict finds for the plaintiff the sum of £50 "that being the debt in the declaration mentioned," the error is in the sum only, which may be regarded as surplusage, and the verdict is cured by the statute of jeofails. *Roane v. Drummond*, 6 Rand. 182.

Defective Plea.—The proper plea to an action of debt upon a prison bounds bond is "conditions performed"; but as the plea "that he was not guilty of the premises laid to this charge," is substantially the same, it is good after verdict. *Payne v. Ellzey*, 3 Wash. 143.

But it seems that a plea of "the act of limitations" in those words only, to which the plaintiff replies generally, is good after verdict. *Cook v. Darby*, 4 Munf. 444.

Wrong Form of Action.—If a man, prosecuted without probable cause for stealing a deed, brings trespass on the case instead of trespass, the error cannot be taken advantage of in arrest of judgment; the error being cured by the act of jeofails. *Cleek v. Haines*, 2 Rand. 440.

Averment of Demand in Detinue.—If the declaration in detinue does not contain a demand "that the defendant surrender to the plaintiff" the property sued for, yet, after verdict on the plea of *non detinet*,

judgment ought not to be arrested. *Bogges v. Bogges*, 6 Munf. 486.

Doctrine of Intendment.—Nothing will be presumed after verdict, but what must have been necessarily proved from the matter stated in the declaration, and therefore, the total want of an averment of fact, which constitutes the gist of the action, will not be cured after verdict by the act of jeofails. *Chichester v. Vass*, 1 Call 83, 1 Am. Dec. 509.

Collateral Parts of Pleading.—Defects, omissions, or imperfections, though in form only, appearing in some collateral parts of the pleading which were not in issue between the parties, may not be cured by the application of this doctrine of intendment, as there is no room for the presumption that the defect or omission was supplied by proof. *Bailey v. Clay*, 4 Rand. 346.

"A verdict operates, under the act of jeofails, only where the case is defectively stated in the declaration, and not where no case or title is made. It cures on the ground that proof is presumed to have been given at the trial, without which the jury could not have found the verdict in question; but it does not cure in cases in which no such presumption can be made. The court presumes proof to have been given as to facts imperfectly laid, but not as to facts not laid; it only presumes such proof to have been given as is called for by the averments in the declaration." *Laughlin v. Flood*, 3 Munf. 273.

Imperfect Statement of Essential Facts.—A verdict cures, where the essential facts are imperfectly stated, but not where they are entirely omitted. *Fulgham v. Lightfoot*, 1 Call 250; *Horrel v. M'Alexander*, 3 Rand. 101, opinion of CARR, J.

See "Omission of Essential Elements."

Ambiguities.—The court, in *Chichester v. Vass*, 1 Call 83, 1 Am. Dec. 509, said: "Under our act of jeofails, according to the principles of construction adopted by the courts of law in England, a verdict will cure ambiguities, but it will not cure a declaration where the gist of the action is omitted; for, no proof at the trial can make good a declaration, which contains no ground of action upon the face of it. This is the distinction laid down in the case of *Rushton v. Aspinall*, Dougl. 679, and upon this distinction, this court went in the case of *Winston v. Francisco*, 2 Wash. 187."

Averment of Breach.—If the breach in a declaration is not sufficiently laid, and, therefore, would be bad on demurrer, it will, nevertheless be cured by a verdict, if the necessary facts are stated, though imperfectly. The distinction taken in *Chichester v. Vass*, 1 Call 83, and in *Fulgham v. Lightfoot*, 1 Call 250, is between necessary facts not being stated at all, and being imperfectly stated. In the first case, a verdict does not cure; in the second, it does. *Horrel v. M'Alexander*, 3 Rand. 94; *Peas' Case*, 2 Gratt. 640.

Promise to Pay in Assumpsit.—But if the promise to pay, in an action of assumpsit, be not averred, the omission is not cured by the verdict; or where the promise is averred by way of recital, instead of positively, the error is fatal after verdict. *Winston v. Francisco*, 2 Wash. 187; *Sexton v. Holmes*, 3 Munf. 566.

Refusal of Payment.—A declaration, however, which charges only that the defendant "hath and does refuse to pay," without alleging that he has not paid, is good on general demurrer. *Cobbs v. Fountaine*, 3 Rand. 484.

Condition Precedent.—The failure to allege the performance of a condition precedent, in a declaration,

will be cured by a verdict at common law. *Bailey v. Clay*, 4 Rand. 346.

Separate Values.—Failure to lay a separate value in an action of detinue, as to each slave demanded, is an error which would be fatal on demurrer, but is cured by a verdict severing the values. *Holladay v. Littlepage*, 2 Munf. 539.

Payment on Demand.—In *Winslow v. Com.*, 2 H. & M. 459, in debt on a sheriff's bond, the declaration charging that he failed to pay the taxes on demand, instead of at the time appointed by law, was held sufficient after verdict.

Charging Heir Only in the Detinet.—Charging an heir in the *detinet* only, instead of in the *debet* and *detinet* as is proper, is not a fatal defect after verdict, or upon general demurrer. *Waller v. Ellis*, 2 Munf. 88.

Demise and Ouster in Ejectment.—If, in ejectment, the demise and ouster be laid precedent to the plaintiff's title, it is cured by the act of jeofails. *Duval v. Bibb*, 3 Call 362.

Maliciously Suing Out Attachment.—Where, in an action for maliciously suing out an attachment against the effects of the plaintiff, the declaration alleges, that the attachment was sued out "wrongfully and without good cause," instead of "maliciously and without probable cause," such an irregularity is cured by the verdict. *Spengler v. Davy*, 15 Gratt. 381. It would certainly seem that the cases of *Kirtley v. Deck*, 2 Munf. 10; *Ellis v. Thilman*, 3 Call 3; *Young v. Gregorie*, 3 Call 446, would have dictated an opposite decision in the above case, but the court reconciled its decision on the ground that these cases were decided in the absence of some of the most sweeping provisions of the present statute of jeofails.

Declaration by Firm Name.—A declaration in behalf of a mercantile company, by the name of the firm, without mentioning the names of the partners, is good after a verdict for the plaintiffs upon the general issue. *Pate v. Bacon*, 6 Munf. 219; *Totty v. Donald*, 4 Munf. 430. See *Scott v. Dunlop*, 2 Munf. 349; *Murdock v. Herndon*, 4 H. & M. 207.

Covenant—Certainty.—On a covenant in which the plaintiff engaged to serve the defendant as his overseer, for one year, and the defendant to pay the plaintiff a certain part of all grain made on the plantation (after deducting the seed) oats excepted; a declaration charging that the defendant did not at the close of the year, pay to the plaintiff such part of the grain made on the plantation (without setting forth what crop was made) is good after verdict. *Laughlin v. Flood*, 3 Munf. 255.

Naming of Issue.—In detinue, if a negro woman by name, and her issue (without naming them), be demanded in the declaration and the jury find the names of the issue, the defect (if any) is cured after verdict. *Holladay v. Littlepage*, 2 Munf. 539.

Where an action was brought on a bond for \$188, which is declared on as for \$108, and the defendant confessed judgment for the debt in the declaration mentioned, and judgment is entered for \$108, this is not a clerical error which may be amended under the 108th section of the statute of jeofails, 1 Rev. Code, ch. 123. *Compton v. Cline*, 5 Gratt. 137.

Writ of Right.—The statute of jeofails extends to writs of right, therefore, if the verdict and judgment be substantially right, though not in the words of the law, they ought not to be disturbed. *Turberville v. Long*, 3 H. & M. 309.

A count upon a writ of right describing the land demanded as a certain number of acres, part of a

larger tract, and setting forth the boundaries of such larger tract is sufficiently certain after verdict. *Lovell v. Arnold*, 2 Munf. 167.

Failure to File Plea.—In a writ of right, the failure to file a plea is not cured by a verdict in favor of the tenant. *Rowans v. Givens*, 10 Gratt. 250.

Blanks, Informal Titles, Bad Grammar.—After verdict for the tenant in a writ of right, the blanks, informalities and bad grammar of plea and replication is immaterial. *Snapp v. Spengler*, 3 Leigh 1.

Distinction between Defective Statement of Title and Statement of Defective Title.—"If the declaration states a defective title or cause of action, though it state it well, or if it state no title or cause of action at all, neither common law nor the statute of jeofails helps the judgment. If it states a defective title, it shows that there is no right to recover; if it states no title, the presumption is irresistible that the plaintiff could not have made out a case by proof on the trial. But if it states a good title, but states it defectively, it is fair to say that the plaintiff on the trial proved a good case, else the jury would not have found for him, and the statute cures the defective statement." *Long v. Campbell*, 37 W. Va. 66, 17 S. E. Rep. 199, citing *Chichester v. Vass*, 1 Call 83; *Fulgham v. Lightfoot*, 1 Call 350; *Laughlin v. Flood*, 3 Munf. 273, opinion of court.

Where a plea is so defective as not to raise a substantial defence to the action, the plea is bad even under the statute of jeofails; and a repleader ought not to be awarded by the appellate court, though no objection was raised thereto in the court below, and issue had been joined thereon. But where an improper or defective plea raises a substantial defence to the action, and it is unobjected to in the court below, and issue is joined thereon, after verdict or judgment it is too late to object; the defect being cured by the statute of jeofails. *State v. Seabright*, 13 W. Va. 590, citing *Callis v. Waddy*, 3 Munf. 511; *Tomlinson v. Mason*, 6 Rand. 169; *Dimmett v. Eskridge*, 6 Munf. 308; *Hunnicut v. Carsley*, 1 H. & M. 153; *Cleek v. Haines*, 2 Rand. 440; *Chew v. Moffett*, 6 Munf. 120; *Pence v. Huston*, 6 Gratt. 304.

B. UNDER THE STATUTE.

1. JOINDER OF ISSUE.—It is a perfectly well settled rule of law, that the statute of jeofails will cure a misjoinder or informal joinder of issue, but it is equally well settled that it will not cure a nonjoinder or want of issue altogether. *Petty v. Frick Co.*, 86 Va. 501, 10 S. E. Rep. 886; *Johnson v. Fry*, 88 Va. 605, 12 S. E. Rep. 973; *Southside R. Co. v. Daniel*, 20 Gratt. 345 (a case of nonjoinder); *McMillion v. Dobbins*, 9 Leigh 423; *White v. Clay*, 7 Leigh 68 (a case of misjoinder); *Sydnor v. Burke*, 4 Rand. 161; *Walden v. Payne*, 2 Wash. 1; *Stevens v. Tallafarro*, 1 Wash. 155; *Wilkinson v. Bennett*, 3 Munf. 314; *Totty v. Donald*, 4 Munf. 430; *Lockridge v. Carlisle*, 6 Rand. 21 (cases of nonjoinder or want of issue); *Simmons v. Trumbo*, 9 W. Va. 358; *Huffman v. Alderson*, 9 W. Va. 617; *Moore v. Mauro*, 4 Rand. 488 (cases of misjoinder).

Want of Similitude.—But the mere want of a *similitudo* shall not after a trial, vitiate the verdict. *Brewer v. Tarpley*, 1 Wash. 363.

Where there has been a demurrer to any pleading, and the same has been overruled, the statute cures no defect, imperfection, or omission therein, except such as could not be regarded on demurrer. 4 Min. Inst. (3d Ed.) 941; Va. Code 1887, sec. 3246; *Southern Railway Co. v. Wilcox*, 98 Va. 223, 35 S. E. Rep. 365.

The misjoinder of an issue is not fatal after ver-

dict, when it is stated in the record that issue was joined. *Moore v. Mauro*, 4 Rand. 488.

Former Rulings.—Misjoinder of issue was, at one time, held not to be cured by the statute of jeofails. *Stevens v. Tallafarro*, 1 Wash. 155; *Wilkinson v. Bennett*, 3 Munf. 314. But it was held otherwise in *Moore v. Mauro*, 4 Rand. 488, and this decision in *Moore v. Mauro*, *supra*, apparently met the approbation of the court in the case of *Southside R. Co. v. Daniel*, 20 Gratt. 360.

Upon the plea of payment or nonassumpsit, though all the evidence has not been certified, yet if the plea be such that the plaintiff could reply no special matter without a departure from the allegations of the declaration, but could only take issue on the plea, the nonjoinder will be cured by the statute of jeofails. *Douglass v. Central Land Co.*, 12 W. Va. 502.

Joinder of Counts in Contract and Tort.—After verdict, without a demurrer, the statute of jeofails cures a misjoinder of counts, as where counts *ex delicto* are joinder in the same declaration with counts *ex contractu*. *N. & W. R. R. Co. v. Wysor*, 82 Va. 250.

Defective Declaration of Title by Descent.—A defective plea and issue joined upon a defective declaration of title by descent, in an action against an heir on his ancestor's covenant, is cured by the act of jeofails. *Woodford v. Pendleton*, 1 H. & M. 303.

Also, a defective setting forth of title by descent in an action by an heir for breach of covenants contained in a conveyance of lands to his ancestor, is good after verdict. *Woodford v. Pendleton*, 1 H. & M. 303.

Plea of Nil Debet in Assumpsit.—A plea of *nil debet* in an action of *indebitatus assumpsit* is cured by a verdict and will be treated in the appellate court as if it had been a plea of nonassumpsit. *Smith v. Townsend*, 21 W. Va. 486.

Plea of Not Guilty in Covenant.—Also, a plea of not guilty to an action of covenant is cured by a verdict. *Hunnicut v. Carsley*, 1 H. & M. 153.

Plea of Statute of Limitations.—And, if a plea of the statute of limitations to an action of covenant is defective in form or substance, but is not demurred to, such plea is cured after verdict by the statute of jeofails, Va. Code 1873, ch. 177, sec. 8; *Davis v. McMullen*, 86 Va. 256, 9 S. E. Rep. 1095.

Actio Personalis Moritur Cum Persona.—Such an error as giving judgment for the plaintiff, in an action for deceit against the vendor's personal representative, will not be cured by the act of jeofails. 1 Rev. Code of 1819, ch. 128, sec. 103, p. 511; *Boyles v. Overby*, 11 Gratt. 202, disapproved in *Lee v. Hill*, 87 Va. 497, 12 S. E. Rep. 1052.

Extent of Curative Effect.—If errors in the pleadings or proceedings are cured by the statute of jeofails as to one defendant, they are cured as to all the defendants. *Jenkins v. Hurt*, 2 Rand. 446.

2. OMISSION OF ESSENTIAL ELEMENTS.—In spite of the sweeping provisions of the statute of jeofails, it does not apply to cases in which the declaration sets forth no cause of action or no ground of defence, as where there is a total omission to state matters essential to a cause of action or defence. *Roanoke Land & Imp. Co. v. Karn*, 80 Va. 589; *Boyles v. Overby*, 11 Gratt. 202; *Davis v. Com.*, 13 Gratt. 189, 151; *Laughlin v. Flood*, 3 Munf. 273; *Buckner v. Blair*, 2 Munf. 336; *Braxton v. Lipscomb*, 2 Munf. 282; *Green v. Dulany*, 2 Munf. 518; *Sydnor v. Burke*, 4 Rand. 161.

Where a declaration shows that the plaintiffs have

no right of action, but on the contrary that the right of action is in another, and verdict is found for the plaintiffs, the statute of jeofails, 1 Rev. Code, ch. 128, sec. 108, does not apply to the case, and does not cure such a defect. *Ross v. Milne*, 12 Leigh 200, 37 Am. Dec. 646; *Robrecht v. Marling*, 29 W. Va. 765, 2 S. E. Rep. 827.

Quare, if the plaintiff omits to aver in his declaration matter necessary to show a good cause of action, and the defendant, instead of demurring, pleads the general issue, whether, upon the construction of the statute of jeofails, 1 Rev. Code, ch. 128, sec. 108, p. 512, the plaintiff is bound to prove the matter at the trial of the issue, which he has not averred in his declaration. *Thompson v. Cumming*, 3 Leigh 321.

To hold a defendant liable upon a cause of action not asserted, is going to the utmost verge of the law, even where such a cause of action is proved. But to hold him liable for such cause when not proved, or proved by evidence not admissible if the suit had been brought for that cause, is going beyond the letter and spirit of the law. *Boyles v. Overby*, 11 Gratt. 202, and *note*.

An action is misconceived in the sense of the statute of jeofails, only in a case, wherein upon the trial, the proofs show a cause of action fit to be asserted in a form different from that adopted. The defendant is held liable upon proof showing a liability; and if no objection is made to the form of the action until after verdict, the defect is cured thereby. *Boyles v. Overby*, 11 Gratt. 202.

But under the statute of jeofails of 1819, the omission to allege property in the plaintiff, in the declaration, is cured after verdict. *Valden v. Bell*, 3 Rand. 448.

Averment of Notice.—The failure of the plaintiff, in an action on a collateral promise, to aver notice to the guarantor of the performance of the act contemplated by the promise, and, perhaps, of a failure to pay by the person, in whose favor the undertaking was made, will be cured by the statute of jeofails, after verdict. *Pasteur v. Parker*, 3 Rand. 458.

Misnomer.—Where suit is brought against the president and directors of a branch bank, this is not a mere misnomer, which must be pleaded in abatement, but is a bar to any recovery; and though the verdict is founded upon the general issue pleaded, the error is not cured by the statute of jeofails. *Mason v. Farmers' Bank*, 12 Leigh 86.

Ejectment.—Under sec. 5, ch. 177 of Va. Code 1878, an amendment of a judgment for the plaintiff in ejectment "for their term yet to come in the lands," etc., so as to conform with the plaintiff's claim and the requirements of the Va. Code 1849, whereby ejectment was adopted to try title to, as well as to get possession of land, is not erroneous. *Alvey v. Cahoon*, 86 Va. 173, 9 S. E. Rep. 994.

a. Gist of Action Omitted.—"Though the statute of jeofails will aid many omissions after a verdict, it will not cure the defect in a declaration, in which the very gist of the action is omitted to be charged." *Moore v. Dawney*, 3 H. & M. 184. See *Smith v. Walker*, 1 Wash. 185.

Statements under Quodcum.—The gist of the action must, in all cases, be directly and positively averred in the declaration, therefore, if in trespass, the plaintiff declare "for that whereas," etc., and does not make a positive averment, it is error, and will not be cured by the verdict. *Moore v. Dawney*, 3 H. & M. 187; *Lomax v. Hord*, 3 H. & M. 271, citing

Winston v. Francisco, 3 Wash. 187; *Chichester v. Vass*, 1 Call 83; *Cooke v. Simms*, 2 Call 20.

3. CRIMINAL CASES.

a. Errors Cured.—The statute of jeofails is frequently applied in criminal cases to cure informal defects in indictments, or such as are not essential or of the substance of the charge. As, where in an indictment for grand larceny, the charge was for stealing on a certain day, in the year one thousand eight hundred and twenty-three, leaving out the r; and in rape, the using of the word "female" child, instead of "woman" child, and omitting the word "unlawfully"; and in an indictment for malicious and voluntary shooting, using the term "willfully" instead of "voluntarily." *Aldridge v. Com.*, 2 Va. Cas. 447; *Com. v. Bennet*, 3 Va. Cas. 235; *Trimble v. Com.*, 3 Va. Cas. 143.

Where, in an indictment for forgery of bank notes, the notes are referred to as being annexed to the count, instead of setting out the tenor of the forged notes, this careless and irregular mode of counting is cured, after verdict, by the act of jeofails. *Com. v. Ervin*, 3 Va. Cas. 337.

Indorsement of Grand Jury's Finding on Indictment.—It has been held that where an indictment filled the whole sheet of paper and was then folded in another half sheet of the same size, on which half sheet the attorney indorsed "Commonwealth v. Joseph Burgess, indictment," and immediately below, in the handwriting of the foreman of the grand jury was indorsed "A true bill, Robert Hamilton, Foreman," although the half sheet of paper was blank except the indorsement, and although it was not otherwise attached to the indictment then being folded around it, yet the indictment enveloped by it must be considered as the indictment which was passed on by the grand jury, and on which, verdict was found by the jury. Though the objection was a good one, it would come too late after verdict. *Burgess v. Com.*, 2 Va. Cas. 483.

Sufficient Certainty.—Where, in a presentment, the offence is charged with a sufficient certainty for judgment to be given thereon according to the very right of the case, any defect in the presentment will be aided by the verdict. Thus, where an indictment against S for keeping an office and transacting business as agent of the protection Insurance Company of Hartford, incorporated and authorized by the laws of Connecticut, without having a license therefor, did not allege that the said company was an insurance company, the error was held to be cured by the verdict. *Slaughter v. Com.*, 13 Gratt. 707.

b. Errors Not Cured.

Ownership of Stolen Bank Notes.—If the indictment for stealing bank notes does not charge that they are the bank notes of, or belong to, some person or persons by name, or of, or to, some person to the jurors unknown, the defect is fatal, and is not cured by the act of jeofails. *Barker v. Com.*, 2 Va. Cas. 122.

Omission of Word "Feloniously."—The statute of criminal jeofails does not cure an indictment for stealing bank notes under the act of 1806, which fails to charge that they were feloniously stolen. *Barker v. Com.*, 2 Va. Cas. 122.

Intention of Statute.—The statute of criminal jeofails was not intended to introduce a carelessness or laxity in pleading but merely to cure those defects which the over-nicety of the courts had introduced into the common law, and which did not put the rights of the commonwealth or the accused

into jeopardy. *Barker's Case*, 2 Va. Cas. 122; *Old v. Com.*, 18 Gratt. 930.

Origin of Statute.—That part of our statute of jeofails which cures the omission of all averments, "without proving which the jury ought to have found such a verdict," is not taken from the English statute, but is the adoption of the principle established in the English courts, and which is well explained in *Ruston v. Aspinall*, Dougl. 658, per ROANE, J. *Stephens v. White*, 2 Wash. 210.

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*Galt v. Archer.

April Term, 1851, Richmond.

(Absent CABELL, P.)

Common Carriers—Action for Freight—Case at Bar.—A

common carrier contracts to deliver a crop of wheat at an agreed price per bushel. A large proportion of the crop is delivered in good order; but from the unavoidable effects of a storm, a small part is delivered in a damaged condition, and another small portion is lost. In an action by the carrier for the freight, he is entitled to recover under the common *indebitatus* count, the agreed price for the whole quantity so delivered or lost.

This was an action of assumpsit in the Circuit court of Goochland county by Peter J. Archer against James and William Galt. The suit abated as to the latter by the return of "No inhabitant" upon the writ. The object of the action was to recover the freight upon certain wheat and tobacco and other articles, which the plaintiff had contracted to carry on his boat from the farms of the defendants on James river to Richmond. The declaration contained only the common *indebitatus* count.

On the trial of the cause, after the plaintiff had offered evidence for the purpose of proving that a contract had been entered into between James and William Galt and himself, by which he undertook as common carrier, to receive of them their crop of wheat, and to deliver the same to the consignees in Richmond for a freight of 12½ cents per bushel; and that in pursuance of this contract he did receive the said crop and deliver a part thereof, but that the whole of the crop was not delivered to the consignees, and that a portion of that

which was delivered was in an unsound and damaged condition; and among other evidence introduced a letter from William Galt to himself, and an account accompanying it, which shewed that the matter of difference between them, was as to the lost and damaged wheat; in connexion therewith and in explanation thereof, offered to introduce a witness to prove that the failure to deliver the whole of said crop and the damaged condition of a part of that delivered, resulted from inevitable accident, to wit, a storm, by which a portion of said wheat whilst in the hands of the plaintiff as common carrier was ducked in James river. To the introduction of which testimony under the pleadings in this cause, the defendant by his counsel objected; but

the Court overruled the objection and admitted the testimony; and the defendant excepted.

After the evidence referred to in the first bill of exceptions had been introduced, which, with the bill of particulars, was all the evidence in the cause, the defendant by his counsel moved the Court to instruct the jury as follows: "If, from the evidence, the jury shall believe that a portion of the wheat for which freight is charged was not delivered, and a part of it was damaged and delivered to the consignee in an unsound state, then the plaintiff is not in this cause entitled to recover the freight for wheat at the rate of 12½ cents per bushel, as claimed by him in the account filed in the cause." But the Court overruled the motion and gave the following instruction, viz: "If, from the evidence, the jury shall believe that a portion of the wheat for which the freight is charged was not delivered, and a part of it was damaged and delivered to the consignee in an unsound state, then the plaintiff is not in this cause entitled to recover the freight for wheat at the rate of 12½ cents per bushel, as claimed by him in the account filed in the cause, unless the jury shall believe from the evidence, that the loss and damage were occasioned by inevitable accident; and not by the

negligence of the plaintiff. And if the jury shall believe from the evidence, that the loss and damage were occasioned by the negligence of the plaintiff, or could have been prevented by proper care and diligence on the part of the plaintiff, then the defendant is entitled to the full amount of the loss and damage by way of set off." To the opinion of the Court refusing the instruction asked, and giving the other, the defendant again excepted.

There was a verdict and judgment in favour of the plaintiff for 172 dollars 72 cents, with interest thereon from the 22d of July 1839, till paid; and thereupon Galt applied to this Court for a supersedeas, which was awarded.

Stanard and Bouldin, for the appellant, insisted, that in this case the special contract had not been completely executed; and therefore, that the plaintiff below was not entitled to recover upon it, under the common *indebitatus* count. *Hulle v. Heightman*, 2 East's R. 145; *Algeo v. Algeo*, 10 Serg. & Rawle 235; *Donaldson v. Fuller*, 3 Id. 505; *Jennings v. Camp*, 13 John. R. 94; *Harris v. Liggett*, 1 Watts & Serg. 301; *Brown, &c. v. Ralston, &c.*, 9 Leigh 532.

Grattan, for the appellee, insisted, that the *indebitatus* count was sufficient in this case to let in either the special contract or the quantum meruit. 1 Chitty's Plead. 333, 337, 339; *Brooke v. White*, 4 Bos. & Pul. 330; *Payne v. Bacomb*, 2 Doug. R. 651; *Bank of Columbia v. Patterson*, 7 Cranch's R. 297; *Brooks v. Scott*, 2 Munf. 344; *Brown, &c. v. Ralston, &c.*, 9 Leigh 532; 2 Smith's Lead. Cas. 24, 44 Law Lib.

By the Court. The judgment is affirmed.

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***Fleming v. Toler.**

April Term, 1851, Richmond.

(Absent CABELL, P.)

1. **Pleading and Practice—Bonds—Special Plea in Nature of Plea of Set-Off—Case at Bar.**—In an action on a bond given for the price of a slave, a special plea under the act of 1831 is good, which avers in general terms, that the slave was unsound at the time of the sale, and that the plaintiff knew the fact and fraudulently concealed it from the defendant; and that upon discovering the fact the defendant offered to return the slave and demanded a rescission of the contract, which plaintiff refused; laying the damages to the whole amount of the price, or not laying any damages, and praying for judgment in bar of the action.

2. **Same—Same—Same—What May Be Proved under.**—If such a special plea avers in general terms the unsoundness of the slave, and then adds a specific unsoundness, the defendant may under this plea, prove any unsoundness; and is not confined to the specific unsoundness mentioned in the plea.

3. **Same—Same—Same—Case at Bar.**—Where a plea under the statute is filed, and another is tendered, which only varies from the first in the amount of damages laid, or in asking to rescind the contract entirely, the rejection of this last by the Court is not ground for reversing the judgment upon appeal, where the verdict negatives the facts stated in both pleas.

4. **Same—Same—Penalty and Condition of Same—How Treated.**—The penalty and condition of a bond for the payment of money, is in the same sum. It is proper to treat it as a single bill, and to give judgment for the amount of the bond with interest from the time of payment.

This was an action of debt in the Circuit court of Goochland county, brought by William T. Toler, administrator of William Toler deceased, against Tarlton Fleming and John B. Pemberton. The action was founded on the following bond:

“Know all men by these presents, that we, Tarlton Fleming and John B. Pemberton are held and firmly bound unto William T. Toler, administrator of William
311 *Toler deceased, in the just and full sum of eleven hundred dollars, to be paid unto the said William T. Toler, administrator of the said William Toler deceased, his certain attorney, his executors, administrators and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this 23d day of October one thousand eight hundred and thirty-eight. The condition of the above

***Pleading and Practice—Bonds—Special Plea in the Nature of Plea of Set-Off.**—On this question, see principal case cited in *foot-note* to Watkins v. Hopkins, 13 Gratt. 743, where there is a collection of the cases and a discussion of the authorities; *foot-note* to Huff v. Broyles, 26 Gratt. 283; Binns v. Waddill, 32 Gratt. 593; Grayson v. Buchanan, 88 Va. 257, 13 S. E. Rep. 457; Fisher v. Burdett, 21 W. Va. 630. The principal case is cited in Newberry v. Williams, 89 Va. 302, 15 S. E. Rep. 865.

obligation is such, that if the above bound Tarlton Fleming and John B. Pemberton, their heirs, executors or administrators, do and shall well and truly pay, or cause to be paid, unto the said William T. Toler, administrator of said William Toler deceased, his certain attorney, his executors, administrators or assigns, the just sum of eleven hundred dollars, twelve months after the date hereof, then the above obligation to be void, or else to remain in full force and virtue.

Tarlton Fleming, [Seal.]
John B. Pemberton, [Seal.]”

Fleming appeared and filed a plea of payment; and at a subsequent term he filed a special plea under the statute. In this plea he alleged that the bond sued on was executed by the defendants to the plaintiff for the price of a negro man slave, sold by the plaintiff to Fleming, for the sum of 1100 dollars; Fleming then believing that the slave was sound and healthy and free from blemish. That at the time of said sale, the slave was defective in this: that he was diseased; and was constitutionally liable to periodical returns of bilious colick once every week, and so continued to be; of which defect plaintiff was informed at the time of the sale, and fraudulently concealed his knowledge of said defect, and the fact of said defect from the defendant Fleming, whereby Fleming was induced to purchase
312 chase *said slave of the plaintiff as a sound slave, without any defect; and the defendant averred that the defect lessened the value of the slave 900 dollars, which the defendant proposed to set off against the debt declared upon. Upon this plea, and that of payment, the plaintiff took issue.

At another term of the Court the defendant tendered two other special pleas under the statute. The first after stating as in the special plea filed, the execution of the bond for the price of a negro man slave, sold by the plaintiff to the defendant Fleming, averred that on the day of sale the slave was unsound, defective and constitutionally diseased, and still continued to be so. That at the time of said sale the plaintiff well knowing that the slave was so unsound, defective and diseased as aforesaid, did not disclose the same to the defendant, but fraudulently concealed the same and all knowledge on the part of him, the plaintiff, in relation thereto from the defendant; by means whereof the defendant believing that the said slave was sound, healthy and free from blemish, was induced to purchase and did purchase the slave as a healthy slave at the price of 1100 dollars. That after the sale and purchase, and as soon as defendant discovered that the slave was so unsound, defective and diseased as aforesaid, viz.: on &c., he apprised the plaintiff thereof, and notified him that he should resist the payment of the bond executed by him to the plaintiff as aforesaid. And that after he had so discovered that the slave was unsound, and within a reasonable time

thereafter, viz.: on the 24th of October 1839, he offered to return the said slave to the plaintiff, and demanded a rescission of the said contract of sale, and the surrender to him by the plaintiff of said bond; but the plaintiff then and there refused to comply with such demand, or to surrender the said bond. That defendant had always been

ready and willing to return the said slave and receive back *his bond, and was willing still so to do. Whereby defendant had sustained damage to the whole amount mentioned in the bond, viz.: 1100 dollars, with interest thereon from the 23d of October 1839 till paid. Wherefore he prayed judgment, and that the plaintiff be barred to have or maintain his aforesaid action thereof against him.

The second plea tendered only varied from the first by the omission of the averment of damages. The Court rejected both the pleas, and the defendant excepted.

When the cause came on for trial the jury found a verdict as follows: "We, the jury, find for the plaintiff the debt in the declaration mentioned, with interest thereon, from the 23d of October 1839 till paid." And on this verdict the Court rendered a judgment, that the plaintiff recover against the defendants eleven hundred dollars, the debt in the declaration mentioned, with six per cent. per annum interest thereon from the 23d day of October 1839 till paid, and his costs by him about his suit in this behalf expended. From this judgment Fleming applied to this Court for a supersedeas, which was awarded.

Stanard and Bouldin, for the appellant, insisted that the pleas tendered and rejected stated a valid defence to the action on the bond; and if sustained entitled the defendant below to a total rescission of the contract. And for this they referred to *Lewis v. Cosgrave*, 2 Taunt. R. 2; *Thornton v. Wynn*, 12 Wheat. R. 183; *Burton v. Stuart*, 3 Wend. R. 236; *Street v. Blay*, 22 Eng. C. L. R. 122; 1 *Smith's Leading Cases*, p. 155, 157, note to *Chandellor v. Lopus*; *Story on Sales*, § 405, 408, 411, 420, 426. That in this respect they differed from the special plea filed; and they also differed from that plea, in the fact that under that plea the defence was confined to the proof of the specific

*disease mentioned therein; whereas under the special pleas tendered, any legal unsoundness might have been proved. As to the second of the pleas, they insisted the omission of the averment of damage was not a defect in the plea. That going for a rescission, the averment of damage was out of place; and that the statute authorized the defendant to insist upon the entire rescission of the contract. And they insisted further, that the plea set out a valid defence at common law. This they argued upon principle; and also referred to *Hayne v. Maltby*, 3 T. R. 438.

2d. They insisted further that it was error to enter the judgment for the amount due with continuing interest, the action being on a bond with a penalty. *Tennants v. Gray*, 5 Munf. 494.

Lyons and Grattan, for the appellee, insisted that the pleas tendered and rejected were defective, and therefore properly rejected. That the statute authorizes a plea of set off, and not a plea in bar, and these pleas are pleas in bar. That it is true that fraud and injury may be proved to the extent of the whole price, but to do this the thing must be worthless or he must return it within reasonable time. *Story on Sales*, § 427; *Perley v. Balch*, 23 Pick. R. 283; *Holbrook v. Burt*, 22 Id. 546; *Kingsley v. Wallis*, 2 Shepl. R. 57. And they insisted Fleming did not offer to return the slave within reasonable time.

They insisted further, that if the rejected pleas were good, the same defence could have been made under the special plea filed. That there was in this plea a general charge of disease as well as the specific disease named, and that the proof was not necessarily confined to the specific disease mentioned. And under this plea defendant might have proved that the slave was of no

value and thus have defeated the action. *Beecker v. Vrooman*, 13 John. R. 302; *Lewis v. Cosgrave*, 2 Taunt. R. 4. That the second plea was defective under the statute for want of an averment of damages; and it was not good as a plea at common law. *Taylor v. King*, 6 Munf. 358.

2d. They insisted further, that the judgment was correct. That the act 1 Rev. Code, ch. 128, § 80, p. 508, authorized the jury to fix the period when interest should commence to run; and they referred to *Davies v. Miller*, 1 Call 127; *Francis v. Wilson*, 1 Ryan & Moody 105.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that the pleas tendered by the plaintiff in error, and set out in his first and second bills of exceptions, were good in form and substance, and presented a proper defence to the action; and as the same were not objected to on account of the time at which they were offered, they should have been received. But the gravamen of each of said pleas was the unsoundness of the slave, a fact also put in issue by the special plea on which issue was joined; it being competent for the plaintiff in error on the issue joined on that plea, to have given any evidence of general unsoundness, notwithstanding the plea, in addition to the averment that the slave was defective and diseased, also specified a particular disease. As all the pleas concurred in resting on the proof of the existence of a disease or defect amounting to unsoundness, and that such defect, though known to the defendant in error, was fraudulently concealed by him; and differed merely as to the measure of relief resulting from the establishment of the facts aforesaid; and the existence of such facts being negatived by the finding of the jury on the plea putting the existence of such facts in issue, it is manifest the plaintiff in error was not prejudiced by the re-

jection of said pleas. There is no exception *to the rejection of any testimony offered by him at the trial. If he failed to offer proof which would have been proper under the issue, it was his own fault; he could have offered, and from the whole record it is most probable he did offer, all the proof in his power to sustain his defence, and the verdict of the jury is not objected to: It therefore must be taken as concluding the facts alleged in the pleas which were rejected, and the judgment thereupon was plainly right.

The Court is further of opinion, that although the obligation sued on purports to be a penal bill, yet as the sums named in the penalty and condition correspond, there was no error in treating it as a simple obligation and rendering a verdict and judgment for the amount, with continuing interest from the time the same fell due.

BALDWIN, J., dissented. He thought the Circuit court erred in rejecting the plea in the first bill of exceptions mentioned; that there is nothing in the record to shew that the error was not prejudicial to the plaintiff in error; and that the judgment ought to be reversed.

Judgment affirmed.

317 *Dabney & Wife & als. v. Kennedy.

April Term, 1851, Richmond.

(Absent CABELL, P., and DANIEL,* J.)

1. **Husband and Wife—Agreement in Contemplation of Marriage Unrecorded—Effect as to Creditors—Between Parties—Specific Execution.**†—An agreement made in contemplation of marriage, though void against creditors because not recorded, is valid between the parties; and the wife and children for whose benefit it is made, may call for a specific execution of the agreement, if there is no existing creditor or purchaser whose rights will be affected by it, though the marital rights of the husband has attached by an actual reduction of the property into his actual possession.

2. **Same—Same—Suit to Obtain Possession of Wife's Property.**—In a suit by husband and wife against the executor of her father, to obtain possession of her property, there is a decree directing the executor to deliver it to the husband and wife, to be held by them subject to the uses and stipulations of a marriage agreement entered into by them before marriage, but unrecorded. **HELD:**

1. **Same—Same—Same—Decree—Marital Rights of Husband.**—The decree did in effect set up and execute the marriage agreement; the marital rights of the husband were thereby intercepted; and the property taken and received in virtue of the said decree, was thereafter held by the husband and wife as trustees under said decree for the purposes of the agreement; and not by the husband in his character of husband alone.

*JUDGE DANIEL was related to one of the parties.

†See principal case cited in *Glazebrook v. Ragland*, 8 Gratt. 340. See also, monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt 159.

2. **Same—Same—Same—Same—Failure to Record—Effect.**—That the validity of the decree is not impaired by the failure to record it in the county where the property was situated or the parties resided; and the rights acquired in virtue of the decree are good and valid against the subsequent creditors of the husband.

3. **Same—Same—Suit against Administrator of Husband—Case at Bar.**—After the death of the husband the wife and children file a bill against his administrator to recover the property covered by the decree which remained, and for satisfaction for that which had been wasted by the husband; and there is a decree in their favour. **HELD:** Such recovery of the property undisposed of, and for the value of such as was wasted, is conclusive against the administrator and creditors of the husband.

318 *A marriage being about to occur between John H. Lee and Elizabeth Prosser, and she being entitled to a considerable estate, real and personal, by bequest from her father, the parties entered into articles under seal, bearing date the 5th day of December 1825, by which it was agreed between them, that all the estate, real and personal, to which the said Elizabeth was entitled should be secured to and settled upon her and her heirs. And Lee covenanted that all the said estate should remain in the possession of the said Elizabeth during the continuance of the intended marriage; and the annual proceeds thereof only should be applied to the maintenance of the said Lee and the said Elizabeth and their issue. And he further covenanted not to sell any part of the property except for the purpose of reinvestment or appropriation within the meaning of the articles. And it was further agreed that if Lee died in the lifetime of the said Elizabeth, leaving issue by her, any issue she might have by a subsequent marriage should share equally with his children in the property; and if there should be no issue of the marriage, and Mrs. Lee died in the lifetime of her husband, then the whole of the aforesaid estate, whether real or personal, should go to such persons as the said Elizabeth by her last will, or by any other instrument, properly attested, should appoint. This agreement was not admitted to record.

The marriage took place, and shortly thereafter, in January 1826, a bill was filed in the Chancery court at Richmond in the name of Lee and wife against Edmund W. Rootes, the executor of John Prosser, the father of Mrs. Lee, in which, after stating the provisions of the will of the father, they say they have applied to the executor to pay to them the female plaintiff's share of the property, but he declined to do it without the authority of the Court, because he doubted whether he could properly deliver to the complainants the property of the female complainant because of the

319 articles of *agreement aforesaid. The articles were exhibited with the bill; and the question was submitted to the Court whether they created any obstacle to the transfer by the executor of the property

to the complainants. They say it was not designed by the articles to interfere with the right of Lee to have possession during the marriage, and during his life, of all and every part of the property of the complainant Elizabeth.

The executor answered the bill, expressing his anxiety to deliver over the property in his possession belonging to Mrs. Lee to whomsoever the Court might appoint to receive the same, and give a legal discharge therefor. And when the cause came on to be finally heard on the 4th of February 1826, it was decreed that the plaintiffs should hold the real estate and slaves, and also the bank stocks and money transferred and paid to them by the executor, subject to the uses and stipulations of the marriage agreement.

John H. Lee died in July 1832, leaving Mrs. Lee and two children of the marriage surviving him; and John Tabb qualified as administrator upon his estate. In 1833 Mrs. Lee for herself, and as next friend of her two infant children, filed their bill in the Circuit court of Norfolk county against Tabb as the administrator of John H. Lee, in which she set out the execution of the marriage agreement and the suit against Rootes as executor of Prosser. She charged that Lee had with the proceeds of some of the trust property purchased certain slaves named, of which he died possessed; that he had sold too, fifty-four shares of bank stock for 5292 dollars; and held other moneys of the trust fund amounting together to 15,192 dollars. And she prayed that Tabb as the administrator of Lee might be restrained from setting up any title to the slaves purchased as aforesaid by Lee; and that they might be so disposed of as to satisfy all rights in them under the trust.

And she asked that Lee's estate might be held *responsible for so much of the trust moneys as he had received and wasted.

Tabb answered the bill, admitting the facts stated in the bill, and submitting the case to the Court upon the law, for such a decree as should be consistent with his safety as administrator, and the rights of the parties.

The cause came on to be heard in June 1833, when the Court held that the marriage articles were valid in equity as between the parties thereto, and that the estate of John H. Lee was responsible for their violation by him; and the plaintiff being willing to take a decree against the estate of Lee in the hands of the administrator Tabb, without taking an administration account, the Court decreed that the administrator should convey to trustees named, the slaves mentioned in the bill, to be held by them as trustees for the purposes, objects and intents of the marriage articles; and that the administrator should, out of the assets of his intestate in his hands, pay to the same trustees the sum of 15,192 dollars, to be held or invested by them for the same objects, purposes and intents. Upon this decree Tabb transferred to the trustees the slaves

mentioned therein; and paid to Mrs. Lee 442 dollars 13 cents, in part of the 15,192 dollars, which he as administrator of Lee was decreed to pay to her. And there seems to have been no further or other assets remaining in his hands.

At the time of John H. Lee's death Edmund P. Kennedy was his surety as endorser on a negotiable note for 1800 dollars discounted at the Bank of Virginia at Norfolk, for the accommodation of Lee. On this note the bank instituted an action at law against Kennedy, and recovered a judgment against him in November 1832; and in June 1833, Kennedy being taken in execution took the benefit of the act for the relief of insolvent debtors. Upon this proceeding

there seems to have been made the sum of 277 dollars 84 cents, credited *the 16th of July; and it appears by a receipt of the president of the bank, bearing date the 22d of May 1838, that Kennedy then paid the balance of the judgment, amounting to 2104 dollars 15 cents.

In October 1838, Kennedy instituted an action in the Circuit court of Norfolk borough against Tabb as the administrator of Lee, to recover the amount which he alleged he had paid as the surety of Lee; and Tabb having pleaded non assumpsit, and fully administered, on which pleas issues were made up, on the trial the jury found a verdict for the plaintiff on the first, and for the defendant on the second issue; and there was a judgment quando, for the plaintiff for 2381 dollars 99 cents, with interest on 277 dollars 84 cents, a part thereof, from the 16th of July 1833, until paid, and on 2104 dollars 15 cents, another part thereof, from the 22d of May 1838, until paid.

Mrs. Lee having intermarried with Chiswell Dabney of Lynchburg, Kennedy in October 1840, filed his bill in the Circuit court of the borough of Norfolk against Dabney and wife and her children, and the trustees, and Tabb as administrator of Lee, for the purpose of subjecting the slaves conveyed to the trustees, and the money paid to Mrs. Lee, under the decree of June 1833, in her suit against Tabb as the administrator of Lee, to the satisfaction of his judgment against the administrator. In his bill, after referring to the marriage articles and Mrs. Lee's suit against Tabb as administrator of Lee, he charged that the marriage articles and all the proceedings in said suit were fraudulent and void as to him; and that the marriage articles never having been recorded, were fraudulent in law as to him as a creditor of Lee.

Dabney and wife in their answer, called for proof that Kennedy was the creditor of Lee. They insisted that the marriage articles were valid in equity though not *recorded; and they further relied on the proceedings and decree in the case of Lee and wife against the executor of Prosser, as giving it validity. They utterly denied all fraud in procuring the decree of June 1833; and they pleaded the statute of limitations. Tabb also answered, denying all fraud if any was charged.

The facts hereinbefore stated all appear in the pleadings and proofs. And the cause came on to be heard in June 1842, when the Court held that the marriage articles were as to the complainant's demand, fraudulent and void, at least so far as to entitle him to satisfaction out of the slaves mentioned in the decree of June 1833; and decreed that unless Dabney should pay to the complainant the sum of 2381 dollars 99 cents, with its interest, and his costs at law and in this suit, within sixty days from the rising of the Court, then that he should deliver up the slaves aforesaid to the sergeant of the Court to be sold for the payment of said debt, interest and costs. And the sergeant was directed to sell the slaves on twenty days notice, at public auction, and out of the proceeds to pay the complainant. And liberty was reserved to the complainant to ask for a further decree against the defendants, if it should become necessary. From this decree the defendants, except the administrator Tabb, applied to this Court for an appeal, which was allowed.

Patton, for the appellants, insisted:

1st. That even if the marriage contract, by itself, was void against creditors of the husband because not recorded, yet it was affirmed by the decree of February 1826, in the case of Lee and wife against Prosser's executor. That the decree established the marriage articles, and that the property went into the possession of Lee and wife by virtue of that decree, and in pursuance thereof, upon the trusts of the marriage articles; and was not in possession of
323 Lee as the husband *of Mrs. Lee:
And there was no statute which required the decree to be recorded.

2d. That although the statute required deeds of marriage settlements to be recorded, that statute did not apply to marriage articles; upon the principle affirmed in the case of Withers v. Carter, 4 Gratt. 407.

3d. That the marriage articles were at least valid as between Lee and his wife and children; and he having appropriated the trust property was their debtor. That the bill filed by them against Tabb the administrator of Lee, was the bill of creditors of Lee, and the decree was a decree in favour of creditors; and it was not competent for creditors of even higher dignity to recover from them what they had received under the decree of the Court, and which as creditors of Lee they were legally and justly entitled to demand and have from his estate.

T. Taylor, for the appellee, insisted:

1st. That the suit brought by Lee and wife against Prosser's executor, was not a suit to have the estate settled on Mrs. Lee, but to relieve the executor from any difficulty in delivering over the property of Mrs. Lee to her husband. That the bill shewed the plaintiff's intention to hold under the articles and not under the decree; otherwise the Court would not have made the decree rendered in 1826, but would have appointed

a trustee. That the decree could not, therefore, give validity to the marriage articles against creditors.

2d. That the decree of 1833 against Tabb the administrator of Lee did not affect the rights of the appellee; who was not even a creditor of Lee at that time. That the decree, as between the parties to it, was proper; but it did not affect the rights of creditors who were no parties to it. These creditors were entitled to pursue the assets in the hands of the wife and children or their trustees. Gillespie v. Alexander, 1 *Cond. Eng. Ch. R. 388; March v. Russell, 14 Id. 31; Neafie v. Neafie, 7 John. Ch. R. 1; M'Call v. Harrison, 1 Brock. R. 126; Boyd v. Stainback, 5 Munf. 305; 2 Wms. Ex'ors 893; Story's Eq. Pl. § 793; 2 Spence's Eq. p. 297.

MONCURE, J. I feel myself compelled to dissent from the opinion of a majority of the Court in this case. The marriage agreement made between John H. Lee and Elizabeth his wife, on the 5th day of December 1825, not having been recorded, was, according to the decision of this Court in the case of Thomas v. Gaines, 1 Gratt. 347, void as to his creditors. Does it derive any validity as against those creditors, from the decree of the Richmond Chancery court of the 4th of February 1826? Or does that decree, proprio vigore, make the claims of those who claim under the agreement, paramount to the claims of the said creditors? I think not. It is unnecessary to enquire in this case what would be the effect on the claims of the husband's creditors, of a decree in an adversary suit, brought by the wife against her husband to enforce the execution of an ante-nuptial agreement between them. Nor whether a deed executed in pursuance of such a decree, or of a decree for a settlement, rendered in a suit in which the wife's equity could properly be administered, would be good against the husband's creditors, without being recorded. There would be much room for contending in such a case, that both the letter and the spirit of the statute required the recordation of the deed. On that question, however, I express no opinion. It is enough to say that this is not such a case. The suit in which the decree of the 4th of February 1826 was rendered was not an adversary suit, as between husband and wife, if adversary as to any person. It was brought by husband and wife in about a month after their marriage, to
325 recover of her father's executor her portion of *his estate, real and personal. It was not brought to enforce the execution of the ante-nuptial agreement. There had been no refusal and was no unwillingness on the part of the husband to execute it. Suppose it had been executed by the execution of a deed conveying the property to a trustee for the purposes of the agreement. Would not the recordation of that deed have been necessary to give it effect against the husband's creditors? The agreement was referred to in the bill because it was a binding agreement between

the parties, and the husband was willing the property should be received and held subject to the uses therein declared. Whether the suit would have been brought if there had been no agreement does not positively appear. The nature of the wife's property and the provisions of her father's will might have rendered such suit necessary. It seems that the portions of the older children had been assigned and paid to them under the order of the Chancery court. However this may be, the executor did not refuse to assign and pay the wife's portion to the husband in this case for the purpose of enforcing the execution of the agreement, or a settlement by him on her. The bill states that the executor doubted whether he could properly deliver to the complainant the share of the wife, because he had been informed of the ante-nuptial agreement. The agreement is then exhibited, and the complainants pray that the share of the wife may be assigned and paid to them. The executor probably doubted whether the husband could give him a valid discharge under the agreement, and in his answer stated that he was willing and anxious to surrender her portion of her father's estate to whomsoever the Court might appoint to receive the same and give him a legal discharge. And the Court decreed that the plaintiffs hold the real estate and slaves allotted to them in right of the female plaintiff, subject to the use and stipulations of the *marriage agreement.

I think this decree was merely a recognition of the agreement, and cannot operate as notice to creditors and purchasers, or dispense with the necessity of recording the agreement according to the requisition of the statute. I cannot see how such a recognition can have any greater effect on the rights of creditors than a deed executed by the husband in pursuance of the agreement, which it will be admitted would not affect those rights without being recorded. It seems to me that it would be strange indeed if a decree for the plaintiffs in a suit brought to recover property on an agreement binding on the parties, but not as to creditors because not recorded, should have the effect of setting up the unrecorded agreement against the creditors. This would be against the policy of the statutes of registration, the overruling influence of which is so great, that, as was decided by this Court in *Newman v. Chapman*, 2 Rand. 93, the pendency of a suit to set up an unrecorded deed which is required by law to be recorded, will not affect a subsequent purchaser for valuable consideration without actual notice.

The agreement then being void as to creditors, notwithstanding the decree of the 4th of February 1826, is it rendered valid as to them by the decree of June 1833? Or does that decree proprio vigore bind the creditors of Lee? I think not. The agreement and decree of 1826 being void as to the creditors of Lee at the time of his death, that event rendered it impossible to set up the agreement against those creditors.

Their rights to the legal administration of Lee's estate, of which the trust subject was part as to them, became then fixed, and could not be changed by the subsequent recordation of the deed or recovery of the subject by the wife. The agreement being valid inter partes, the trust subject did not devolve on the executor of Lee, or if it did, he held it as trustee in equity *for the benefit of the wife. He could not resist her suit against him for it, and therefore he was properly decreed to render it to her by the decree of 1833. But that decree declares the deed valid as between the parties thereto, and not as to creditors; and the Court which pronounced it did not intend "to intimate any opinion as to the effect of the marriage contract as to the creditors of Lee," as appears by a copy of the opinion contained in the record. Supposing the agreement then to be void as to creditors, notwithstanding the decrees of 1826 and 1833, the wife held the property after its recovery by her as executrix de son tort as to her husband's creditors, and those creditors had a right to subject it to the payment of their claims after exhausting the assets in the hands of the legal executor. *Chamberlayne v. Temple*, 2 Rand. 384; *Boyd v. Stainback*, 5 Munf. 305; and *Shields v. Anderson*, 3 Leigh 729. Kennedy is a creditor of Lee, and he established his claim by judgment against the executor, which is at least prima facie evidence against the executrix de son tort. The assets in the hands of the rightful executor have been exhausted. The act of limitations interposes no bar in favour of the executrix de son tort, and I therefore think that the subject is liable for the payment of the appellee's claim, and that the decree in his favour should be affirmed.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that the agreement entered into on the 5th December 1825 between John H. Lee and the appellant Elizabeth, in contemplation of marriage, was a valid agreement between the parties; that although for want of recordation the same would have been void as against the creditors of the said John H. Lee, it was nevertheless competent for the wife and children provided for in said agreement, to have called for the specific execution of said agreement; and if *there was no existing creditor or purchaser whose rights would have been affected thereby, there could have been no objection to such specific execution, even although the marital rights of the husband had attached by a reduction of the property into his actual possession. It would have been competent under such circumstances for the husband to have made a voluntary settlement, which, if duly recorded, would have been good against subsequent creditors; and a decree for the specific execution of an agreement, made in consideration of marriage where there was no existing creditor or purchaser to be affected is equally free

from objection. The Court is further of opinion, that in this case the wife and children occupy a more favourable position than in the case supposed of an agreement in respect to, or a voluntary settlement of, property upon which the marital rights of the husband had attached by a reduction of the property into possession. Inasmuch as it became necessary here to apply to the Court of chancery for its aid in reducing the property into possession, it would have been competent for such Court in a proper case to have required a settlement even in the absence of any marriage contract, as a condition upon which it would interpose. The Court is further of opinion, that by the bill exhibited in the late Superior court of chancery for the Richmond district by the said John H. Lee and Elizabeth his wife, against Edmund Rootes executor of John Prosser deceased, for a division and allotment and delivery to the plaintiffs of her portion of said Elizabeth in the estate of her father, the rights of said Elizabeth and her children under said marriage agreement were brought directly to the consideration of the Court; that by the issue made up by the bill, answer and proceedings in said cause, it was proper for the Court to determine and adjudicate upon the legal effect of said agreement. The Court

is further of opinion, that when
329 *by the interlocutory decree and by the final decree pronounced in said cause on the 4th of February 1826, the property of said Elizabeth was decreed to be delivered over to the said John H. Lee and Elizabeth his wife, to be held by them subject to the use and stipulations of said marriage agreement, the decree in effect did set up and execute said marriage agreement; the marital rights of the husband were thereby intercepted; and the property taken and received in virtue of said decree was thereafter held by said John H. Lee and wife as trustees under said decree for the purposes of said agreement; and not by the said John H. Lee in his character of husband alone. The Court is further of opinion, that the validity of said decree was not impaired by the failure to register the same in the county where the property was situate or found, or the parties resided; and the rights acquired in virtue of said decree are good and valid as against the subsequent creditors of the said John H. Lee. The Court is therefore of opinion, it was not competent for the appellee, a subsequent creditor of the said John H. Lee, to assail the validity of said marriage contract so as aforesaid established by the decree of the 4th of February 1826, because said contract and decree had not been duly recorded.

The Court is further of opinion, that when after the death of said John H. Lee, the widow and children filed their bill against the personal representative of said John H. Lee and obtained a decree for the recovery of such of the property as remained undisposed of, and for the value of such as had been wasted by said Lee, they asserted a claim to such undisposed of property by

a title paramount to the title of the personal representative; and their title being valid under and in virtue of the decree of the 4th of February 1826 aforesaid, such recovery of the property undisposed of, and for the value of such as was wasted, is conclusive against said administrator of John H. Lee. 330 Lee *and the creditors of said Lee, who became such after the decree of the 4th of February 1826; there being no allegation that said decree against the administrator of John H. Lee was collusive. The Court is therefore of opinion said decree is erroneous; reversed with costs: And this Court proceeding, &c. Bill dismissed with costs.

Tucker v. Daly, Assignee.

April Term, 1851, Richmond.

(Absent CABELL, P., and ALLEN, J.)

Bonds—Assignment*—Case at Bar.—Y agrees with D to assign to D a bond held by Y, to indemnify D for becoming his surety; but the bond not being present, is not then delivered to D. Afterwards Y commits an act of bankruptcy, upon which he is duly declared a bankrupt. After committing the act of bankruptcy, Y writes upon the bond an assignment of it to D, and delivers it to D, who collects the money from the obligor. **HELD:** D is entitled to hold the money as against the general assignee of the bankrupt.

This was an action of assumpsit, brought in the Circuit court of Mecklenburg county by J. J. Daly, assignee of J. Murray Yates, a bankrupt, against Henry Tucker. On the trial the jury found a special verdict, which set out the following facts, viz:

That the defendant received from John G. Oliver the sum of 470 dollars 86 cents, that being the amount of a bond executed by Oliver to J. Murray Yates. That on the 17th of December 1841, the defendant became the surety of Yates in a bond to 331 E. James & Co. for *the sum of 222 dollars 78 cents, in consideration of the promise of Yates to assign to him the bond aforesaid, and other papers, to indemnify him for thus becoming his surety, and for previous liabilities of the defendant as surety for Yates. That the bond of Oliver was not then delivered to the defendant, it not being then present; but was retained by Yates, and remained in his possession until after the 30th of May 1842. That Yates on the 4th of May 1842, committed an act of bankruptcy, upon which he was thereafter duly declared a bankrupt; and the plaintiff was appointed his assignee in bankruptcy. That after this act of bankruptcy, Yates wrote an assignment on the bond of Oliver to the defendant; and after the 30th of May 1842, for the first time delivered the bond to the defendant.

On this special verdict the Court rendered a judgment in favour of the plaintiff for 470 dollars 86 cents, with interest from the 21st

*See monographic note on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 400.

October 1843 till paid, and his costs. Whereupon the defendant applied to this Court for a supersedeas, which was granted.

Stanard and Bouldin, for the appellant, admitted that the judgment was in accordance with the decisions in England; but they insisted that the English decisions were founded upon a provision of the English statute to which there was no similar provision in the act of Congress: and that in cases not coming within that provision, the English decisions were opposed to the judgment in this case. They referred to *Mogg v. Baker*, 3 Mees. & Welsb. 194; *Winsor v. M'Lellan*, 2 Story's R. 492; *Mitchell v. Winslow*, Id. 630; *Winsor v. Kendall*, 3 Id. 507.

J. Alfred Jones, for the appellee, insisted, that the agreement between the appellee and Yates, did not constitute such an equitable assignment of the bond as was protected by the act of Congress. He referred to **Foster v. Lowell*, 4 Mass. R. 308; *Anderson v. Temple*, 4 Burr. R. 2235; *Hague v. Rolleston*, Id. 2174.

DANIEL, J., delivered the opinion of the Court.

This Court is of opinion, that by virtue of the agreement between the plaintiff in error and John Murray Yates, and the conduct of the said parties in reference thereto, set forth in the special verdict, the plaintiff in error acquired a right to have an assignment of the bond of Oliver, and a lien upon its avails, which a Court of equity would, as between the parties, have respected and enforced: That whilst, by the third section of the act of Congress, entitled "an act to establish a uniform system of bankruptcy throughout the United States," approved the 19th August 1841, the defendant in error, was, under the decree of bankruptcy in said verdict mentioned, vested with all the property and rights of property of the said Yates; yet, that by a just construction of said section, he took said property and rights of property subject to all the equities which had attached thereto prior to the act of bankruptcy on which the decree aforesaid was founded; and by the express terms of the proviso of the second section of the act aforesaid, of the 19th August 1841, held the same subject to all liens, mortgages and securities which were valid by the laws of this State, and which were not inconsistent with the provisions of said act.

The special verdict does not disclose the pecuniary condition of the said Yates at the time the agreement before mentioned was made, nor does it find any facts or circumstances that would justify this Court in inferring that the said agreement was made in contemplation of bankruptcy, or that the conduct of the parties to it was in any respect inconsistent with the provisions and requirements of the said act of Congress.

333 *The Court is also further of opinion, that notwithstanding the act of bankruptcy committed by Yates, and the

decree of bankruptcy consequent thereupon, there was nothing to restrain him from proceeding to execute and perfect, on his part, the agreement between him and Tucker; but that on the contrary, equity and good conscience required that he should do so; and that by virtue of the actual assignment and delivery of the said bond of Oliver, and of the preceding agreement and transactions in reference thereto, the said Tucker acquired a complete right to enforce the collection of said bond, and to hold its proceeds as an indemnity against the suretyships and liabilities in the verdict mentioned, which he had undertaken on account of the said Yates. The Court is therefore further of opinion, that the Circuit court erred in pronouncing the law upon the special verdict to be for the defendant in error, and in rendering the judgment thereon in his favour.

Judgment of the Circuit court reversed, with costs; and this Court proceeding to render such judgment as said Court ought to have rendered, judgment for the plaintiff in error, on the special verdict, with costs, &c.

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*Wilson v. Buchanan.

April Term, 1851, Richmond.

(Absent CABELL, P.)

Fraudulent and Voluntary Conveyances—Donor and Donee—Liability of Property in Hands of Donee.*—

W being largely indebted in proportion to his property, made a gift of slaves to his married daughter; and her husband remained in possession of them for eight years. Judgment having been recovered on some of these debts, and also on other debts contracted since the gift, B became the surety of W in the forthcoming bonds; and was compelled to pay the money. He then recovered judgment against W for the amount so paid by him, and all the property of W having been then sold, by the directions of B, his executions were levied on the slaves given by W to his daughter and their increase. **HOLD:** The slaves were liable to satisfy the debt of B.

***Fraudulent and Voluntary Conveyances—Settling Aside—Limitation.**—In *McCue v. McCue*, 41 W. Va. 156, 28 S. E. Rep. 691, it is said: "As the grantee parted with no value in consideration thereof, it makes no difference whether she had notice or not of such fraudulent intent; she stands in place of, and on no higher ground than, the grantor. For a discussion of the subject, see *Huston v. Cantril*, 11 Leigh 186; *Hunters v. Waite*, 3 Gratt. 36 (which led to the enactment of the statute); *Wilson v. Buchanan*, 7 Gratt. 334; *Bickle v. Chrisman*, 76 Va. 678, 684; *Snoddy v. Haskins*, 12 Gratt. 363; *Jenkins v. Clement*, 1 Harp. Eq. 72, 14 Am. Dec. 698, 703. *note*; especially *Lockhard v. Beckley*, 10 W. Va. 87, and *Greer v. O'Brien*, 36 W. Va. 277, 15 S. E. Rep. 74. See also, *Himan v. Thorn*, 32 W. Va. 508, 9 S. E. Rep. 930; *Glascock v. Brandon*, 35 W. Va. 84, 12 S. E. Rep. 1102, and *Humphrey v. Spencer*, 36 W. Va. 11, 14 S. E. Rep. 410." On the question of limitation to the action, see the principal case cited and followed in *Snoddy v. Haskins*, 12 Gratt. 369, and *note*. See monographic *note* on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348.

This was a suit in equity in the Circuit court of Halifax county, instituted in February 1844 by William Wilson against John Buchanan and the sheriff of Halifax. The bill alleged that some eighteen months or two years before the filing thereof, John Buchanan became the surety of William Webb in a forthcoming bond. That the bond had been forfeited, and by this means Buchanan had obtained a judgment against Webb for the amount of the bond and costs, and had levied his execution on six slaves the property of the plaintiff. That the said slaves were the absolute property of the plaintiff, were born his and on his plantation, with the exception of one of them, and that one he had held as his own for nine or ten years. The prayer of the bill was for an injunction to the sale of the slaves, and for general relief.

Buchanan in his answer, stated that he had been compelled to pay money for Webb as his surety in two *forthcoming bonds, in both of which Easley & Co. for the benefit of Bruce's executor, were plaintiffs. That for the money so paid he had recovered a judgment against Webb; and the execution which had issued thereon had been levied on the property mentioned in the bill by the direction of the defendant. That defendant believed the property was liable to satisfy his execution, as the debts out of which it originated had been contracted by Webb long before the plaintiff had become possessed of the property, for which he never had paid a cent. That after the defendant had become the surety of Webb, the latter had by three several conveyances conveyed all his property to secure other debts which he owed, except the property he had loaned or fraudulently given to the plaintiff. That previous to giving the property in the bill mentioned to the plaintiff, Webb, who was the plaintiff's father-in-law, was largely indebted for a man of his property; and had failed to pay many of the debts he then owed, and among them the debts for which the forthcoming bonds in which defendant was surety were given. That the three oldest of the slaves on which the execution was levied were the property of Webb, and went from his possession to that of the plaintiff; the others were born since.

The evidence shewed that one of the slaves named Martha, who was the mother of the others, and her oldest child then a few weeks old, were given by Webb to his daughter Mrs. Wilson, in April or May 1834, and had been in the possession of Wilson from that time until the execution was levied upon them; and the other slaves had been born in his possession. That at the time Webb gave the woman and child to Mrs. Wilson he owed about 3519 dollars 7 cents, some of which had been due as early as 1825. That his debts had been for some years gradually increasing, up to that time, and continued to increase until 336 1842, when it *amounted, as far as ascertained in this cause, to 5717 dollars 88 cents. That in 1837 and 1838 he ex-

ecuted deeds upon the most of his property to secure debts which he owed. That in 1842 he executed two other deeds for the like purpose; and in November of that year his whole property was sold for the payment of his debts, when the sales amounted upon six months credit, to the sum of 4393 dollars 45 cents: Though some of the witnesses thought that if it had been sold some three or four years earlier it would have produced more money; and Webb thought that if it had been sold in the spring of 1834, after he gave the woman and child to Mrs. Wilson, it would have paid all his debts and left him 1200 dollars. It appeared further that a part of the debts for which Buchanan was the surety of Webb was due at the time of the gift of the slaves.

It seemed probable from the papers in the record that the judgment which Buchanan had recovered against Webb was for more than he had paid for him; but that was a question not noticed in the pleadings or in any way put in issue.

The cause came on to be heard in September 1845, when the Chancellor—Leigh—pronounced the following opinion:

Two questions are presented in this case:

First. Was the gift of the slaves by Webb to the plaintiff fraudulent as to the defendant's debt? And if it was, then, secondly, whether the length of time during which the plaintiff has held the slaves, bars the defendant of the right to levy his execution on them?

In examining the first question, it may be well to enquire whether the debt due to the defendant is to be regarded as a debt existing at the date of the gift, or as a subsequent one? It is clear that the defendant

became the surety of Webb on 337 the forthcoming bonds, *long subsequent to the gift; but it is equally clear that by far the greater part of the debts, to satisfy which the forthcoming bonds were executed, was due at the time of the gift. And to the amount of this part of the debts, my opinion is that the debt due to the defendant must be regarded as an existing debt at the time of the gift. A forthcoming bond forfeited is no actual payment of the judgment; *Randolph v. Randolph*, 3 Rand. 490; and if the forthcoming bonds had proved unproductive, it surely would not be contended that the obligees ought to be regarded as subsequent creditors. The debt has in truth been paid by the defendant; and in some sense, he is a creditor of Webb subsequent to the gift. But Webb has never paid the pre-existing debt; and his donee cannot be in a better situation, because he has by his management compelled the defendant to pay this pre-existing debt. I do not, however, consider it as of much importance whether the debt be a pre-existing or a subsequent one. For in *Richardson v. Smallwood*, 4 Cond. Eng. Ch. R. 262, it is settled, that if a gift be fraudulent as to previous creditors, it is also fraudulent as to subsequent creditors. Some of the remarks of the Master of the Rolls are so apposite and conclusive, that

I will extract a part of them. He says: "Suppose a person to execute a conveyance, such that if those who were creditors at the time complained, it would be void as to them; then if they are paid off, and a new set of creditors stand in their places, does that make any difference? Does it not delay and hinder these creditors, and is it not void as to them? If it be not so, it would be easy to evade the statute: the party may pay off those to whom he is then indebted by borrowing of others, and then he may say to them, I did not make the settlement to defraud you, but to defraud the other persons who were my creditors."

338 *These remarks are made upon a supposed case by no means as strong to shew the unreasonableness of the position he was opposing, as the case actually before me. For the debt due to the defendant is for money which Webb compelled him to pay in discharge of a previous debt. I need hardly add, that this view of the Master of the Rolls is sustained by Judge Baldwin's opinion in *Hutchison v. Kelly*, 1 Rob. R. 128, and by Atherly, in his treatise on marriage settlements, p. 313. It seems that it was formerly considered by some high authorities to be the law, that every voluntary conveyance was fraudulent in respect to existing creditors. *Reade v. Livingston*, 3 John. Ch. R. 481, and the cases there cited; *Atherly on Mar. Sett.* 212-217; 1 Mad. Ch. 218; and *Stanard, J.*, in two recent cases, *Huston v. Cantril*, 11 Leigh 168, and *Hutchison v. Kelly*, 1 Rob. R. 128, has expressed the opinion that this is still the correct doctrine. And I have read most of the English cases, and I have no doubt the remark of Chancellor Kent is correct, namely, that there is no English case in which a voluntary gift has been held valid against a pre-existing debt. But notwithstanding this weight of authority, the modern cases seem opposed to this doctrine; and according to them, the question always is, was the gift made with the intent to defraud creditors? Still, if the grantor was so greatly indebted and embarrassed as that the gift put in hazard the debts due to his creditors, it is the presumption of law that the gift was made with intent to defraud creditors. What degree of indebtedness (short of insolvency) will conclusively raise the presumption of the fraudulent intent has never been, and never can be, settled; and this want of some certain rule, will probably give rise to much troublesome litigation, and will result in different decisions on nearly the same state of facts, according to the varying deductions which different Judges may draw from them. It is, however,

339 settled, that a voluntary *gift is not to be sustained merely by proving that the donor was not insolvent at the time of the gift. Indeed, there is but one case which seems to countenance the doctrine that the insolvency of the grantor must be proved in order to invalidate a voluntary gift. That case is *Lush v. Wilkerson*, 5 Ves. R. 384, in which a subsequent

creditor filed his bill to set aside a voluntary settlement; and having failed to prove any antecedent debt, asked for an account to ascertain whether the settler was indebted at the time of the settlement. This Lord Alvanley refused, remarking that the plaintiff had not proved a single antecedent debt; and then added, "a single debt will not do: it must depend on this—whether he was in insolvent circumstances at the time." Such a remark, unsupported by any authority, on such a subject, is surely not entitled to much consideration. It seems to be opposed by the constant course of the Court; for if such was the law, the Court ought, in all doubtful cases, to direct an enquiry to ascertain whether the grantor was in insolvent circumstances. Yet such an enquiry is never directed, unless under very peculiar circumstances. But, in truth, the correctness of the remark is disproved by subsequent cases. Thus, in *Richardson v. Smallwood*, before cited, the Master of the Rolls said—"I do not conceive it necessary to shew that the party was insolvent." And in *Chamberlayne v. Temple*, 2 Rand. 384, Green, J., delivering the opinion of the Court, said—"The deeds in question are clearly fraudulent and void as to the creditor of the donor. All except that to *Everlyn Beverly*, in 1793, were executed when the donor was indebted to a degree of embarrassment, and when the very debt, the satisfaction of which is now claimed, was due; and although he retained enough to satisfy all his debts, and lost a large portion of his personal estate by a calamitous accident, he had no right to throw upon his creditors the hazard of such

340 *an accident, and to provide for his family at their expense." But there can be no necessity to cite particular cases. The whole course of argument upon the cases shews that it is not necessary to prove insolvency in the grantor. If it was, all the laboured reasoning of Chancellors, and Judges, and text-writers, as to the degree of the indebtedness and embarrassment of grantors has been worse than useless; for it has only served to deceive the enquirer. Their labour would have been saved by the single remark, that the insolvency of the grantor must be proved. On the other hand, the modern cases establish that neither a single debt, (unless it be equal, or nearly equal in amount to the value of the donor's estate,) *Bank of Alexandria v. Patton*, 1 Rob. R. 499, nor indebtedness to a considerable amount, if the grantor be not on the eve of insolvency, *Bailey's S. Car. R. 585*, as cited in 2 Kent's Com. 441, note, will render void a voluntary gift as to the creditors. What state of indebtedness, then, will authorize the presumption that a voluntary gift was made to defraud creditors? I answer, a state of indebtedness which produces embarrassment, and which approaches to insolvency; a state of indebtedness which, if any calamitous accident should happen to the property, or any fall in the price of it should take place, would probably leave the donor without the

means of paying his creditors. For a gift made under such circumstances would prove, that the donor was so unmindful of his obligation to his creditors, as fairly to justify the presumption that he designed to defraud them. This appears to me to be the true doctrine, as deduced from the modern cases. Thus it seems that a voluntary gift, made when the donor is in debt, is prima facie fraudulent. *George v. Milbanke*, 9 Ves. R. 189; *Hutchison v. Kelly*, 1 Rob. R. 128, Judge Baldwin's opinion. And it is incumbent upon the donee to

repel this presumption, which he may
341 do by *proving that the donor was in prosperous and unembarrassed circumstances at the time he made the gift, not considerably indebted, and that the gift was a reasonable provision for the child, according to his state and condition in life, comprehending but a small portion of his estate, and leaving ample unincumbered funds for the payment of his debts. *Hinde's lessee v. Longworth*, 11 Wheat. R. 199; *Salmon v. Bennet*, 1 Conn. R. 525; *Huston v. Cantril*, 11 Leigh 168. But if the donor be loaded with debt, the prima facie presumption of fraud becomes conclusive. *Baldwin, J.*, 1 Rob. R. 128. Such appears to be the now prevailing doctrine: a doctrine which, from the uncertainty as to the degree of indebtedness necessary to authorize the inference of a fraudulent intent, is well calculated to produce litigation; and, what is infinitely worse, to hold out to debtors in doubtful circumstances, the temptation to attempt to provide for their families at the expense of their creditors. And I cannot but think it would have been better to have adhered to the doctrine laid down in *Reade v. Livingston*, and since so long and so strenuously insisted on and maintained by Chancellor Kent. For either that doctrine or the present uncertain rule must govern, since, I presume, no one will contend that a gift ought to be upheld unless it should be established that it was made with a previous fixed intent to defraud creditors. For if this was established as the true doctrine, the gifts of debtors, not only on the very brink of insolvency, but also lately insolvent, would be maintained; a doctrine which no one who regards a debtor under the least obligation to his creditors, would be willing to sanction.

Let us now examine the case according to the principles deduced from the modern cases.

The Judge then proceeded to examine the evidence in the cause, and held that
342 upon the principles stated *in his opinion the gift was clearly fraudulent as to the defendant's debt. He then proceeded to the consideration of the second question.

I regret that I have not the notes of the plaintiff's counsel on the second question, as I do not know whether he considers the plaintiff's right to the slaves protected by some provision of the act of Assembly for the limitation of actions, or merely from some principle adopted by the Courts for

the purpose of discountenancing stale demands.

In examining this case, I have been unable to lay my hands on any direct authority. Yet I am pretty sure there is authority to establish that, so long as the creditor has a right to sue out an execution, the execution may be levied on the property of the debtor, either in his own possession, or in the possession of his fraudulent donee. This has always been my opinion; and upon principle, I think it must be so. For the fraudulent gift of property to defeat creditors is utterly void. 1 Rev. Code, ch. 104, § 2, p. 372. And the creditor has always been permitted to regard the fraudulent gift as a nullity, and to prosecute his legal remedies for the recovery of his demand in like manner as if the fraudulent act had never been done. *Baldwin, J.*, in *Hutchison v. Kelly*, 1 Rob. R. 128. If the property fraudulently given is, as to the creditors, regarded as the property of the debtor, and if the creditor may prosecute his remedies precisely as if the gift had never been made, it follows that the execution, which issues at the suit of the creditor, may be levied on the property of his debtor, whether the property be in his possession or in the possession of his fraudulent donee. Besides, the act against fraudulent gifts was made for the benefit of creditors; not to change their mode of proceeding, either as to the time of bringing their suits, or in any other manner.

343 *But as to the act of limitations:

I can find no one provision, which has the remotest application to the present question, unless it be the one which limits the time within which creditors are at liberty to sue out executions after judgments have been obtained by them. And fraudulent donees, doubtless, are entitled to the benefit of this provision in all cases where it is applicable. But this provision, it must be observed, takes away the right to sue out an execution, but interferes not at all with the right to levy it after it has been legally sued out. In all the other provisions of our act of limitations, the time begins to run against the creditor only from the time when his cause of action accrued. In this case, however, the defendant never had a cause of action against the plaintiff, either for the debt due to him by Webb, or for the negroes on which his execution has been levied. Indeed, previous to the defendant's placing his execution in the hands of the sheriff, he had no right to institute any proceeding questioning the fairness or legality of the gift to the plaintiff. *Tate v. Liggatt, &c.*, 2 Leigh 84; *Rhodes v. Cousins*, 6 Rand. 188. So that, from the moment the defendant acquired the right of questioning the plaintiff's right, he has been diligently prosecuting his claim; and it is difficult to conceive how the act of limitations can apply to such a case. Had the defendant, or had Bruce's representative delayed the action against Webb, so that Webb might have relied effectually on the act of limitations,

the question would have been of more difficulty; but this is not even pretended to be the case.

I understood the plaintiff's counsel, at the last term, to insist that the eight or nine years possession which the plaintiff had had of the slaves before either Bruce's or the defendant's execution against Webb was sued out, gave the plaintiff a complete title to the slaves. It is true that an adverse possession of five years gives

344 "a complete title to slaves against all to whom such possession has been adverse after the accruing of their rights of action. But no possession, however long or adverse, if it be before the accruing of the claimant's action, is a bar, as is proved by the clear right of a remainderman to sue, after the death of the tenant for life. A slave is given to one for life, with remainder to another. No possession of a third person during the life of the tenant for life, no matter how long or how adverse, will bar the action of the remainderman; and for this reason—that the remainderman had no cause of action until the death of the tenant for life.

There is only one other ground, as it seems to me, on which the plaintiff can contend that his possession of the slaves bars the defendant's right to levy his execution on them—namely, the delay in proceeding to subject them. But the delay in nowise barred the right of action of the creditors against Webb; and if I am right, that an execution legally issued against a debtor may be levied on property in the possession of his fraudulent donee, no matter how long such possession may have continued, this delay cannot avail the plaintiff at law. Is there any principle of Courts of equity more favourable to the plaintiff? There may be cases, in which creditors have so long delayed the assertion of their rights, that Courts of equity will refuse to give them any aid to enable them to subject to their demands property in the hands of fraudulent donees; for Courts of equity discountenance all stale demands. But here the defendant is asking no aid of the Court. Besides, the delay has not been great; and even if it had been greater, it would be difficult to maintain, that a Court of equity ever regards a demand as stale, for which a judgment has been obtained at law in an action, to which no legal defence could have been made. And my opinion is, that the possession of the slaves by the plaintiff for eight or nine years pre-

345 vious to the *suing out the defendant's execution, does not exempt the slaves from the defendant's execution. On this question, there is a late case in the Court of appeals, which, perhaps, requires some remarks from me. I allude to the case of *Huston v. Cantril*, 11 Leigh 168. That case was a suit in equity to subject property in the possession of alleged fraudulent donees to the plaintiff's demand; and three of the Judges thought that the action was barred by the act of limitations. But it is clear that the general question, whether the act

of limitations will bar the right of the creditor to levy his execution on property in the hands of a fraudulent donee, was not decided. The case as to this point was this: The plaintiff became the security of the grantor in a bond to Mayo. After this, the grantor made the fraudulent gifts, and died in 1798; upon whose death the property came to the possession of the grantees. In 1800, the plaintiff paid the debt for which he was the security of the grantor; and in 1827, filed his bill against the grantees. And three Judges held that this suit was barred by the act of limitations. But this decision no way affects the general question; for the Judges seem to have held that the grantees, by taking possession of the property, after the death of the grantor, became executors de son tort; that a cause of action against them in that character accrued to the plaintiff in 1800; and that this latter cause of action was barred by the act of limitations. That this was the decision, is manifest from the whole report, and from the opinions of the other Judges; and if so, it is obvious that the decision in that case does not touch the question now under consideration.

In accordance with this opinion the Court dissolved the injunction and dismissed the bill, with costs. Whereupon Wilson applied to this Court for an appeal, which was allowed.

346 *Robinson and G. N. Johnson, for the appellant.

Stanard and Bouldin, for the appellee.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that upon the issue made by the pleadings, and the evidence applicable thereto, there is no error in the decree; and the same is therefore affirmed, with costs to the appellee. But this affirmance of the decree is to be without prejudice to the right of the appellant to shew in any proper proceeding where that matter may be put in issue, that the judgment in favour of the appellee against said William Webb was rendered for too large a sum; and that the credit endorsed on the execution of 124 dollars 85 cents does not cover the whole excess.

Gray v. Overstreet & als.

April Term, 1851, Richmond.

(Absent CABELL, P.)

Injunctions—Dissolution—Before Final Hearing.*—Under the circumstances of this case, it was error to dissolve the injunction, before the cause was matured and came on for a final hearing.

On the 5th of October 1844, James Gray presented to the Judge of the Circuit court of Bedford county, a bill, in which he al-

*See principal case cited in *Walker v. Hunt*, 2 W. Va. 495; *B. & O. R. R. v. Wheeling*, 3 W. Va. 375. See monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

leged that, on the 6th of October 1838, he purchased of George Overstreet, of Bedford county, a tract of land in that county, containing about 320 acres, which was described in the written and sealed contract exhibited with his bill, as "the tract of
347 *land on which he Overstreet lives, it being the same he bought of John West, also the land that Overstreet bought off of Miller's tract, and thirty odd acres that he bought of Jesse A. Bramblett, about 320 acres in all;" and that it was further set forth in said written contract, that the plaintiff was "to give five dollars per acre for all excepting the part that Overstreet had run off for Joel Richards, say forty odd acres, for which he was to give four dollars per acre, to be paid for as follows: six hundred dollars in hand, and the balance to be divided into four annual payments;" that the plaintiff went on to pay the 600 dollars from time to time, as Overstreet wanted it, until the 6th of March 1839, when he completed the cash payment, and executed four bonds for the deferred payments for 250 dollars each, payable on the 25th day of December in 1839, 1840, 1841 and 1842, which was the full contract price for the whole tract, made up as aforesaid of three smaller tracts. And he called the attention of the Court to the fact, that in the bond payable in 1842 the two hundred and fifty dollars therein promised to be paid on the 25th December in that year, is said to be "the fifth payment of two tracts of land, one of which formerly belonged to Thomas West, and the other to William Miller." "But he charged that, in fact and in truth, the said bond was executed as the last payment for the 320 acres of land mentioned in the contract aforesaid, including the thirty odd acres bought of Jesse A. Bramblett."

He charged that the said thirty odd acres bought of Bramblett, were part and parcel of a larger tract by him bought of William Dickenson, containing acres, at the price of dollars. For this tract the said William Dickenson never executed to him any deed, but retained in himself the title as a security for the purchase money.

348 *The bill proceeds to state that Bramblett, having absconded from the State, Dickenson proceeded to make what he could by a sale, &c., of the residue of the land, which fell short, by 300 dollars, of the purchase money due to him, and had instituted a suit in chancery against the plaintiff, to charge the said sum of 300 dollars on the thirty odd acres of land aforesaid still remaining in his possession.

The plaintiff further stated, that he had never got any title to the thirty odd acres, though he had paid off the bonds for 250 dollars each due in 1839, 1840 and 1841, and had moreover paid 85 dollars on account of the last bond. He averred also that the thirty odd acres was wood land and very valuable to him, and that he would gladly pay the balance due on the last bond to obtain a title for it. No title, good or bad,

has ever been made to him by Overstreet, nor can he make such title.

Finally, the plaintiff stated that Overstreet had unjustly assigned the last obligation to S. C. Hurt & Co. who had sued and were about to obtain judgment against him, to wit, at the October term 1844, of said Circuit superior court.

On these grounds he asked an injunction, which was granted.

On the 14th of April 1845, the assignees of the obligation, who had obtained judgment in the preceding October, filed their answer. They deny, on the strength of a letter said to have been received by them from Overstreet, (who, after assigning to them the last bond in September 1843, had removed to the west,) that the thirty odd acres of land got by Overstreet of Bramblett was any part of the consideration of the fourth or any bond given by Gray to Overstreet.

They allege that the bond was assigned to them with the full knowledge, consent and approbation of *the plaintiff,
349 with a knowledge on his part at the time, that the said Overstreet would remove from this Commonwealth in a short time thereafter, who, so far from intimating any objection to the payment of said bond on account of a failure of the consideration, or otherwise, expressed himself well pleased and satisfied with the arrangement, because, as Overstreet was about to remove, he would want the money for the bond immediately, in the event he did not dispose of it, and that if the defendants obtained the bond, they being stationary here, engaged in the mercantile business, and the complainant being one of their customers, he could get some indulgence on the same and be relieved from the necessity of immediate payment to Overstreet. It was under these circumstances that these respondents were induced to take the said bond, for which they paid a full and valuable consideration.

They insist that the plaintiff having signed a paper, (the bond,) stating that the consideration thereof was two tracts of land, viz: the Miller tract and the West tract, has no right to set up as against them that the Bramblett tract was a part of the consideration.

In September 1845, the absent defendant Overstreet (having given security for costs), filed his answer.

He says "that the bond for 250 dollars, assigned to S. C. Hurt & Co. was given for the consideration stated on its face, to wit, 'as the fifth payment of two tracts of land, one of which formerly belonged to Thomas West, and the other to William Miller;' and that no part of the consideration of said bond is 'for thirty odd acres bought of Jesse A. Bramblett,' nor did the complainant ever execute to this respondent his bond for the purchase money, or any part thereof, of the land that was purchased of Bramblett; nor does this respondent believe that the complainant has ever, at any time, paid to this respondent, or to any person

for him, any sum on account of land purchased of Bramblett; nor *is he bound to this respondent, in any manner, for the purchase of the same. It is true, that at one time, there was a contract between this respondent and complainant for the purchase of a small tract of land obtained of Bramblett, in addition to the West and Miller tracts; but when the complainant came to execute his bonds, he executed them in consideration of, and for the price of the Miller and West tracts alone, one of which is the bond assigned by this respondent to S. C. Hurt & Co., to which tracts the complainant has a good and perfect title; and it was agreed that the complainant should pay Bramblett for the land which had been purchased of him, and look to him for the title; the complainant preferring that arrangement because Bramblett was indebted to him, which debt, this respondent is informed, was actually taken in by Bramblett in payment of the said land; so that, by the arrangement, this respondent had nothing to do with receiving the pay for, or making a title to the land that had been purchased of Bramblett."

He adds that "he assigned the bond to S. C. Hurt & Co., with the knowledge and consent of the complainant; and although it was known for a long space of time that this respondent was about to leave the State, the complainant never intimated to him that he had the slightest defence to make to said bond, or that he conceived this respondent in any manner liable to him for the title to the land bought of Bramblett.

The documentary evidence filed in the cause, (it does not always appear in the record by whom,) consists of two deeds, a copy of the contract of October 6, 1838, and a copy of the obligation sued on, which bears date March 6th, 1839. One of the deeds, from Overstreet and wife to Gray, dated November 20, 1838, conveys "one hundred and thirty-four and three-fourths acres and thirty-one poles," for the consideration of 643 dollars 72 cents. The other, from the *same grantors to the same grantee, conveys 161½ acres, for the consideration of "eight hundred and seven and half dollars." Total quantity of land 296 acres, 1 rood and 31 poles. Total consideration 1451 dollars 22 cents.

The deposition of Alexander A. Smith completes the record. He was examined by the plaintiff on the 30th of September 1845, two days before the successful motion to dissolve. He said that "he was present when the contract between Gray and Overstreet was closed, which was in the early part of March 1839. The bonds were executed at that time by James Gray to George Overstreet, who was present, and he understood from all parties the bonds were for the purchase money of all three of said parcels of land, including the thirty odd acres which Overstreet bought of Bramblett. There were four bonds of 250 dollars each, due in one, two, three and four payments. A part of the money—the amount he did

not remember—was paid down at the time the bonds were executed for the balance due, in the four payments above mentioned."

This deposition was objected to for want of notice to the defendants Hurt, Preston and Overstreet. It appeared that Leftwich, one of the partners of the firm of S. C. Hurt & Co. was present with his counsel at the taking of the deposition, and the commissioner who took it certified it as taken pursuant to notice; but the notice was not returned.

The cause came on in October 1845, upon a motion to dissolve the injunction, when the same was dissolved. Whereupon Gray applied to this Court for an appeal, which was allowed.

John R. and John E. Cooke, for the appellant.

Stanard and Bouldin, for the appellee.

352 *ALLEN, J., delivered the opinion of the Court.

The Court, without deciding upon the merits of the controversy, as such decision would be premature until the case was matured and came on for final hearing, is of opinion, that upon the motion to dissolve, the Court erred in dissolving the injunction. Order dissolving the injunction reversed, with costs to appellant. Injunction reinstated, and cause remanded in order that the same may be matured for hearing and a final decree.

Crump & c. v. United States Mining Company.

April Term, 1851, Richmond.

(Absent CABELL, P., and MONCURE,* J.)

1. **Corporations—Suit by—Forfeiture of Charters—When Open to Enquiry.**†—In an action by a corporation, the question whether the corporation has forfeited its charter is not open for enquiry, unless the forfeiture has been ascertained by the sentence of a Court in a proper proceeding for the purpose.

2. **Same—Corporate Existence—How Proved.**‡—The organization of a corporation may be proved by

*The case was argued before his appointment.

†**Corporations—Forfeiture of Charter—How Ascertained.**—In an action by a corporation, the question whether the corporation has forfeited its charter is not open for enquiry, unless the forfeiture has been ascertained by the sentence of a court in a proper proceeding for the purpose. For this proposition the principal case is cited with approval in *Lumber Co. v. Ward*, 30 W. Va. 50, 3 S. E. Rep. 231; *Baltimore & O. R. R. Co. v. Supervisors*, 3 W. Va. 324; *Pixley v. Roanoke, etc., Co.*, 75 Va. 325; *foot-note* to *Shinn v. Com.*, 32 Gratt. 899. See, in accord, *Banks v. Poitiaux*, 3 Rand. 136. See monographic note on "Corporations (Private)" appended to *Slaughter v. Com.*, 13 Gratt. 767.

‡**Same—Corporate Existence—How Proved.**—The corporate existence of a corporation may be proved, by the introduction of its charter, and of the minute book showing organization under the charter.

its records and parol proof, without the production of its list of subscribers.

3. **Same—Ratification of Acts of Directors—Effect upon Purchasers.**—The stockholders of a corporation having directed the directors to create new stock and sell it; and the directors having instead, acquired original stock and sold it, their act may be ratified subsequently by the stockholders, so as to render the sales valid and binding upon the purchasers.

4. **Same—False Representations—Purchasers Misled to Their Injury—Effect.**§—In written proposals for a sale of stock in a mining company, if the representations contained therein are false as to any material fact, by which the purchasers have been misled to their injury, and in which they are presumed to have trusted to the vendors, then the contract founded on such representations, is

353 void; whether *the vendors knew the representations to be false at the time they were made, or not; and whether made with a fraudulent intent or not.

5. **Same—Suppression of Truth—Effect upon Contract.** | —In such a case the suppression from the written proposals, of any fact within the knowledge of the vendors, materially affecting the value of the thing to be sold, and inconsistent with the statements in the written proposals, vitiates the contract as fully as the false affirmation of any material facts; if the purchaser is injured thereby.

6. **Same—Representations True—Subsequent Failure of Mine—Right of Vendors to Enforce Contract.**—If in such a case the representations contained in

Chesapeake & Western R. R. Co. v. Washington, etc., R. R. Co., 99 Va. 726, citing Grays v. Turnpike Co., 4 Rand. 578; *Crump v. Mining Co.*, 7 Gratt. 352.

Same—Acts of Agent—Ratification.—See principal case cited and approved in *Harvey v. Steptoe*, 17 Gratt. 303, and *note*; *Owens v. Boyd Land Co.*, 96 Va. 562, 28 S. E. Rep. 950.

§**Contracts—False Representations—Effect.**—As to the effect of false representations upon contracts, where the purchaser is injured thereby, see the principal case cited and approved in *Grim v. Byrd*, 32 Gratt. 301, and *note*; *Linhart v. Foreman*, 77 Va. 545; *Lowe v. Trundle*, 78 Va. 68; *McMullin v. Sanders*, 79 Va. 365; *Meek v. Spracher*, 87 Va. 169, 12 S. E. Rep. 397; *Wilson v. Carpenter*, 91 Va. 187, 21 S. E. Rep. 243; *Max Meadows L., etc., Co. v. Brady*, 92 Va. 77, 22 S. E. Rep. 845; *Dickinson v. R. R. Co.*, 7 W. Va. 439; *Lane v. Black*, 21 W. Va. 625.

§**Corporations—Promoter's—Suppression of Truth—Effect.**—In *Virginia Land Co. v. Haupt*, 90 Va. 537, 19 S. E. Rep. 168, it is said: "The authorities are abundant in support of the general rule that a person fraudulently induced by an agent of a corporation—and a promoter is an agent—to subscribe to its capital stock, may, at his option, repudiate the contract; and a fraud may consist as well in the suppression of what is true as in the representation of what is false. Indeed, the law is that where the person solicited to subscribe has no other information on the subject than that which the agent chooses to convey, the statements of the agent ought to be characterized by the utmost candor and honesty. 1 *Cook, Stockh. and Corp. Law* (3d Ed.) sec. 147; *Crump v. U. S. Mining Co.*, 7 Gratt. 352; *Bosher v. R. & H. Land Co.*, 89 Va. 455, 16 S. E. Rep. 360; *Directors, etc., v. Kisch*, L. R. 2 H. L. App. Cas. 99." See also, *Richardson v. Graham*, 45 W. Va. 141, 30 S. E. Rep. 94.

the written proposals of sale were in all material respects true, and no fact within the knowledge of the vendors materially affecting the value of the thing sold, was suppressed to the injury of the purchasers, the subsequent failure of the mine in value and productiveness, does not impair the right of the vendors to enforce the contract.

7. **Sale of Land—False Representations by Agent—Effect upon Contract.**—Owners of property employ an agent to sell it, and they give him written proposals containing the terms of sale and a description of the property. If the agent makes other representations of the value and condition of the property, which are false, and by these false representations induces persons to buy, the owners, though they neither authorized or were informed of these representations, are bound by them; and the contracts are void.

8. **Corporation—Sale of Property by President—Not Binding on Corporation.**—The president of a corporation is not *ex officio* the agent of the corporation to sell property which it may direct to be sold; and unless appointed the agent to sell, his representations are not binding on the corporation.

This was an action of debt, brought in the Circuit court of law for the county of Henrico and the city of Richmond, by the United States Mining Company, against Crump and Liggon. It was one of twenty-eight actions brought by the same plaintiffs against certain subscribers to the stock of the company, for arrears due upon their stock. All the cases turned upon the same questions, and were *submitted to the same jury.

On the trial of the causes the plaintiffs introduced in evidence an act of the General Assembly of Virginia for the incorporation of the United States Mining Company, and then offered in evidence a minute book purporting to be a minute book of the
354 company, for *the purpose of proving the existence of the corporation. To this evidence the defendants objected, upon the ground that it was not competent until it was shewn by the subscription list of stockholders, that the persons who assembled on the 16th of August 1834, (the day when according to the minute book the company was organized,) were stockholders authorized to associate and act as such; and they called for the production of such list. Whereupon the plaintiffs offered to prove by J. J. Chew, that shortly after the passage of the act of incorporation, the company had an office or place of business, where the business to carry on which they were incorporated, was carried on; and that the affairs of the company had been managed by directors who were chosen from time to time. That he was himself a subscriber, and had paid after the organization of the company, a portion of his subscription as called for from time to time; and that he had sold out his stock to a person who had fully paid up to the company the instalments due upon it. That he had transferred said stock in the office of the company on the books of the company. And that the various books purporting to be the books of the company, including the

minute book aforesaid, were kept in the handwriting of Richard B. Maury, who was the recognized, notorious secretary of the company from the time it purported in said books to have been organized, and his appointment as secretary, until the death of said Maury. The plaintiffs by their counsel stated also, that they proposed to follow up the evidence of Chew, in further proof of the organization of the company, by evidence that each and all of the present defendants recognized the company as an existing corporation, by entering into the contracts with the said corporation upon which the present actions were brought. Whereupon the defendants moved to exclude

the testimony of Chew, upon the
355 ground that such *testimony was not competent in the absence of the subscription book, which being written evidence of the fact that the persons who claimed the right to act as a corporation, were subscribers to stock, could not be dispensed with, unless shewn to be lost or destroyed, by any parol proof of the fact which such subscription list would establish. But the Court overruled the motion, and admitted the testimony; and the defendants excepted.

In the further progress of the cause, the plaintiffs offered in evidence the prospectus of a sale of the stock of the company signed by William Jackson the president, and the contract annexed thereto, on which this action is founded, and proved the signatures of the defendants to the contract by which they each subscribed for the number of shares annexed to his name. They also introduced a printed report of the president and directors giving a description of the property and of the condition and prospects of the company, which was referred to in the prospectus. They also introduced copies of the certificates of stock issued by the company to the defendants, and offered evidence to prove that the defendants had received a dividend of five per cent. upon the amount of forty dollars a share paid in by them for their stock. And they introduced certain proceedings of the defendants, by which they expressed their determination to pay on requisitions which should be made upon them on account of their stock. And the plaintiffs then rested their case. Whereupon the defendants called a witness, John H. Eustace, whose name appears first upon the list of subscribers mentioned above, who stated that the signature of his name was not in his handwriting, and that he had no recollection of having given any person authority to make it for him; though he has no doubt he did: but that he had never paid anything for the stock standing
356 against his name, nor had he been called upon to pay *anything for it.

The defendants then called a witness, James B. Cowles, who proved that his signature to the subscription list aforesaid was genuine. That the book which contained the prospectus and list, was in the hands of James Williams, who came to the city of Richmond as the agent of the plain-

tiffs to sell their stock, and presented the said prospectus and subscription list, but did not shew him, and he did not ask for, the printed report before referred to, and induced the witness to subscribe for stock, which he did without reading the prospectus. And then the defendants offered to prove by the witness Cowles, that Williams at the time of procuring the subscriptions to the said stock from the witness and the defendants, and for the purpose of inducing him and them to subscribe for and purchase the stock, made representations to them in addition to those contained in the report and prospectus, as to the description, condition and value of the gold mine, upon the faith of which, he and the defendants became subscribers for the stock, as shewn by the list aforesaid; which representations were false and fraudulent: And for the purpose of getting such proof, asked the witness to state what representations were made to him and the defendants, as aforesaid, by Williams touching the value and description of the mine and condition of the company. But the plaintiffs objected to the question and any answer thereto, upon the ground that it was not competent for the defendants to give evidence of any representations by said Williams, because they insisted he was a limited agent, whose authority was defined by the prospectus aforesaid and the printed report referred to in it. The Court sustained the objection, and excluded the evidence; and the defendants again excepted.

After the introduction of the evidence mentioned in the previous exceptions, the defendants proposed to prove by the witness Cowles, that when Williams made
357 *the representations referred to in the preceding bill of exceptions, William Jackson the then president of the company, whose name was signed to the prospectus, was present and assented to them; and also proposed to prove that the same representations were made sometimes by Williams in the presence of Jackson, and sometimes by Jackson himself, to other subscribers for stock, who are defendants in these causes. The witness did not identify Jackson very confidently, though he expressed the belief that the person who was with Williams was the same with William Jackson the president of the company, who was then in court, and was pointed out to the witness. The counsel for the defendants then asked the witness to state what the representations were which were made as aforesaid by Williams and assented to by Jackson. But the plaintiffs by their counsel moved the Court to exclude all evidence of any such statements or representations made in the presence of or by William Jackson the president of the company, which were not contained in the written prospectus and the report therein referred to, upon the ground that the said prospectus and report contained the only representations of the value of the mine and stock, and the condition of the company, which could be given in evidence in the cause,

based upon any representations of Jackson or Williams. The Court sustained the motion and excluded the evidence; and the defendants again excepted.

It appears that an act for the incorporation of the United States Mining Company was passed in January 1834. This act constituted John L. Marye and four other persons by name, and such other persons as should be thereafter associated with them, a corporation for the purpose of mining. These five named gentlemen owned a tract of land on which the mining was expected to be carried on. Their proposals for the disposition of stock were, that the land

should be put in as a part of the
358 *capital stock of the company, at 150,000 dollars; in payment of which they were to receive 40 dollars a share, on each share subscribed for by others than themselves, until the proceeds with their own subscription, which was to be for five hundred shares in the first instance, should make the sum of 150,000 dollars. It was first intended that the capital stock should be 300,000 dollars; of which the original proprietors were to take 500 shares, and the rest be sold out to other persons; but it was afterwards agreed to reduce it to 180,000 dollars. Of this sum the original proprietors subscribed for five hundred shares, equal to 50,000 dollars, and other persons subscribed for five hundred and nineteen shares, equal to 51,900 dollars: The proprietors then, to make up the capital stock, subscribed for the remaining seven hundred and eighty-one shares; and the company was organized, and proceeded to business.

At the annual meeting of the company held about the 17th of August 1836, a committee made a report in which they "earnestly recommend that the mine should be further developed and worked on a scale commensurate with the immense treasures it contained;" and to obtain the means thus to enlarge the operations of the company, they recommend a sale of the capital stock to the amount of 70,000 dollars; and advise that it shall be sold at a premium of 10 dollars a share.

In accordance with the recommendation of the committee the stockholders, on the 17th of August, adopted a resolution authorizing the board of directors to create six hundred and eighty-nine shares of additional stock, upon such terms as they might deem most expedient; and that they should cause books for the sale of the same to be opened when and where they might think proper. On the 14th of September the board of directors adopted a resolution in which it was recited, that the

359 *original proprietors had proposed to surrender to the company a part of the stock received by them in payment for the mine, not exceeding 781 shares, provided the company would issue new scrip for a like number of shares to such subscribers as are content to pay therefor to the proprietors 40 dollars per share, and to the company 60 dollars per share. And it was declared that the proposition met the

approval of the directors; and directions were given for carrying it into execution. Some time after the stock had been subscribed for by the defendants, these proceedings of the directors were approved and ratified by the stockholders.

In pursuance of the resolutions aforesaid the prospectus referred to in the second bill of exceptions was prepared, in which it was stated that the company holding in reserve 781 shares of the original stock of the company, propose to sell the same on the following terms and conditions, viz: The terms were then stated, and it was added that the mines were in full and successful operation, having three veins of valuable ore, one of which was then working at the depth of eighty feet, &c. And for a full description of the mine, buildings, machinery, &c. reference was made to the last report of the president and directors of the company. To this prospectus was attached a subscription paper, upon which the defendants in these cases made their subscriptions. These are the papers referred to in the foregoing exceptions, and which were in the hands of Williams, the agent of the company, when he was in Richmond soliciting subscriptions to the stock.

In addition to the written evidence much parol testimony was offered by both parties, on the one part to prove that a fraud had been practised upon them in the sale of the stock, and on the other to repel and disprove the imputation; but only such a statement of the proofs is given as will shew the nature of the claim and of the defence, and

the relevancy of the instructions given
360 or *refused by the Court. In 1837 the mine proved to be unprofitable and was abandoned.

After all the evidence had been introduced the defendants by their counsel, moved the Court to instruct the jury as follows:

1st. "If from the evidence the jury shall believe that the United States Mining Company, either by forfeiture of its charter or by failure to appoint the proper officers and nonuser, has ceased to be a legal corporation, this suit cannot be maintained, and a verdict must be rendered for the defendants."

2d. "That the stockholders of the United States Mining Company in general meeting, only, and not the board of directors, had authority to create new stock, and if they shall believe that the stockholders in general meeting authorized a sale of new stock, and the defendants afterwards, in Richmond made their subscription for stock; and after that subscription without the assent of a general meeting of the stockholders, and without the assent of the defendants, the board of directors purchased old stock from the original proprietors, and did not create new stock according to the authority and resolution of the stockholders, and have not created any, the plaintiffs are not entitled to recover."

But the Court refused to give the first instruction, upon the ground, that whether

the supposed acts of forfeiture, the failure to appoint officers, or other acts of nonuser, did exist or not, they could not be enquired into collaterally in this case, for the purpose of affecting the right of the plaintiffs to maintain their suit, unless there was evidence to shew that the charter had been ascertained to be forfeited, or the corporation to be dissolved, by the sentence of a Court in which those matters had been decided.

And the Court refused to give the second instruction without the following qualification, which was insisted on by the plaintiffs, viz:

361 ***"But if the jury believe that after the order of the stockholders authorizing the board of directors to create new stock, the board agreed with the original proprietors, that the latter should surrender a portion of the original stock for the use of the company, and to be sold by the company as original stock instead of creating new stock; and the said original stock was thereupon offered for sale and subscribed for by the defendants; and that the contract thus made was executed by the subscribers receiving the scrip for the stock purchased by them, and that they have claimed the benefit of said contract by receiving dividends on said stock purchased by them, and that the stockholders at a subsequent meeting approved and ratified the act of the board, then the plaintiffs are not precluded from recovering by reason of the stock sold to them being original or old stock substituted as aforesaid, instead of creating new stock."**

To the opinion of the Court refusing the instructions asked, and giving the addition to the second, the defendants excepted.

The defendants further moved the Court to instruct the jury:

1st. That if the representations contained in the prospectus and report, as part thereof, are false as to any material fact, constituting an inducement or motive to the subscription for stock by the defendants, by which they have been misled to their injury, and in which the defendants are presumed to have trusted to the plaintiffs, and not to have relied on their own judgment, then the contract founded on such representations is void, and cannot be enforced, whether the plaintiffs knew the representations to be false at the time they were made or not; and whether made with a fraudulent intent or not.

2d. That the suppression from the prospectus of any fact within the knowledge
362 of the plaintiffs materially *affecting the value of the thing to be sold, and inconsistent with the statements in the prospectus, vitiates the contract as fully as the false affirmation of any material facts, if the defendants be injured thereby.

The Court gave these instructions, and the plaintiffs excepted.

The plaintiffs then moved the Court for the following instruction, viz:

"That if the jury believe from the evidence that all the representations made by

the plaintiffs in the prospectus and report, as to the description, condition and prospects of the mine, before and at the time of the sale, were in every material particular substantially true as represented, and that the plaintiffs at the time believed, and were justified by the facts known at the time, in believing, the ore and mine as valuable as they represented it to be, then that the right of the plaintiffs to recover in this case is not impaired or affected by any proof that the mine and ore did not, when subsequently developed and opened to a greater depth, prove to be as valuable as in the opinion of the plaintiffs so expressed and believed, it was supposed to be; and thus failed to be as productive and valuable as was anticipated at the time of the sale of the stock to the defendants."

This instruction the Court refused to give, but at the instance of the defendants' counsel gave the following in lieu thereof, viz:

"If the jury shall be satisfied that the representations contained in the prospectus and the report, as part thereof, were true at the time they were made as to all the material facts constituting an inducement or motive to the defendants to subscribe for the stock, and as to which the defendants are presumed to have trusted to the plaintiffs, and not to have relied on their own judgments, and that no fact within the knowledge of the plaintiffs materially affecting the value of the thing sold

363 *was suppressed to the injury of the defendants, the subsequent failure of the mine in value and productiveness, and disappointment of the expectations and anticipations of the parties, does not impair the right of the plaintiffs to recover: And the subsequent failure of the mine can be relied on by the defendants, only as evidence to affect, so far as it may, the question whether the representations were true at the time they were made."

To the refusal of the Court to give the instruction asked for by them the plaintiffs excepted.

There was a verdict for the plaintiffs for 600 dollars, with interest, whereupon the defendants asked the Court for a new trial, on the ground that the verdict was contrary to evidence; but the Court overruled the motion, and gave a judgment for the plaintiffs according to the verdict; and the defendants excepted. Upon the application of the defendants this Court awarded a supersedeas to the judgment.

Robinson and Lyons, for the appellants, insisted:

1st. That the proof offered to shew the organization of the company should have been rejected. That this charter was a private act, and the organization of the company must therefore be proved. *United States Bank v. Stearns*, 15 Wend. R. 314; *Rees v. Conococheague Bank*, 5 Rand. 326; *Lithgow's Case*, 2 Va. Cas. 297; *Bacon's Abr. title Corporations*, p. 12. And although the books of a corporation are competent

evidence of their corporate acts, it must first be proved that a corporation exists. Philips' Evi. 1156 in notes; Ang. & Ames on Corpo. 533.

2d. Upon the question whether the company might not cease to exist in some of the modes mentioned in the instructions, without a proceeding against it at the suit of the Commonwealth to enforce the forfeiture of its charter, they referred to 4 Comy. Dig. title Franchise, 375; Greeley v. Smith, 3 Story's C. C. R. 657.

3d. That the representations of Williams the agent of the plaintiffs in the sale of the stock to the defendants, should have been received in evidence. They said that the cases make a distinction between the declarations of the agent made at the time of the contract, and those made before or after. Fairlie v. Hastings, 10 Ves. R. 123. That the representations of Williams offered in evidence, were made at the time of the contract; and these were clearly admissible. Westcott v. Bradford, 4 Wash. C. C. R. 492; 1 Stark. Evi. p. 47, § 28; Haynes v. Rutter, 24 Pick. R. 245; Woods v. Clark, Id. 35; Hannay v. Stewart, 6 Watts 487. That he was an agent to sell stock, and representations as to the nature, quality, prospects, &c. of the thing sold, were legal incidents of his powers. Hough v. Doyle, 4 Rawle's R. 291. That the prospectus does not set forth the terms of his agency; indeed does not mention him; and cannot, therefore, limit his powers. Lobdell v. Baker, 1 Metc. R. 193; Locke v. Stearns, Id. 560; Welsh v. Carter, 1 Wend. R. 185; Story on Agency, 58, 73, 135. That if Williams exceeded his powers, yet when plaintiffs come into Court to enforce a contract made by him they ratify his acts, and are bound by his representations. Story on Agency, § 126, 135-39; U. S. Bank v. Davis, 2 Hill's R. 452; Campbell v. Fleming, 28 Eng. C. L. R. 29. And they insisted that the question as to the authority of the agent, ought to have been determined by the jury. Paley on Agency 211.

4th. That the Court erred in excluding the evidence as to the representations made by Jackson the president of the company. They insisted that the representations of Jackson were as binding on the company as was the prospectus itself. Salem India rubber Co. v. *Adams, 23 Pick. R. 256; Gibbs v. Neely, 7 Watts' R. 307; Dobell v. Stevens, 10 Eng. C. L. R. 201; Pilmore v. Hood, 35 Id. 43. That these representations were calculated materially to influence the purchasers of the stock; and even if they were free from all moral fraud, yet if they were untrue in fact and calculated to mislead in any important particular, they were proper to be given in evidence. Pawson v. Watson, Cowp. R. 788; Adamson v. Jarvis, 13 Eng. C. L. R. 346; Foster v. Charles, 19 Id. 113; S. C. 20 Id. 64; Polhill v. Walter, 23 Id. 38; Humphrys v. Pratt, 5 Bligh P. C. New series 154; Hazard v. Irwin, 18 Pick. R. 95; Lobdell v. Baker, 1 Metc. R. 193; Smith v. Richards, 13 Peters' R. 26; U. S. Bank v. Davis, 2

Hill's R. 452; Conn v. Penn, 1 Peters' C. C. R. 496.

B. B. Minor and Patton, for the appellees, insisted:

1st. That the corporation books properly kept are evidence of the organization of the company, and of the regularity of their proceedings. Angel & Ames on Corp. § 373, 374, 567-70, 502; Utica Ins. Co. v. Tilman, 1 Wend. R. 555; Hagerstown Turnp. Co. v. Creeger, 5 Har. & John. 122; Wood v. Jefferson City Bank, 9 Cow. R. 205; Grays v. Turnpike Co., 4 Rand. 578; Turnpike Co. v. M'Carson, 1 Dev. & Batt. 309.

2d. That no act of forfeiture of a charter can be relied on in a collateral way to defeat a suit by the corporation; but there must first be a proceeding for the purpose of enforcing the forfeiture, and an ouster of the franchise. People v. Manhattan Co., 9 Wend. R. 351; Trent v. Cartersville Bridge Co., 11 Leigh 521; Angel & Ames on Corp. 224-5, and also 82, 84, 85, 86: As to the omission to elect officers, they referred to Angel & Ames on Corp. 106-8, and 734-36.

3d. That Williams was a special agent to make sale of the stock; that the only evidence of his agency which these defendants had, was his possession of the *prospectus and the report of the directors; and these distinctly stated what was to be sold, and described the subject. If, therefore, Williams made any other representations than are contained therein, the defendants were obliged to know, by an inspection of his powers, that he had no authority to make it; and they were bound to look to his powers. Story on Agency, § 76; Angel & Ames on Corp., p. 301. They insisted that the rule as to an agent of a corporation was the same, or even more stringent than that applicable to agents of private persons. Angel & Ames on Corp., p. 215, 216, 290, 292; Gunnis v. Erhart, 1 H. Bl. 289; Howard v. Braithwaite, 1 Ves. & Beame 202; Powell v. Edmonds, 12 East 6; Whitehead v. Tuckett, 15 East 400; Fenn v. Harrison, 3 T. R. 757. And this rule limited the agent strictly by his authority; so that he could not bind his principal for any thing beyond it. Gibson v. Colt, 7 John. R. 390; Delafield v. The State of Illinois, 2 Hill's R. 159; North River Bank v. Aymar, 3 Hill's R. 262; Mann v. King, 6 Munf. 428; Hooe, &c. v. Oxley, &c., 1 Wash. 19; Hopkins v. Blane, 1 Call 362; Blane v. Proudfit, 3 Call 207; Bank U. S. v. Beirne, 1 Gratt. 234; Union Bank v. Beirne, Id. 226; Hortons v. Townes, 6 Leigh 47; Bryant v. Moore, 26 Maine R. 84; Brown v. Johnson, 12 Smeade & Marsh. 398; Bank of Hamburg v. Johnson, 3 Richardson's R. 42; Schimmelpennich v. Baird, 1 Peters' R. 264; Parsons v. Armor, 3 Id. 413; Walker v. Smith, 1 Wash. C. C. R. 152; Rossiter v. Rossiter, 8 Wend. R. 494; Jones v. Edney, 3 Camp. R. 285; Pickering v. Dowson, 4 Taunt. R. 779; Kain v. Old, 9 Eng. C. L. R. 205; Jaques v. Todd, 3 Wend. R. 83.

4th. That the Court properly excluded the

evidence as to the statements of Jackson, the president of the company. He had no authority further than as president; and it was no part of his official duty to make statements as to the value of the stock, 367 or the condition, *prospects, &c. of the company, in order to induce subscriptions. *Angel & Ames on Corp.*, 243, 249, 251; *Hartford Bank v. Barry*, 17 Mass. R. 97.

BALDWIN, J., delivered the opinion of the Court.

The question presented by the second bill of exceptions taken at the trial is, whether the Circuit court erred in rejecting the evidence offered by the defendants in these actions for the purpose of proving that the contract upon which the actions are founded was procured from them respectively by false and fraudulent representations made to them at the time, as to the description, condition and value of the subject, by Williams the agent of the plaintiffs. And the question must be considered upon the hypothesis, that the defendants were able and ready to prove such false and fraudulent representations so made at that time. The first step in the order of such proof was of necessity evidence of the declarations and conduct of the agent at the time the contract was entered into; and the decision of the Court excluding the representations so made by him, assumes the proposition, that though the contract in question was so fraudulently procured from the defendants, it is nevertheless obligatory upon them.

It cannot be doubted that where a contract is made between parties acting for themselves as principals, and in an action founded upon it, the defence is that the contract was procured by the false and fraudulent representations of the party seeking to enforce it, his conduct and declarations at the time are parts of the *res gestæ*, and essential elements of the defence. If therefore the decision of the Court below can be sustained, it must be upon the ground of a distinction, applicable to these cases, between the effect of such a fraud when perpetrated by a principal, and its effect when perpetrated by an agent.

368 *The question whether an agent has transcended the authority conferred on him by his principal in making a contract, usually arises where the other party is seeking to enforce it, and the agent's want of authority is relied upon by the principal as matter of defence against the performance of the contract on his part. But in the present cases, the principals demand the performance of the contract by the other parties, and of course recognize the authority of their agent to procure it, but deny that they can be affected by the alleged false and fraudulent representations employed by him for that purpose. This denial rests upon the alleged ground that Williams was an agent of limited powers, restricted by his principals from making any representations true or false on the subject of the contract, and made the mere

medium for communicating to purchasers the terms of sale proposed by his principals, and their own representations of the description, condition and value of the property.

But the admissibility of evidence to prove the procurement of a contract by the fraudulent practices of an agent does not turn upon the extent or the limitations of his authority; for if so, then as the principal may in most cases recognize and confirm the authority of the agent, the consequences of his misconduct would be visited, not upon the person whose confidence enabled him to commit the fraud, but upon its innocent victim. The fraudulent conduct of the agent in procuring a contract may be an abuse of his known authority, or it may be accomplished by means of the suppression or concealment of the limitations upon it; and in neither case can his principal give validity to the contract by repudiating the fraudulent practices employed to obtain it.

That a person professing to act as agent for another does so wholly without authority, or transcends the authority actually conferred upon him by his principal, 369 *is no reason for enforcing the contract against the other party when obtained from him by false and fraudulent representations. In the words of a judicious writer: "Contracts made for the benefit of another, but without his privity or consent, may be rejected or affirmed at his election. But by making the election to affirm it he adopts that which is detrimental, as well as that which is for his benefit. And in seeking to enforce contracts entered into by agents, the principal is subject to have them impeached by any conduct of his agent which would have that effect if proceeding from himself. Every species of fraud, misrepresentation or concealment, therefore, in the agent, affects the principal's right to recover." *Paley Agency*, 324-5.

That an agent to sell is restricted in the delegation of his authority by his principal from making any representations on the subject of the contract, whether true or false, has, it is true, a bearing upon the obligatory force of the contract; but it is as a question of fact, and not as a question of law. It may be used in evidence as tending to prove that the representations of the agent, though false and fraudulent, had not the effect of deceiving the purchaser. But this presupposes that the restraint upon the authority of the agent was known to the purchaser; and whether he knew it, and the effect of such knowledge in preventing him from being deluded, deceived and defrauded, are also questions of fact for the consideration of the jury.

It is difficult to conceive a case of an action founded upon a contract of sale, to which the defence is that it was obtained by fraud, in which the acts and declarations whether of the principal seeking to enforce the contract, or of his agent through whose intervention it was procured, occurring at

the time of making it as part of the res gestæ, are inadmissible evidence. Such a defence does not present a naked question of law for the decision of the Court; but a mixed question of law and fact for the consideration of the jury, with the aid of such instructions as the Court may give in regard to the principles of law applicable to the facts that may be proved to the satisfaction of the jury.

The bill of exceptions shews nothing to render these cases an exception to the general rule of evidence just mentioned. It appears therefrom that the contract in question consisted of a written prospectus on the part of the plaintiffs, in the form of a subscription paper, to be signed by the purchasers, for the sale of a number of shares of reserved stock of their Gold Mining company, upon the terms and conditions therein prescribed, representing the mines to be in full and successful operation, with several particulars of description and recommendation, and referring to the last report of the president and directors of the company for a full description of the mine, buildings, machinery, &c., which subscription paper was signed by the defendants and others. The plaintiffs also gave in evidence a report of the president and directors of the company to the stockholders, containing a detailed and favourable description and statement of the condition of the mining property, and of the operations, resources and prospects of the company, as being the report referred to in the prospectus; but it does not appear that it was shewn to the defendants, or was called for by them; or that the prospectus itself was read to or by them, except so far as it may be inferred from their having subscribed it. It further appears that Williams was an agent of the company for effecting the contemplated sales of the stock upon the terms and conditions prescribed in the prospectus; but the extent or limitations of his authority do not appear, except so far as may be inferred from the facts above mentioned, and the recognition of his agency by the act of the company in seeking to enforce the contract in

question. Upon this state of facts, the defendants offered to prove that Williams, at the time of procuring the subscriptions of stock from them, and for the purpose of inducing them to subscribe for and purchase the same, made representations, in addition to those contained in the prospectus and report therein referred to, as to the description, condition and value of the gold mine, upon the faith of which the defendants became subscribers for said stock; which representations were false and fraudulent; and for the purpose of getting such proof, asked a witness to state what representations were made to the defendants as aforesaid, touching the value and description of the mine and condition of the company: whereupon the counsel for the plaintiffs objected to the question and any answer thereto, upon the ground that it was incompetent for the defendants to give

evidence of any representations by said Williams, because they insisted that he was a limited agent, whose authority was defined by the said prospectus and the report of the president and directors therein referred to.

We are of opinion, for reasons above suggested, that the Circuit court erred in rejecting the evidence so offered by the defendants, upon the ground urged on the part of the plaintiffs, and if the propriety of its rejection on any other ground could be considered by this Court, as to which we express no opinion, none such appears from the bill of exceptions. The evidence relied on by the plaintiffs as proving acquiescence in and recognition of the contract on the part of the defendants, was proper for the consideration of the jury, in connection with all the circumstances of the case, and the principles of law applicable thereto; but could not be used by way of estoppel, for the purpose of excluding the evidence of fraud offered by the defendants.

The Court is further of opinion, that the Circuit court did not err in the rejection of the declarations of Jackson, the president of the company, as stated in the third bill of exceptions, upon the assumption made by that Court, that he was identified as the person who made them; inasmuch as it does not appear that he acted as the authorized agent of the company for the purpose of making sales of the stock above mentioned.

And the Court is further of opinion, that there is no error in the several decisions of the Circuit court, rejecting proposed instructions, nor in the actual instructions given, as set forth in the several bills of exception in relation thereto.

The Court therefore, without considering whether the bill of exceptions to the refusal of the Circuit court to grant a new trial, was properly taken, is of opinion that the judgments must be reversed for the error of that Court in rejecting the evidence offered of the declarations of Williams, as stated in the second bill of exceptions.

Judgments reversed, with costs to the plaintiffs in error, verdict set aside, and new trial directed.

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*Morris v. Peregoy.

April Term, 1851, Richmond.

(Absent CABELL, P.)

Detinue—Female Slave—Recovery.*—In an action of *detinue* for a female slave, the recovery may be, not only for the slave named in the writ, but for her children born since the commencement of the action.

This was an action of *detinue* brought in the Circuit court of Orange county, by Thomas H. Peregoy against George Morris, for the recovery of four slaves, one of whom was named Fanny. On the trial an in-

*See monographic *note* on "Detinue and Replevin."

struction was asked for by the defendant and refused by the Court, and another instruction was given; and exceptions were taken, but it is not important to report them. The jury found a verdict for the four slaves mentioned in the writ and declaration, and also for a fifth, the child of Fanny, born since the institution of the suit; and there was judgment accordingly; whereupon Morris applied to this Court for a supersedeas, which was awarded.

Lyons, for the appellant, and Robert G. Scott, for the appellee, submitted the case on printed notes.

By the Court. The judgment is affirmed.

374 *Yarborough & Wife v. Deshazo.

April Term, 1851, Richmond.

(Absent CABELL, P.)

1. **Appeals—Bond Not Given within Prescribed Period—Effect.***—Upon an appeal to the Court of appeals, from a final judgment, decree or order, if the appeal bond is not given within five years from the date of the said judgment, decree or order, the appeal will be dismissed.

2. **Statutes—Construction.**†—A case in which there has been a final decree is not a pending suit in the sense of the Code, ch. 16, § 18, p. 101, and ch. 216, § 2, p. 800.

3. **Statute of Limitations—Proviso—Applicable to What.**—The proviso in the act for limitation of suits as to rights existing when the Code takes effect, ch. 149, § 19, p. 549, is restricted to actions and rights barred by that chapter; and does not extend to the law limiting and regulating appeals.

This was a motion to dismiss the appeal in this case, because it was not perfected in time. It appears that there was a final decree in the cause on the 10th of November 1845, from which an appeal was allowed on the 8th of November 1850, and process issued from the clerk's office on the next day; but the appeal bond was not executed until the 18th of December 1850.

S. Taylor, for the motion, referred the Court to the Code of 1850, ch. 182, § 17, p. 686.

J. Howard, in opposition to the motion, referred to Williamson v. Gayle, 4 Gratt. 180.

***Appeals—Bond Not Given within Prescribed Period—Effect.**—The proposition of the principal case, that an appeal will be dismissed when the appeal bond is not given within the time prescribed by law, was approved in Otterback v. Alexandria & Fredericksburg R. Co., 26 Gratt. 941, 942; Pace v. Flicklin, 76 Va. 297.

See the principal case also cited in Dunbar v. Dunbar, 5 W. Va. 570.

Laws Allowing Appeals—Remedial in Nature.—The principal case was cited in Crawford v. Halsted, 20 Gratt. 236, as holding that laws relating to appeals are remedial in nature. See the principal case also cited in Price v. Harrison, 81 Gratt. 114.

†**Statutes—Construction.**—See principal case cited in Nelson v. Jennings, 2 P. & H. 369.

ALLEN, J., delivered the opinion of the Court.

In the case of Williamson v. Gayle, 4 Gratt. 180, it was decided that the act of 1830-31, Sup. Rev. Code, p. 148, limiting appeals to this Court, refers to the time *of presenting the petition for an appeal to the Court, or a Judge in vacation. That if the petition be presented within five years from the date of the judgment or decree, the appeal is not barred by the statute. That the appeal being allowed, the cause was pending in the Court of appeals; and that the failure of the appellant to execute the appeal bond directed to be given on granting the appeal, did not avoid the appeal. In the opinion given in that case it was said that "by the terms of the statute, the limitation applies to the time at which the petition shall be preferred to the Court, or any Judge in vacation. The law is silent as to the period within which the bond may be given. The petition may be preferred on the last day allowed by law, and will be within time, but if not acted on within the five years by the Judge or Court, bond could not be given within the five years, or if acted on within the time limited, it might be impossible, from the remoteness of the county, to execute the bond in time. In such instances, would it be contended the party had lost his right to appeal?"

The law as thus construed, with the reasons assigned for such construction, were before the legislature at the late revision. The Code of Virginia, ch. 182, § 17, p. 686, provides that "no process shall issue on any appeal, writ of error or supersedeas allowed to or from a final judgment, decree or order, if, when the record is delivered to the clerk of the appellate Court, there shall have elapsed five years since the date of such final judgment, decree or order: But the appeal, writ of error or supersedeas shall be dismissed whenever it appears that five years have elapsed since the said date before the record is delivered to such clerk, or before such bond is given as is required to be given before the appeal, writ of error or supersedeas takes effect."

Under this law, although the petition may have been preferred, and appeal allowed, within the time limited, 376 *yet if the record be not delivered to the clerk of the appellate Court; and where bond is required, if it be not also given within five years from the date of the judgment, the appeal must be dismissed. No reservation is made to meet the cases of hardship suggested in the opinion delivered in Williamson v. Gayle, or to secure a perfect equality between suitors residing near to or remote from the places at which the sessions of the Court are held. A short proviso allowing a certain number of days from the date of the order granting the appeal, to file the record and give bond, when required, though the five years should have elapsed, would have remedied the inconvenience, if it had been deemed of any importance to provide for it. In the absence of

any such provision, the law is imperative, and no discretion is left to the Court. Parties desiring to apply for appeals must make their applications in time not only to allow the Court or Judge to act upon it, but also to allow themselves time to file the records in the appellate Court, and to give the bonds required. In the present case a final decree was rendered by the Circuit court of Powhatan county on the 10th November 1845. It does not appear when the petition was presented, but an appeal was allowed in Court on the 8th November, and process issued on the 9th of November 1850; and it appears from the certificate of the proper clerk that an appeal bond was executed on the 18th of December 1850. Five years from the date of the decree had not elapsed before the record was delivered to the clerk, but more than five years had elapsed since the date of the decree before the bond was given. It therefore falls within the terms of the law, and the appeal must be dismissed. The appeal was allowed under the act in the New Code, the only law in force at the time, regulating appeals, and must be governed by its provisions. Not being a prosecution, suit or proceeding pending on the 1st July 1850, when the Code 377 *went into operation, it is not affected by the 18th section, ch. 16, p. 101, and the 2d section, ch. 215, p. 800 of the Code, providing that the repeal of the previous acts should not affect any prosecution, suit or proceeding pending on that day. The proviso in the act for limitation of suits as to rights existing when the Code takes effect, contained in the 19th section, ch. 149, p. 594, is restricted to actions and rights barred by that chapter, and does not extend to the law limiting and regulating appeals.

Lyon's Adm'r v. Magagnos' Adm'r.

April Term, 1851. Richmond.

(Absent CABELL, P.)

1. **Legacy—Direction to Be Paid a Year after Testatrix' Death—Interest.**—Testatrix gives a legacy, and directs it shall be paid within a year from her death. The legacy bears interest from the end of the year, though there is no hand to receive it for thirteen years.
2. **Same—No Hand to Receive It—Duty of Executor.***—Where there is no hand to receive a legacy, the executor should invest it in an interest bearing fund, or bring it into Court to be so invested.
3. **Same—Statute of Limitations—Case at Bar.**—The legatee having died shortly after the testatrix and before a qualification upon her estate in this country, and there having been no administration on the estate of the legatee for twelve years, the act of limitations of 1826 does not bar the claim for the legacy.

Anne M. G. Magagnos was a French woman who came to this country some time before 1807. At that time she lived in Nor-

*See monographic note on "Executors and Administrators."

folk, where she kept a clothing store, by which she made a considerable property.

She returned to France in 1818, and 378 died in 1826, at Marseilles. *Shortly before her death she made her will, which was written in French, and was duly proved in France; and in August 1827 a copy properly authenticated was admitted to record by the Borough court of Norfolk. In August 1829 Joseph Magagnos qualified as administrator with the will annexed.

By one clause of her will she says: "I leave to Jean Layene, and in case of his death, to his children, and in case he has left no children, then to his heirs or legal representatives, 1200 dollars, or six thousand francs, also payable within the year of my decease. The said Jean Layene was born in Washington, and was purser in the navy at Norfolk in Virginia during the time of the embargo."

On the 28th of November 1840, Sanford Chancellor qualified as the administrator of John Lyon; and then filed his bill in the Circuit court of Norfolk borough against the administrator of Madame Magagnos, in which he charged that his intestate was the person referred to in Madame Magagnos' will as Jean Layene, he having been a purser in the navy at Norfolk at the time designated by her, and dealing largely with her at her store; and that he died between the first of the year 1827 and 1829. The administrator answered, denying that John Lyon was the Jean Layene of the will; and relying upon the act of the 8th of March 1826 limiting proceedings against fiduciaries.

The evidence in the cause satisfied the Court below and this Court, that the intestate of the plaintiff was the party referred to in the will of Madame Magagnos; and the cause coming on to be heard in July 1843, the Court held that the plaintiff was entitled to the legacy of 1200 dollars, with interest from the 28th of November 1840; and directed an account of the defendant's administration upon the estate of Madame Magagnos. On the next day, however, this decree was set aside, and the administrator 379 admitting assets sufficient to satisfy the *decree about to be made, it was decreed that the plaintiff as administrator of John Lyon deceased, recover of the defendant as the administrator with the will annexed of Anne M. G. Magagnos, the sum of 1200 dollars, with interest thereon at the rate of six per cent. per annum, from the 28th day of November 1840 till paid, and his costs; thus giving interest on the legacy only from the date of the plaintiff's qualification as administrator of Lyon. From this decree the plaintiff applied to this Court for an appeal, which was allowed.

W. Harrison, for the appellant, referred to Granberry v. Granberry, 1 Wash. 246; 2 Fonb. Equ. p. 432, § 3; Bourne's ex'or v. Mehan, 1 Gratt. 292.

There was no counsel for the appellee.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that there is no error in so much of the decree as decides that the appellant is entitled to the legacy of 1200 dollars, mentioned in the will of the testatrix. But as by the terms of the will the said legacy was payable within one year after the decease of the testatrix, the Court is of opinion there was error in allowing interest thereon from the 28th day of November 1840, instead of allowing interest from a year after the death of the testatrix: the Court being of opinion that although there was no hand to receive the same, it was the duty of the representative of the estate of the testatrix to have invested the same in some interest bearing fund, or to have paid the same into Court to be invested; and failing to do so, and retaining the fund, he should account for the interest. *Burwell's ex'or v. Anderson*, 3 Leigh 348; *S. C.* 6 Gratt. 405; *Bourne's ex'or v. Mechan*, 1 Gratt. 292. And the Court would now proceed to enter such a decree as the Court

below should have done, if it appeared
380 *that assets sufficient to pay the same had come to the hands of the appellee. But as the admission of assets was made with reference to the amount of the claim as ascertained by the interlocutory decree, such admission should not bind the party to the payment of the larger amount to which the appellant is entitled.

It is therefore adjudged and ordered, that so much of said decree as conflicts with this opinion, be reversed, with costs to the appellant; and that the residue be affirmed. Cause remanded for an account of assets, unless a sufficiency to pay the plaintiff's claim be admitted; and for a final decree according to the principles above declared.

Peyton & Others v. Stratton & Others.

April Term, 1851, Richmond.

(Absent CABELL, P.)

Partnerships—Dissolution—Transfer of Partnership Debts—Case at Bar.—S is the acting member of the firm of L, S & Co. The partnership is dissolved by the death of L: the firm being largely indebted to S for advances for them in their business, and S being indebted to P the commission merchant of the firm and S. S transfers to P the debt due him from the firm in discharge of his debt due to P, and credits the firm with the amount. **Held:** S under the circumstances of the case was authorized to make the transfer, and the members of the firm were bound for the amount to P.

This was an action of assumpsit, brought in the Circuit court of Buckingham county by Peyton, Deane & Edwards against Peter B. Stratton and three others, surviving partners of the firm of Lancaster, Stratton & *Co. On the trial after a
381 number of exceptions had been taken, in which all the evidence was stated, there was a verdict for the defendants. The plaintiffs thereupon asked for a new trial

on the ground that the verdict was contrary to the evidence; but the Court overruled the motion, and the plaintiffs excepted. In this bill of exceptions the Court certified all the evidence stated in the previous bills of exceptions as to the facts proved.

It appears from the evidence that Lancaster, Stratton & Co. were partners and millers doing business at Curdsville in the county of Buckingham; and that Peter B. Stratton was the managing partner. The business was commenced in the spring or summer of 1838, and Nathaniel Lancaster one of the partners died on the 19th of March 1841; but the business was continued until the 30th of June of that year.

In the year 1838 Peter B. Stratton commenced business as a merchant at Curdsville, in his own name; and in September 1839 he formed a partnership with Richard A. Booker, under the name of Stratton & Booker, which was continued until September 1841.

Peter B. Stratton being the acting partner in both concerns, and the books of Lancaster, Stratton & Co. being in fact kept in his storehouse, he purchased the grain manufactured at the mill of Lancaster, Stratton & Co. paying for it sometimes by goods out of his store or the store of Stratton & Booker, and at others by his own money or his own note, or by the proceeds of the flour manufactured. This flour was shipped to the plaintiffs Peyton, Deane & Edwards, commission merchants in Richmond; and Peter B. Stratton drew upon them for the proceeds of it, either in his own name or the name of Lancaster, Stratton & Co., as suited his own convenience.

The books of Lancaster, Stratton & Co. shewed that when Peter B. Stratton
382 purchased grain for them and *paid for it out of his store or the store of Stratton & Booker, Lancaster, Stratton & Co. were charged with the amount paid for them; and when Stratton drew on Peyton, Deane & Edwards on his own account, Lancaster, Stratton & Co. were credited with the amount so drawn. In the account rendered to this firm by the plaintiffs, there is, under the date of February 4th, 1840, a charge by the plaintiffs to them, of 4222 dollars 43 cents, being a transfer of that sum from the account of Peter B. Stratton to the account of Lancaster, Stratton & Co. To this charge the other members of the partnership made no objection; and at this time the books of the firm shewed that Lancaster, Stratton & Co. were debtors to Peter B. Stratton to this amount. Again, there is in the account of the plaintiffs with Lancaster, Stratton & Co. under date of July 15th, 1841, a charge of 10,646 dollars 42 cents in like manner transferred from the account of Peter B. Stratton to the account of Lancaster, Stratton & Co. This sum it was ascertained afterwards, was more than Stratton or Stratton & Booker were in advance to Lancaster, Stratton & Co., and the excess was returned: yet leaving Lancaster, Stratton & Co. debtors to Peyton, Deane &

Edwards as appeared by the books of the former in the sum of 8252 dollars 26 cents, on the 1st of July 1841. Of this sum there does not seem to have been any doubt but that it was due to Peyton, Deane & Edwards from one or the other of the parties; and the question in the cause was whether Peter B. Stratton was authorized, after the dissolution of the partnership of Lancaster, Stratton & Co. by the death of Nathaniel Lancaster, in March 1841, to substitute them as the debtors of Peyton, Deane & Edwards in the stead of Stratton & Booker, whilst he credited them with Stratton & Booker for the same amount.

The Court having refused a new trial, and rendered a judgment upon the verdict for the defendants, the *plaintiffs applied to this Court for a superseas, which was awarded.

Randolph, Patton and Lyons, for the appellants.

Garland, for the appellees.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that as it appears from the account taken from the books of the firm of Lancaster, Stratton & Co., that the firm, at the expiration of the partnership, was indebted to the plaintiffs in error in an amount exceeding the sum claimed in this suit, such account furnished by their own books would be prima facie evidence of the claim of the plaintiffs in error, and throws upon the defendants in error the burthen of shewing that the claim was not really due.

The Court, without deciding upon the sufficiency of the certificate of the facts proved upon the trial, as set forth in the bill of exceptions to the decision of the court overruling the motion for a new trial, but looking thereto for the purpose of ascertaining to what extent the prima facie evidence furnished by said account is counteracted by the other evidence in the cause, and regarding the same in the most favourable aspect for the defendants in error, it clearly appears from evidence uncontradicted by any thing appearing in the cause, that the firm of Lancaster, Stratton & Co. were indebted to Stratton or Stratton & Booker in an amount exceeding that which was transferred for the account of the latter, and not settled by P. B. Stratton, to the account of the plaintiffs in error. And the effect of such transfer was merely to substitute the plaintiffs in error as the creditors of the defendants in error in the place of Stratton or Stratton & Booker, without enlarging, or in any other mode affecting, their liability for the debt due by them; they having obtained credit for the amount so transferred with Strat-

ton or Stratton & *Booker. The Court is of opinion, that under the authority of the case of *Brown v. Higginbotham*, 5 Leigh 533, and the circumstances of this case, the surviving partner, P. B. Stratton, was authorized to make such transfer. It appears he was the acting member of the

firm charged with the settlement of the accounts; that the debt due from the defendants in error to the said Stratton or Stratton & Booker, grew out of purchases of wheat made for their benefit, by Stratton and Stratton & Booker, and paid for by the latter with merchandise purchased by them of or through the plaintiffs in error. It further appears that the plaintiffs in error supposed that P. B. Stratton, the acting partner of the firm of Lancaster, Stratton & Co., had authority to make such transfers, and that on the 4th February 1840, which was long before the dissolution of the firm by the death of Lancaster, a transfer for the amount of 4222 dollars 43 cents was actually made and entered on the books of the defendants in error, and never objected to; so that in reality the effect of the transfer merely rendered the defendants in error responsible for a debt contracted for goods and merchandise of which they received the benefit; and the propriety of the transfer was recognized by the firm in one instance before its dissolution by the death of Lancaster; in these particulars making this a stronger case for the exercise of the authority to make such transfer by the surviving partner in settling up the affairs of the firm, than was furnished by the facts in the case of *Brown v. Higginbotham*.

It therefore is considered by the Court, that the judgment of the Court overruling a motion for a new trial is erroneous.

Reversed with costs, verdict and judgment set aside, and cause remanded for a new trial.

385 *Bowles' Ex'or v. Elmore's Adm'x.

April Term, 1851. Richmond.

(Absent CABELL, P.)

Pleading and Practice—Amendment of Pleadings—Case at Bar.—In September 1837, the administratrix of E sued the executor of B in debt on a promissory note dated June 1817. The executor pleaded the statute of limitations; and the administratrix replied that after making the note, B having become the bail of E, they in October 1818 entered into a covenant, by which it was agreed that E should deliver to B the note of B, who was to hold it until the liability of B as bail was ended, and then he was to redeliver it to E. That pending the suit, E died in February 1832, and there was no administration on his estate until August 1836. There was a demurrer to the replication, which was sustained, because there was no *proferri* of the covenant. The plaintiff was then allowed to amend the replication by adding the *proferri* of the covenant, and the defendant again demurred. HELD:

1. **Same—Same—Same.**—It was proper to allow the amendment, it being mere matter of form, occasioning no surprise to the defendant, and being necessary to the justice of the case.
2. **Same—Same—Merger.**—The note was not merged in the covenant so that an action could not be maintained upon it.
3. **Same—Statute of Limitations—Sustaining Running.**—The statute of limitations did not run

*Statute of Limitations—Suspension of.—The proper

from the time the covenant was executed, until the liability of B as bail ceased.

4. **Same—Set-Off—Case at Bar.**—The executor offers as a set-off, an account purporting to be due from E to A, and an order on the back of the account, purporting to be signed by E, and addressed to B, requesting him to pay the account; and then an acceptance by B. **QUÆRE**, what is sufficient proof of the execution of the order by E.

In September 1837, the administratrix of David Elmore deceased, instituted an action of debt against the executor of Lyddal Bowles deceased, in the Circuit court for the county of Henrico and city of Richmond. The action was founded on a promissory note for 350 dollars, alleged to have been executed by Bowles to

386 Elmore "on the 13th of June 1817; and which note was then in the possession of the defendant. In December 1837, the defendant appeared and pleaded "non detinet." In December 1842, the defendant was permitted to plead the statute of limitations, and file an account of offsets. To this the plaintiff filed a bill of exceptions, which, however, it is not necessary to notice, as this Court did not consider the question. She also replied specially to the plea of the statute of limitations; and in her replication she averred, that after the making of the note declared on, Bowles became the bail of Elmore in an action of detinue brought against him for a slave in the County court of Henrico. That as his indemnity against loss as said bail he, on the 2d of October 1818, received from Elmore the note declared on, and did then and there covenant with Elmore by his covenant in writing sealed with his seal, to return the note to Elmore as soon as he should be released from his responsibility as bail in said action. That the action of detinue was afterwards proceeded in and pending and undetermined, and that Bowles continued to be the bail of Elmore until the 25th day of February 1832, on which day Elmore died; and no person took administration on his estate until the 3d day of August 1836, when it was committed to the plaintiff for administration. That up to that time there had been no person authorized to bring the suit; and that Bowles during his lifetime, and the defendant since his death, had wrongfully detained the note.

The defendant demurred to the replication, and assigned for causes of demurrer: 1st. That there was no profert of the covenant referred to in the replication.

2d. Because if such a covenant was signed

mode of testing the application of the statute of limitations, is to enquire, not whether the plaintiff might have brought at a given time a premature or groundless action, as where it has been suspended or discharged, but whether his cause of action had accrued—whether he had the right to sue, and was bound to do so, in order to prevent or suspend the running of the statute. *Horner v. Speed*, 2 P. & H. 614, citing the principal case. The principal case is cited and distinguished in *Johnson v. Jennings*, 10 Gratt. 7.

and sealed by Bowles, it did not arrest or suspend the act of limitations, which began to run against the note declared on, on the 1st of September 1817.

387 *3d. That if any such covenant was executed by Bowles and accepted by Elmore, all right of action upon the note was merged in the covenant.

The plaintiff joined in the demurrer, which was sustained by the Court; but the plaintiff had leave to withdraw her joinder in the demurrer, and amend her replication. The only amendment, however, was to make profert of the covenant referred to in the replication; and then, upon the defendant's demurring to the amended replication, the demurrer was overruled: And then the defendant took issue upon the replication.

The cause came on at length to be tried in May 1844, when the defendant to sustain one of the offsets relied on by him, offered in evidence a paper which purported to be a medical account due from David Elmore to Dr. Aaron Burton in 1817, amounting to 27 dollars 50 cents, with the following endorsement thereon:—"Mr. Lyddal Bowles, Sir: Pay to Dr. Burton the within account and oblige y'rs, David Elmore.

June 16th, 1818.

"I accept the above order. Lyd'l Bowles.

Sep. 9, 1818."

And being unable as the defendant averred, to produce direct proof of the handwriting of Elmore in the order on the back of the account, he offered to prove by a witness, that Aaron Burton was a practising physician in the county of Henrico in the year 1818, and practised in the family of Elmore; that he was dead at the time of the trial, and the witness was his executor; that the account was in the handwriting of a brother of Dr. Burton, who was in the habit of collecting his medical bills; that no account had been due or paid from Elmore's estate to Dr. Burton's estate since Dr. Burton's death; and that the acceptance on the back of the order was in the handwriting of Lyddal Bowles; as evidence to be weighed by the jury for the purpose of determining whether the said order on the back of

388 *said account was drawn by Elmore and paid by Bowles. But the Court excluded the evidence and the defendant excepted.

After introducing the account and order above mentioned, the defendant for the purpose of proving them, introduced a witness who deposed that the account was in his handwriting, and was made out by him from the books of Dr. Burton, by his direction; that Dr. Burton practised in the county of Henrico and in the family of Elmore, before and at the time specified in the account; but he had no present knowledge that the particular services charged in the said account were actually rendered; nor did he recollect anything about the presentation of the account to Elmore. That the witness had frequently gone to Elmore's house for the purpose of collecting from him money due to Dr. Burton by Elmore for

medical services; and that the order was in the handwriting of the witness; but he did not recollect that Elmore signed the order, and was not sufficiently acquainted with his handwriting to swear to his signature.

The witness was then asked by the counsel for the defendant if he had any doubt that the said account was due according to its face, at its date, from Elmore to Burton; but the question was objected to by the plaintiff as not proper evidence to charge Elmore on said order, in the absence of any proof of his signature to the order; and it was excluded by the Court as inadmissible for that purpose.

The witness was then asked whether at the date of the order he had any knowledge of indebtedness by Bowles to Elmore, to which he answered he had not. He was then asked, whether he could have drawn that order without the direction of Elmore to him to do so; whereupon the plaintiff by her counsel moved the Court to exclude the said question and any answer to it, upon

the ground that the handwriting of 389 Elmore to the order *could only be proved by the testimony of a witness having knowledge of the handwriting, or by proof of the admission of Elmore that it was his signature. And the Court upon that ground sustained the motion, and did exclude the said question, and forbade any answer to it by the witness. And the defendant again excepted.

There was a verdict and judgment for the plaintiff for 350 dollars, with interest from the 13th day of June 1818, until paid. And thereupon the defendant applied to this Court for a supersedeas, which was awarded.

Lyons, for the appellant.

Daniel, for the appellee.

MONCURE, J. In my view of this case it is unnecessary to decide whether the Court below erred in permitting the plea of the act of limitations and list of offsets to be filed; being of opinion that it did not err in deciding the other questions which arose in the case.

I think the Court did not err in permitting the replication to the plea of the act of limitations to be amended. The demurrer to the original replication was sustained, solely because it contained no profert in curiam of the covenant therein mentioned. After the demurrer was sustained the replication was amended by the insertion of the profert therein. This amendment cured a defect which was merely technical, produced no delay nor inconvenience, and was necessary to the ends of justice. Without stopping to enquire how far it would have been authorized by the English practice, it is sufficient to say that it was fully authorized by the practice and decisions of Virginia. *Cooke v. Beale's ex'ors*, 1 Wash. 313; *Graham v. Graham*, 4 Munf. 205.

Nor do I think the Court erred in overruling the demurrer to the amended replication. Two propositions *are 390 presented by the demurrer. First, that the promissory note on which the ac-

tion was brought was merged in the covenant; and if not, secondly, that the action on the note accrued at its date, and the act of limitations began then to run, and was not afterwards arrested or suspended by the covenant.

First. Was the promissory note merged in the covenant? The doctrine of merger is a technical doctrine founded upon the presumed intention of the parties. "A simple contract debt is merged in a bond or covenant taken for or to secure the claim, because in legal contemplation the specialty is an instrument of a higher nature, and affords a higher security and a better remedy than the original demand presented. But this does not hold, even in favour of a surety by simple contract, if it appear on the face of the subsequent deed that it was intended only as an additional or collateral security, and there is nothing in the deed itself expressly inconsistent with such intention." *Chitty on Con.* 783. It plainly appears on the face of the covenant in this case that the note was not intended to be merged therein. It was deposited in the hands of Bowles to indemnify him against his responsibility as the bail of Elmore; and was to be returned to the latter as soon as the former should be released from such responsibility. Its existence as an independent security was thus preserved; and though its animation was suspended during the continuance of such responsibility, it was to become again an active security when the responsibility should be determined. The covenant was not given for the payment of the debt, but for the return of the note. It was collateral to the note. The delivery of the note would be a discharge of the covenant, and a suit upon the covenant might produce merely nominal damages. The note therefore was not merged in the covenant.

391 *Secondly. Was the action on the note barred by the act of limitations? The note bears date on the 13th of June 1817, and is payable on demand. The covenant bears date on the 2d of October 1818. The plain object of the covenant was to suspend the right of action on the note until Bowles should be released from responsibility as the bail of Elmore, and then to restore such right of action. Was not that object legal? Was it not competent for the parties to agree, on sufficient consideration, that the time for payment of the note should be postponed; or that it should be payable on a future contingency? Could not the debtor, for any consideration however valuable, by any contract however solemn, arrest or suspend the running of the act of limitations against a subsisting debt? Where a new promise is made to pay a debt barred by the act of limitations, it has long been a vexed question whether the action should be brought on the old or new contract; or perhaps it would be more proper to say, whether or not it might be brought on the old; for I suppose there never was a question but that it might be brought on the new contract. Two of the Judges of this

Court contended in *Butcher v. Hixton*, and *The Farmers Bank v. Clarke*, 4 Leigh 519 and 603, that the action should be brought on the new contract; but the question was not decided in those cases, and has never been decided in Virginia. That the old cause of action is revived, and may be sued upon, was recently decided by the Supreme court of Massachusetts in the case of *Ilsey v. Jewet*, 3 Metc. R. 439, which was ably argued, and in which all the authorities on the subject were reviewed. Our statute of 1838 regards the original cause of action as revived and brought down by the new promise, and our new Code expressly authorizes the creditor at his option to sue on the original cause of action or on the new promise. But whether, prior to the 392 operation of the *statute of 1838 and of the new Code, (which do not apply to this case,) the action in such cases should have been brought on the old or new contract, is a question which does not affect this case. Generally, there is nothing in the new promise which shews an intention of the parties to set up the old contract; and an action on the new promise answers every purpose of an action on the old contract. Were such an intention plainly expressed in the new promise, there is no case which shews that the action could not accordingly be brought on the old contract; and I imagine there can be no doubt but that it could. In this case it is plainly expressed in the covenant that the note should be preserved, and set up as the cause of action when the responsibility of Bowles as bail should be determined. This too is a stronger case than that of a mere promise to pay a debt barred by the act of limitations. It is the case of a covenant made on valuable consideration by the maker of a note a few months after its date, to return it to the payee on a future contingency, in order that he might then have a right of action thereon. That the action in this case was rightly brought on the promissory note, and was not barred by the act of limitations, is, I think, clearly shewn by the case of *Irving, &c. v. Veitch*, 3 Meeson & Welsby, p. 90. This is not like the case of a creditor covenanting not to sue for a limited period on a note of the debtor remaining in the hands of the creditor; in which case it might be said that the institution of a suit upon the note during such period would merely be a breach of the covenant. In this case the note was surrendered by the creditor to the debtor, for the purpose of effectually preventing it from being used as a subsisting security until the debtor should be released from his responsibility as bail of the creditor. If the debtor should be so released, the note was to be returned to the creditor, and to become again 393 an active *security. If he should not be so released, but be subjected to loss as bail, the note would be at home, and the amount of it in the hands of the debtor for his indemnity. The effect then of the covenant, in my opinion, was to restore the right of action on the note on the

25th of February 1832, when Bowles was released from his responsibility as the bail of Elmore by the latter's death; but there being no personal representative of Elmore until the 3d of August 1836, the act of limitations did not begin to run until that day. *Hansford v. Elliot*, 9 Leigh 79. The action having been instituted in September 1837, was of course not barred by the act.

I am also of opinion that the Court did not err in excluding the evidence mentioned in the two bills of exceptions taken on the trial. The defendant being unable, as he averred, to produce direct proof of the handwriting of Elmore, offered the evidence mentioned in the first of the said two bills of exceptions, to prove that the order therein mentioned was drawn by Elmore and paid by Bowles; but it was excluded by the Court. Was the evidence admissible for the purpose for which it was offered? The question is not whether independent parol evidence of the payment of the money by Bowles at the request of Elmore would have been admissible. There is a class of cases, it is true, in which parol is primary evidence, notwithstanding the existence of written evidence of the same fact. When a receipt is given for a payment, the general opinion is that the payment may be proved as well by parol evidence of the fact as by the production and proof of the receipt, though the case of *Hamlin's adm'r v. Atkinson*, 6 Rand. 574, has thrown some doubt on that question in this State. But I doubt whether the case under consideration falls in that class. If Bowles claims to have paid this money to Burton upon Elmore's written order, the order itself would 394 *seem to be the highest evidence of the fact of its having been given; and must be produced and proved as primary evidence, or its absence accounted for before secondary evidence would be admissible. There are reasons for the admissibility of parol, as primary evidence in the case of a receipt which do not apply to the case of an order; and I do not see why parol evidence is admissible in the case of an order, any more than in the case of any other written contract. However this may be, certainly the written order having been produced and relied on to prove the request, and no attempt having been made to prove a parol request, the order should have been proved precisely in the same way as if it had been the only admissible evidence of the request. It should have been proved that Elmore executed or acknowledged the order, or that the signature thereto was his handwriting. It may have been impossible for the defendant to have proved either of these facts. If so it was his misfortune or the consequence of his neglect. He should have supplied himself with legal evidence. As to the questions mentioned in the second bill of exceptions, they were, I think, improper, and with the answers thereto were rightly excluded by the Court. The first question was clearly inadmissible. The witness after stating in effect that he had no knowledge of the account or order,

was asked "if he had any doubt that the said account was due according to its face." I think the other question, "Whether he would have drawn the order without the direction of Elmore," was also inadmissible. The answers to these questions would have been mere opinions of the witness; and a very unsafe foundation for the verdict of a jury. Every man who brings a suit for a claim must prove it by legal evidence; and no opinions, however numerous or well founded, that he would not assert an unjust claim, will be sufficient to warrant a verdict in his favour.

I think the judgment ought to be affirmed.

395 *BALDWIN, J. Upon the effect of the covenant between the parties in regard to the promissory note sued upon to prevent the action from being barred by the statute of limitations, and the other questions arising upon the pleadings, I concur in the opinion of Judge Moncure.

But I think the Circuit court erred in excluding from the consideration of the jury the evidence offered by the defendant in the action to prove the following item in his account of set offs: "1819, July 1st. Cash paid Dr. Burton, 27 dollars 50 cents." The defendant's two bills of exception on this subject, one of which refers to the other, may be properly treated together, and as presenting substantially the question, whether the proposed evidence was admissible for the purpose of proving the payment of so much money by the defendant's testator, for the plaintiff's intestate at his instance and request. The defendant produced a paper consisting of several parts, unattested by any subscribing witness, and purporting to be, 1st. An account of Dr. Burton against Elmore, the plaintiff's intestate, for medical services. 2dly. The order of Elmore endorsed thereon addressed to Bowles, the defendant's testator, requesting him to pay the amount of the account to Dr. Burton. 3dly. The acceptance of Bowles at the foot of the order. And to authenticate the paper as genuine, the defendant offered the parol evidence mentioned in the bills of exception. But the Court excluded from the jury the whole evidence written and parol, on the ground it seems that there was no proof of the handwriting of Elmore's signature of the order, nor of his admission that it was his signature.

In this decision the Court overlooked, I think, a distinction between writings attested by subscribing witnesses and those not so attested. Where an instrument is attested by a subscribing witness, the law

requires him to be called to prove its execution; the parties *having agreed

that he shall be their witness of the fact; and the presumption being that he has a better knowledge than any other of the attending circumstances: and the omission to call him cannot be supplied by proof of any acknowledgment or admission of the party against whom the instrument is adduced, or that the signature of the party is

in his handwriting. If, however, the production of the subscribing witness has from his death or other circumstances become impracticable, the next best evidence is proof of the handwriting of his attesting signature, which covers the entire execution of the instrument, from the presumption that he would not have put his name there in authentication of what in truth did not occur.

The case of an instrument unattested by any subscribing witness stands upon a quite different footing. There the parties have not made any one the special depository of the fact of execution. The fact may be proved by any witnesses. And the evidence may be direct and positive or indirect and circumstantial. It may relate to what occurred at the time of the transaction, or to subsequent acknowledgments or admissions of the party, either by words or by circumstances of recognition or acquiescence. Or it may be of the handwriting of the party; but that rests upon no higher ground in regard to competency than any other evidence of the fact of execution, whether direct or circumstantial; if it did then, as being of a higher class, it would exclude all evidence not only of subsequent acknowledgments or admissions, but even of what occurred at the time of the transaction. And besides to require proof of the handwriting of the party, presupposes that the signature of his name was written with his own hand, whereas, in simple contracts, at least, if written by some other person at his request or by his authority, it would have been equally effectual.

397 *In the present case it cannot, I think, be doubted that it would have been competent for a witness to prove that he presented the account upon which the order is endorsed to Elmore, and at his request, or by his permission, wrote the order, which was signed by Elmore with his own hand, or by some other person at his request; and that such proof of the execution of the order would be direct, positive and complete, without any evidence whatever of the handwriting of Elmore. Here the evidence of these facts was not direct and positive, but indirect and circumstantial; and no one supposes that the law makes any distinction in point of competency between these two kinds of evidence, or that the sufficiency of either is not matter for the consideration of the jury. And it is obvious that the evidence of a witness which would otherwise be positive, may be rendered circumstantial by his want of recollection of parts of the transaction, though he still remembers circumstances from which the inference is safe and satisfactory.

The circumstances appearing from the bills of exception are these: 1. The authentication of Dr. Burton's account upon which the order is endorsed. His brother was examined as a witness, and deposed that the account was copied by him from Dr. Burton's books by his direction. 2. The authentication of the body of the order from

its being in the handwriting of the same witness. 3. That the witness would not have written the order without the request of Elmore (which we are warranted in assuming from his being prevented by the Court from speaking to that point). See 1 Stark. Ev. pt. 2, p. 332-3, n. and the cases there cited. 4. That the account with the order endorsed, was in the possession of but not retained by Elmore, but came to the possession of Burton or his agent, and was presented to Bowles for his acceptance, and was accepted by him at the foot of the order. 5. That the order was afterwards *paid by Bowles. The two last circumstances are inferences from, but warranted by the evidence, as will be seen by inspecting it. The evidence moreover warrants the inference, that the medical services charged in the account, were rendered by Burton, and that the account itself was presented to Elmore for payment by the agent of Burton.

I cannot doubt that if the evidence offered had been submitted to instead of being excluded from the jury, they might very properly have deemed it sufficient to sustain the set off claimed by the defendant. But whether they would or not, it seems to me that it was proper for their consideration, and I can perceive no principle, nor am I aware of any authority, upon which it ought to have been rejected. Evidence of the handwriting of the party is doubtless proper in such cases, (though in itself circumstantial,) and is perhaps most usual, because most convenient; and the failure to produce it when obtainable, may in a doubtful case be proper for the consideration of the jury, though entitled to but little weight, for it is equally in the power of either party, and is in its nature of equal force when used negatively as when used affirmatively. But after the lapse, as in this case, of twenty-six years, the fair presumption is that such evidence has perished, if it ever existed; and if so, then the exclusion of other evidence whether direct or circumstantial, to prove the execution of the instrument, has to my mind no colour of reason.

DANIEL, J., concurred in the opinion of Moncure, J., except as to the proof of the set off of 27 dollars 50 cents.

ALLEN, J., concurred with Moncure, J.
Judgment affirmed.

399 *Clarke v. Hardgrove &c.

April Term, 1851, Richmond.

(Absent CABELL, P.)

Sale of Land—Defect of Title—Case at Bar.—H sells land to C, and conveys to him with general warranty; and C assigns to H the bonds of S in payment of the purchase money. The title to a part of the land is afterwards discovered to be clearly defective. **Held:**

1st. **Same—Same—Injunction.***—C may enjoin H from collecting so much of the bond of S as will compensate him for the land to which the title is defective.

2d. **Same—Same—Compensation to Vendee.†**—C is entitled to compensation according to the relative value of the land to which a good title cannot be made.

3d. **Same—Same—Action of Court.**—H should be directed to perfect the title by a day specified by the Court: And if he failed to do so, a commissioner should be directed to ascertain the relative value of the part of the tract to which the title is defective.

This was a suit in equity in the Circuit court of Dinwiddie by Thomas E. Clarke against Thomas Hardgrove and others. In his bill he charged that he in September 1839, bought of Thomas Hardgrove of the city of Richmond a tract of land containing eleven hundred and seventy-six acres, lying in the county of Dinwiddie, at the price of 11,000 dollars; and that Hardgrove had conveyed the land to him by a deed with general warranty. That in the same year the plaintiff had sold a tract of land in Nottoway to Samuel Scott for 10,000 dollars, for which he had received Scott's three bonds of 3333 dollars 33 cents, with good security; which bonds he assigned to Hardgrove in part payment of the land bought of him; and that the last of these bonds

***Sale of Land—Defect of Title—Injunction against the Collection of Purchase Money.**—In Virginia, equity will enjoin the collection of the purchase money of land on the ground of *defect of title*, after vendee has taken possession, after conveyance from vendor with general warranty, if the title is questioned by a suit either prosecuted or threatened, or if the purchaser can show clearly that the title is defective. *Koger v. Kane*, 5 Leigh 606. See also, *Ralston v. Miller*, 3 Rand. 44 15 Am. Dec. 704. For this proposition, see the principal case cited in *Wamsley v. Stalnaker*, 24 W. Va. 223; *Heavner v. Morgan*, 41 W. Va. 442, 23 S. E. Rep. 879; *Heavner v. Morgan*, 30 W. Va. 43, 4 S. E. Rep. 411; *Peers v. Barnett*, 12 Gratt. 416. For further information on this subject, see a somewhat extended discussion in *Wamsley v. Stalnaker*, 24 W. Va. 220 *et seq.*; monographic note on "Injunctions" appended to *Claytor v. Anthony*, 15 Gratt. 518.

Where a vendor has bound himself to convey land with covenant of general warranty, he is responsible for defect of title to any part of the land so sold; and a court of equity will not compel the payment of the whole of the purchase money until the defect is removed, *although there has been a conveyance of the land by the vendor*. *Worthington v. Staunton*, 16 W. Va. 242, citing the principal case, *Koger v. Kane*, 5 Leigh 606, and *Renick v. Renick*, 5 W. Va. 285. See also, principal case cited for this proposition in *Johnston v. Jarret*, 14 W. Va. 230.

†Same—Same—Compensation to Vendee.—To the point, that, where land is conveyed with general warranty of title, and it is found that the title to part of it is defective, the vendee is entitled to compensation for that part, according to its relative value to the whole tract, see principal case cited in *Butcher v. Peterson*, 26 W. Va. 454; *Heavner v. Morgan*, 30 W. Va. 343, 4 S. E. Rep. 411; *Renick v. Renick*, 5 W. Va. 291; *Heavner v. Morgan*, 41 W. Va. 445, 23 S. E. Rep. 880.

remained unpaid. That when he purchased and received the deed for the land, 400 *he had not the slightest suspicion that there was any defect in the title to any part of it. That he has been informed, and has no doubt of the fact, that neither Hardgrove or his vendor ever had any title to a part of the land containing about fifty-one acres. That this fifty-one acres was owned by P. Goodwin, who died about twenty years since, and who devised it to his two daughters, one of whom was married to Thomas Whitworth, and the other had married Daniel E. Allen, and died leaving an infant daughter. And that the legal title to this land was then in this infant and Mrs. Whitworth. That Hardgrove was probably in at least doubtful circumstances.

The plaintiff stated further, that this fifty-one acres of land were situated in the middle of his tract, and in front of his dwelling house, about one hundred and fifty yards from the door: And he stated other circumstances which enhanced its value; so that the whole of the bond of Scott which remained unpaid would be not more than sufficient to compensate the plaintiff for the loss of the land. And having made Hardgrove, Allen and his infant daughter, Whitworth and his wife, and Scott and his sureties, and others, parties defendants, he asked that the payment to Hardgrove of this last bond of Scott might be enjoined. That a commissioner might be directed to enquire and report as to the alleged defects of the title to said land; and if they existed the Court would require the title to be made good if possible; and if that was impossible, that full relief might be afforded him by decreeing payment to him of the amount of Scott's last bond, and such other sum as should be sufficient to compensate him for the loss of the land. And he asked for general relief.

The injunction was granted according to the prayer of the bill: and the cause was so proceeded in that the bill was taken for confessed as to all the before mentioned parties; and one of the commissioners of the 401 *Court was directed to examine and report as to the title to the fifty-one acres of land, and also as to the value of the land the title to which he should consider defective; embracing in such valuation and report the inconveniences, loss of buildings and damages which might be sustained by the plaintiff if he should be deprived of the said land.

The commissioner reported that the title to the fifty-one acres was clearly defective; and he gave the location of it very much as it is described in the bill. For the injury which the plaintiff would sustain by the loss of this land he referred to the testimony of several witnesses whose examinations were returned with the report. These witnesses agreed in estimating the plaintiff's damages by the loss of the fifty-one acres of land at 2500 dollars.

After the commissioner had returned his report the defendant Hardgrove filed his

answer. He objected that the case stated in the bill was not proper for the jurisdiction of a Court of equity; and asked that he might have the benefit of this objection as if it had been formally pleaded. He said that he had purchased the land sold by him to the plaintiff, through the agency of his brother-in-law R. C. Pollard; and knew nothing himself of either the land or the title to it; but relied upon said Pollard who lived near to the land, and who informed him that the title was good. That changing his purpose to remove to the country, he sold the land again through the agency of Pollard. That never whilst he held the land, and indeed not until very lately, had he known or heard of any defect in the title to the fifty-one acres of land mentioned in the bill; but if there was any defect in the title he was willing to do what might be deemed by the Court right in the matter: He was ready and willing to buy the land if it could be bought, and convey 402 it to the complainant; *and if it was so situated that it could not be sold, he was willing to pay a full equivalent to the complainant for it; but he objected strongly that the claim of the complainant as to the amount of the damages sustained by him, was exorbitant and most unreasonable.

It appeared from the testimony of Thomas Whitworth, one of the defendants, that the fifty-one acres of land mentioned in the bill, had been devised by P. Goodwin to his two daughters, of whom Mrs. Whitworth was one; and had been sold by the defendant Allen to Edward O. Branch the vendor of Hardgrove, for 600 dollars. That the sale was sanctioned by Whitworth who had joined in a deed with Allen conveying their interest in the land. That since this controversy commenced he had executed and delivered to Mr. Hardgrove's counsel a legal title to one moiety of the fifty-one acres; and that the legal title to the other moiety was in the infant daughter of Allen.

The plaintiff in 1844 filed an amended bill claiming compensation for an injury which he alleged was done to his land by the Upper Appomattox company under a contract between that company and Hardgrove, entered into whilst Hardgrove was the owner of the land. But it is unnecessary to state the questions arising on that amended bill. The cause came on to be finally heard in September 1845, when the Court dismissed the bill and amended bill with costs: Whereupon Clarke applied to one of the Judges of this Court for an appeal, which was allowed.

Spoooner, for the appellant.

The defect of title in this case was no ordinary one. It was not a mere cloud at a distance, which would in all probability vanish into thin air; it was not only palpable, but alarming to the appellant. When this suit was brought, the legal title to the fifty-one acres, by far the most valuable and important part 403 *of the tract, was in Mrs. Whitworth, wife of

Thomas Whitworth, and the infant daughter of D. E. Allen. Could such a defect of title be of but little importance to the appellant? It was not a distant one, of long standing, which would never probably be noticed, nor any claim be ever set up. The facts, which have happened since the suit was brought, although not a part of the record, may be stated by way of argument. Mrs. Whitworth, whose title Allen attempted to sell and not her husband's, has since died, leaving a child or children; Whitworth himself has become insolvent and taken the oath of an insolvent debtor; D. E. Allen has died utterly insolvent, and was so some time before his death; of what use would their warranty deeds be in such a case? It is said by one of the Judges of this Court, in *Jackson v. Ligon*, 3 Leigh 161, that "it is the settled rule of this Court, not to compel a vendee to pay the purchase money until he gets a title." It is submitted to the Court, that the situation of the persons in whom was the legal title to the fifty-one acres, was such that the appellant might well consider a suit threatened. But if not, he has done what the Court, in *Ralston v. Miller*, 3 Rand. 44, stated as necessary to be done in cases like this; proved the title to be bad. Can there be the least question, that if a suit had been depending against Clarke for the purchase money of the land in question, that a Court of equity could legally have arrested the payment, and compelled Hardgrove to make good in some way the title, or to have secured Clarke against future loss or danger?

The question whether the transfer of the bonds in this case was equivalent to cash as a payment in all respects, may require some notice.

The counsel contends, that while the bonds transferred were uncollected, they should be considered in equity in no other light than if the bonds were due by the vendee himself, or than orders given by Clarke *on the obligors of the bonds and accepted by them. In both cases the vendor would have a clear legal right to go back to the vendee for payment, if the obligors or persons accepting orders should fail to pay. It is no where intimated in this cause, that if the obligors in the bonds assigned and transferred to Hardgrove, had all proved insolvent, that Hardgrove was deprived of his legal right to go back and to look to Clarke to pay the amounts. They were not transferred and assigned to Hardgrove, and received by him as cash, with an agreement that he should have no recourse against Clarke. The transfer then was but the transfer of evidences of debt, to become a payment if collected; if not, he had recourse back on Clarke. The transfer was a payment in common parlance, and was so used in the bill, but not equivalent to an actual payment in cash, or a receipt of the bonds, without recourse to Clarke. The assignment and receipt of the bonds was not a Novation. "The old debt was not extinguished by the transfer." "It was not a

new engagement with Hardgrove in consideration of being liberated from the former." "It was not the accepting of the obligors in the bonds as the sole debtors, and thereby discharging Clarke." The obligors in the bonds were not expromissors. They made no engagement with Hardgrove to stand in the shoes of Clarke, and in fact no engagement at all. Pothier, vol. 2, p. 58, 59, 60, edi. of 1802, chap. 2 of part 3, art. 1.

Neither was there a delegation of the debt in question. Pothier, vol. 2, p. 71, chap. 2, art. 6.

Bouvier's Law Dictionary, vol. 1, p. 71, chap. 436, vol. 2, 231, and references. *Bullitt v. Songster*, 3 Munf. 54. In this case the Court decreed, that a bond due by other persons than the vendee, and assigned by him to the vendor, should be delivered back by him to the vendee.

405 *May and Wallace, for the appellee.

We hold that the plaintiff never having been evicted, has no right of action. There has been no breach of the covenant of warranty. "The covenant of warranty and the covenant for quiet enjoyment are prospective, and an eviction is necessary to constitute a breach of them." Kent's Com. part 6, lecture 66, p. 459. This is the general doctrine admitted by all the writers and approved by all the Courts to whose decisions we have had access; in England, in *New York*, *Greenby v. Wilcocks*, 2 John. R. 1; in *Connecticut*, *Booth v. Stark*, 1 Conn. R. 244; *Mitchell v. Warner*, 5 Conn. R. 497; and in *Massachusetts*, *Marston v. Hobbs*, 2 Mass. R. 439; *Bickford v. Page*, 2 Mass. R. 455; *Gore v. Brazier*, 3 Mass. R. 523.

Chancellor Kent (Kent's Com. p. 464) says, "If the grantor had notice to remove the incumbrance and refused, equity would undoubtedly compel him to raise it, and decree a general performance of a covenant of indemnity." In this case, so far from waiting to give notice to Hardgrove, and giving him an opportunity to remove the difficulty, Clarke goes into a Court of equity without ever even informing Hardgrove that there was a defect in the title. Had he done so, Hardgrove would have willingly procured the title to be made good, and if required, have given a bond of indemnity till it could be done. The truth is, that he did get the title perfected years ago; though as to the half of the 51 acres which Allen's daughter would be entitled to at Allen's death, there is no evidence in this record that her right was quieted, because it was not done till after the decree dismissing the bill was rendered; but as to the part to which Whitworth and wife were entitled, the claim was quieted in 1844.

We submit that the cases referred to by the counsel for the appellant, are not in conflict with these well understood principles. First, the case of *Boullitt v. Songster*, *3 Munf. 54, differs entirely from this. In that case, there was a special agreement; and the case was decided upon that special contract; not upon a mere

warranty of title, such as was given by Hardgrove to Clarke.

Second, the case of *Ralston v. Miller*, 3 Rand. 44, is equally inapplicable. The principle decided in that case was, that Courts of equity will not interfere between vendor and vendee to prevent the collection by the vendor of the purchase money, unless, &c. The decision was against an injunction in that case. It is true there is an obiter dictum in the opinion of the Court, to the effect that this Court has gone far beyond any thing which has been sanctioned by the Courts of England or elsewhere, in enjoining the payment of the purchase money after the purchaser has taken possession under a conveyance, especially with general warranty; and that it would interfere in a case where the purchaser could shew that the title was clearly defective. But is there any intimation that the Court would interfere to prevent the collection of a security against a stranger, received as payment by the vendor, as in this case? The Court meant to say, that it would interfere where the vendor was enforcing the payment of the purchase money from the vendee when there was a defective title. In this case the principle contended for would justify the Court in forcing the vendor to refund what he had already received.

But would the Court interfere even in that case unless the vendee or grantee had given reasonable notice to the vendor of the defect in the title, required him to remove it, and been refused either to remove it or to give satisfactory indemnity.

In every aspect in which we can view the case, we think the law is in favour of sustaining the decree of the Court below.

407 *ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that as the appellant has clearly shewn that at the institution of his suit the title to a portion of the land conveyed to him was defective, he had a right, notwithstanding a deed with general warranty had been made, to enjoin the collection of the purchase money; *Koger v. Kane*, 5 Leigh 606, and cases there cited; and that such right is not impaired though the vendor is seeking to collect the purchase money, not directly from the purchaser, but from a third person on a collateral security assigned to him by the purchaser: It not being incumbent upon the purchaser, in case of such clear defect of title, to risk the hazard of the vendor's solvency.

The Court is therefore of opinion, that said Court erred in dismissing the bill and amended bill of the plaintiff.

Decree reversed with costs, injunction reinstated, and cause remanded with instructions to enter a decree that unless the appellee shall within a reasonable time to be prescribed by the Court, perfect the title to so much of the land conveyed as is shewn

to be defective, that an account be directed to ascertain the relative value of the part, or the interest therein, to which the appellee cannot make a good title, and for further proceedings in order to a final decree.

408 *Tabb's Adm'r v. Archer's Adm'r & als.

April Term, 1851, Richmond.

(Absent CABELL, P.)

Equity Practice—Suits to Divide Estate of Decedent—

Case at Bar.—J T died intestate, leaving a large number of slaves; and leaving a widow F T, and eight children. Of the children a daughter F was married to A, and there was a marriage settlement securing her property to her and her children. Another daughter H, died an infant and unmarried. Subsequently it was agreed between F T and the children, that she should surrender to them at once her dower slaves upon terms agreed on by them; and a suit was brought in equity to have the slaves divided among the parties. The Court appointed commissioners with directions, first to allot to the widow F T one sixty-fourth of the slaves as her own as distributee of her daughter H; and to divide the remainder among the children. The division was made; and the share of the widow was valued at \$1580; the share of each child at \$14039. The share of F was valued at \$211 more than the average; and her husband was directed to pay this to the other children. In consideration of the surrender of these slaves to F and her husband, the husband agreed to convey and did convey to F T, a portion of these slaves valued at \$2200; and he received the remainder, and sold some and retained others until the death of F T, ten years after the division. The children of F then claimed the slaves conveyed by her husband to F T, and their increase. **Held:**

1. **Same—Same—Same.**—The husband of F having been entitled absolutely on account of his wife to her share of her sister T's interest in the slaves amounting to \$1580, and he being required to pay \$211 for owelty of partition,—\$1791; and he having by agreement with F T, conveyed the slaves to her, in consideration of her surrender of the remainder, the slaves so conveyed by him, to the extent of his interest in the dower slaves, must be taken to have been his own, and to have passed by his conveyance to F T; and her title was not affected by the fact that the husband had afterwards, in disregard of the terms of the marriage articles sold some of the slaves surrendered to him.

409 *2. **Same—Same—Same.**—The arrangement by which the beneficiaries in the marriage agreement acquired immediate possession of the slaves, was so clearly beneficial, that the difference between the interest of the husband of F in the dower slaves, being \$1791, and the value of the slaves conveyed by him to F T, was a proper and reasonable charge upon the trust estate.

In February 1829, John Y. Archer filed his bill in the late Superior court of chancery for the Richmond district, in which he stated that he and his four brothers and sisters, three of whom were infants, were the children of John R. Archer and Frances

Cook his wife, formerly Frances Cook Tabb, who had before their marriage, entered into a marriage contract, by which the property of the wife had been secured to her children. That some time during the previous year Frances Tabb, the grandmother of the plaintiff, had died possessed of certain slaves on account of her dower interest in the estate of her husband John Tabb; and that William J. Barksdale as her administrator, was about to sell them as her property. And making Barksdale as the administrator of Frances Tabb, a defendant, he asked for an injunction to the sale; and that the Court would decree to the plaintiff and those equally interested their portion of said slaves; and for general relief.

The injunction was refused by the Chancellor, but was granted by the Court of appeals.

In July 1829, Barksdale answered the bill. He admitted the marriage settlement between John R. Archer and his wife; the death of Mrs. Frances Tabb in April 1828, and his qualification as administrator upon her estate. He said that a large number of slaves had been allotted to Mrs. Tabb as her dower in the slaves of her husband John Tabb deceased; but at the earnest solicitation of John R. Archer the father of the plaintiff, as respondent understood, Frances Tabb on the 25th of December 1818, agreed

410 *that portion of the slaves which would belong to Mrs. Archer at the death of Frances Tabb, the sum of 2000 dollars to be paid in slaves: and in consideration of her relinquishing the same to the said John R. Archer he executed to Frances Tabb a bill of sale for the following slaves, viz: Philip, Maria, Nelly, Lucy and William; as would appear by his bill of sale exhibited with the defendant's answer; and that the woman Maria had since had four children. He admitted the five first named slaves were a part of the slaves held by Frances Tabb as her dower slaves, assigned to her out of the estate of her husband John Tabb; but he insisted that an absolute estate in these slaves was not worth more than the life estate in the slaves surrendered by Frances Tabb to John R. Archer.

The defendant further insisted on an absolute right to these slaves under the bill of sale of John R. Archer; but if Archer had no right by reason of the marriage contract between himself and his wife, to sell them absolutely, then he insisted the sale was good for his life. But if John R. Archer had no right to make the purchase and sale, then that he should be a party in this suit, and should be decreed to pay this defendant as administrator of Mrs. Frances Tabb, a reasonable hire for all the dower slaves of Frances Tabb from the time he received them until her death.

The defendant further insisted that the slave Sye or Syphax was not one of the dower slaves of Mrs. Frances Tabb; but had been purchased by her at a sale of negroes belonging to the estate of her son

John Y. Tabb deceased, made 15th February 1819, at the price of 800 dollars.

At the June term 1830, the Court directed John R. Archer to be made a defendant in the case; and by leave of the Court his name was inserted in the bill as a defendant; and in January 1832, he and his wife filed an answer. They objected to 411 the jurisdiction of the *Court, and insisted that if their codefendant Barksdale had any claim against them, or either of them, he should have asserted it by original or cross bill, or by an action at law. But if they were wrong in their objection, then for answer to the bill they say that the several matters of fact contained therein they believe are correctly stated; and they submit all questions of law arising thereupon to the consideration of the Court.

They say that as to John R. Archer's liability to Barksdale as administrator of Frances Tabb, raised in his answer, they admit the agreement therein mentioned between Mrs. Tabb and Archer; and that he, under a belief that he might lawfully do so, executed the bill of sale exhibited with the answer. That the slaves therein contained were a part of the slaves assigned to Mrs. Tabb for her dower in the slaves of John Tabb deceased. That the price agreed to be paid to Mrs. Tabb for the relinquishment of her life estate was 2000 dollars; but in fact, the slaves conveyed to her were valued at 2200 dollars.

They say that the slave Sye or Syphax was one of the dower slaves allotted to them; and to whom independent of the agreement with Mrs. Tabb, they would have been entitled at her death. That he was sold by John R. Archer at the time and place of the sale made by the trustees of John Y. Tabb; but he was sold solely for the benefit of the defendant Archer, and was purchased for Mrs. Tabb, to whom he was sent; but that no part of the purchase money amounting to 800 dollars, was ever paid.

The defendant Archer further stated, that among the slaves allotted to himself and wife, was one called Miller Lee, valued at 900 dollars. That this slave was sold on account of the defendant Archer, at a sale made on the 18th and 19th December 1818, of a number of the dower slaves, for 700 dollars, and the proceeds paid to William

412 B. Giles, at the instance and for the benefit *of Mrs. Frances Tabb; who also received from the agent who conducted the said sale the further sum of 695 dollars, part of the proceeds of other slaves allotted to the defendants Archer and wife, and sold for the defendant Archer at the sale aforesaid. That there were two other dower slaves held by Mrs. Tabb which under the agreement with her, should have been delivered up to the distributees of her husband, viz: George, called shoemaker George, and Delphia; the latter was sold at the sale mentioned above for dollars, and the proceeds paid over to Mrs. Tabb. George was subsequently disposed of by her. He was worth probably about

900 dollars: And no account had ever been rendered to said distributees of the value of either. They therefore insisted that they had never received the full consideration for which the bill of sale was executed; and that a large portion of the sum of 2000 dollars which the defendant Barksdale supposed he was entitled to claim of the defendant Archer, had been retained or received by Mrs. Tabb in her lifetime.

And they insisted further, that Mrs. Tabb died largely indebted to the estate of her daughter Harriet Tabb, of whom she had been the guardian; and that one seventh part of the sum thus due belonged to the defendants Archer and wife as distributees of said Harriet.

It appears that John Tabb died intestate about the year 1797, leaving a very large number of slaves to be divided among his widow Frances Tabb and his eight children, one of whom was Frances Cook and another was Harriet Tabb. In 1801 Frances Cook Tabb was married to Dr. John R. Archer; and previous to the marriage they executed a marriage agreement by which Dr. Archer agreed that all the estate, real and personal, of the said Frances Cook, should be secured and settled upon her and her heirs, with a specific exception; and the annual profits only should be applied to the support and maintenance of themselves and their
413 issue. This *marriage agreement was sustained and enforced, as will be seen by the case of Tabb v. Archer, reported in 3 Hen. & Munf. 433.

Mrs. Frances Tabb qualified as the guardian of Harriet Tabb, and her guardianship continued until 1806, when Harriet Tabb died an infant and unmarried; and Dr. Bathurst Randolph became the administrator of her estate. In 1818 Mrs. Frances Tabb, Dr. Archer and his wife and three others of Mrs. Tabb's daughters and their husbands filed their bill in the County court of Amelia, in which they stated the fact that Mrs. Tabb had a number of slaves in her possession as dower slaves of her husband's estate, to which the children of John Tabb would be entitled at her death. That it would be for the interest of all the parties that these slaves should be distributed among those entitled in remainder. That arrangements had been made between the complainants for compounding their respective interests in said slaves, which they conceived to be mutually beneficial. And having made the administrator of a deceased child, and the other living daughter defendants, they asked for a distribution of the slaves among the parties entitled, upon their making to Frances Tabb such satisfaction for her dower interest therein as she should be willing to accept in full discharge of the same.

The defendants answered, concurring in the prayer of the bill; and the Court made a decree appointing commissioners who were directed to receive the slaves from Mrs. Tabb, and of these slaves, in the first place to allot one sixty-fourth part to Frances Tabb, to be held by her in absolute

property, as her distributable share of her daughter Harriet's proportion of said slaves; and that they should then proceed to divide the residue of said slaves into seven equal portions or allotments, having reference to value, and should deliver one portion to each of the husbands of the female
414 plaintiffs, *and to the daughter and the representatives of the deceased sons, to be held by the said parties according to their respective titles, upon the exhibition by each of the said parties respectively, of a release or acquittance in writing to the said party by the said Frances Tabb, and attested by two witnesses at the least, discharging the said party from all the right, estate and interest of her the said Frances Tabb, to dower in the slaves composing the said allotment; and if any of the parties failed to produce such acquittance, the slaves allotted to such party should be delivered to Frances Tabb. And the commissioners were directed to make out lists containing the names and descriptions of the slaves composing each allotment; which lists should be separate, and headed with the name of the respective parties to whom the allotment ought to have been made if the conditions of the decree had been complied with. And the commissioners were directed to return the said lists with all other their proceedings in the premises, in order to a final decree.

The commissioners appointed to make the division of the slaves made a report, which contained a list of the slaves allotted to Mrs. Tabb, and to each of the five living children. The slaves allotted to the representatives of the other two children were named, but they were not divided between them. This report shewed that the slaves allotted to Mrs. Tabb for her one sixty-fourth part, as distributee of her daughter Harriet, were valued at 1580 dollars. The shares of the seven children were each 14,039 dollars; and Dr. Archer's share was valued at 14,250 dollars; being 211 dollars more than his share, which he was directed to pay to the different distributees. And it also appeared that the slaves conveyed by Dr. Archer to Mrs. Tabb were valued at 2200 dollars. The report shewed a release by Mrs. Tabb to each of the five living children, as directed by the decree,
415 and a delivery of the slaves to *them.

And it was in consideration of this relinquishment by Mrs. Tabb of her interest in Mrs. Archer's portion of these slaves, that Dr. Archer executed the bill of sale referred to in the answer of Barksdale, by which, in consideration of 2200 dollars, as therein stated, he conveyed to Mrs. Tabb the five slaves mentioned in Barksdale's answer.

The cause came on to be heard in June 1832, upon the bill, answers, replications and exhibits, when the Court then held that the plaintiff and the other children of the defendants John R. Archer and Frances Cook his wife, and the said Frances Cook, were entitled to all the dower slaves of Frances Tabb deceased, and the increase of

the females, the reversion in which, after the death of the said Frances Tabb, was allotted to the defendants John R. Archer and Frances Cook his wife, under the order of the County court of Amelia, filed as an exhibit in the cause. And that John R. Archer had no legal right or authority to sell and convey to the said Frances Tabb the slaves Philip, &c., which he attempted to convey to her by his bill of sale of the 25th of December 1818. And it was therefore decreed that the injunction awarded the plaintiff should be perpetuated; and that the defendant Barksdale should at the end of the year deliver to a trustee appointed for the purpose, the slaves conveyed in the bill of sale aforesaid, and the increase of the females, to be held by him upon the trusts of the marriage agreement referred to in the bill. And Barksdale was directed to render an account of the hires of said slaves before one of the commissioners of the Court.

And the Court further decreed, that the same commissioner should ascertain and report whether the slave Sye or Syphax was or was not one of the dower slaves of Frances Tabb, the reversion in whom, after her death, was allotted to the defendants John R. Archer *and his wife, under the aforesaid order of the County court of Amelia. And if the said slave should be ascertained by the commissioner to be one of the said dower slaves, then that he should state an account of his hire from the 31st of December 1828.

And at another day of the same term, the Court decreed that Barksdale should render an account of Frances Tabb's guardianship of her daughter Harriet Tabb deceased, before the commissioner who might execute the previous order made in the cause; and the commissioner was directed to ascertain the share of that estate to which the defendants John R. Archer and his wife were entitled: and to make an enquiry and take an account of the slave Miller Lee, the reversion in which was allotted to said defendants, alleged in their answer to have been sold, and the proceeds received by Frances Tabb. And the commissioner was also directed to take an account of the sale of the slaves shoemaker George and Delphia his wife; and ascertain the share of the proceeds arising from such sale, to which the defendants John R. Archer and his wife and their children were entitled, and report all the said accounts to the Court, &c.

In July 1834, commissioner Baker made his report. He stated the net hires of the slaves Phil, &c., conveyed by Dr. Archer to Mrs. Tabb, and their increase, up to the time when they were delivered by Barksdale to the trustee of Mrs. Archer and her children, at 154 dollars 53 cents. He reported that Sye or Syphax was one of the dower slaves of Frances Tabb, the reversion in whom after the death of Mrs. Tabb, was allotted to the defendants John R. Archer and his wife: and he stated his hire from 1828 to December 1834, at 100 dollars per annum, or 600 dollars. He reported

the interest of the defendants John R. Archer and wife and of their children in shoemaker George and Delphia, 417 *at 227 dollars 85 cents; and that Mrs. Tabb was indebted to John R. Archer and wife and their children on account of Miller Lee, 1330 dollars.

As to the account of Mrs. Tabb as guardian of Harriet Tabb, the commissioner reported that the administrator represented that he had no other means of rendering an account, except the books of a certain mercantile house in Petersburg, with which Mrs. Tabb kept an account for herself and all of her children except Mrs. Giles. And the commissioner made some statements of the account from these books, but they were unsatisfactory to himself.

To this report the defendant Barksdale filed exceptions. First to the statements of the account of Mrs. Tabb as guardian of Harriet Tabb; and after pointing out what he conceived specific errors in the statements, he relied upon the twenty-seven years which elapsed between the death of Harriet Tabb and the assertion of the claim by Dr. Archer to have this guardian account settled.

2d. He controverted the conclusion of the commissioner that the slave Sye or Syphax was one of the dower slaves the reversion of which had been allotted to John R. Archer and wife.

3d. To the charge for shoemaker George and Delphia, both on the ground of lapse of time and the insufficiency of proof; and to the charge on account of the slave Miller Lee, on the same grounds; and also on the ground that the interest in the value of the slave should not commence until the death of Mrs. Tabb in 1828.

And he insisted that as by virtue of the agreement between Mrs. Tabb and Dr. Archer, his family had the use of twenty-three valuable slaves from 1818 until 1828, if the conveyance by Dr. Archer to Mrs.

418 Tabb was set aside, Dr. Archer and wife and their children *should be held to account for the hires of the said twenty-three slaves.

In July 1840, the plaintiff's death was suggested, and the suit was revived in the name of his administrator; and the cause was removed to the Circuit court for the town of Petersburg. In July 1842, the cause came on to be heard, and the Court held: 1st. That the decree of June 1832, so far as it related to the slaves mentioned in the bill of sale from John R. Archer to Frances Tabb, and their increase, was binding on the Court, and on the parties to this suit; and that the said slaves having been by said decree ordered to be delivered up to a trustee, and having been actually delivered in compliance with said decree, it would be illegal and improper for the Court now to disturb the same.

2d. That the slave Sye or Syphax was one of the dower slaves of Frances Tabb, the reversion in whom, after her death, was allotted to the defendants John R. Archer and wife, under the order of the County

court of Amelia filed as an exhibit; that Archer retained this slave until February 1819, after he had sold much the larger number of the slaves allotted to him and his wife under that order; when he sold him, and he was purchased by Frances Tabb. That therefore the said slave Syphax should be decreed to be delivered to the trustee to be held by him subject to the uses specified in the marriage settlement.

3d. That there was nothing in the decree of June 1832, in relation to the hires of Philip and family or of Syphax, which should restrain the Court from decreeing in relation thereto, as to it might seem just and equitable; and that the plaintiffs had no right to have these hires paid over to them, because the same belonged to and should be paid over, if to any one in this cause, to the defendant John R. Archer. But if he was entitled to them he was also answerable to the defendant as admin-

419 *sum of 2000 dollars, with interest from the 25th of December 1818, the amount paid him by said Frances Tabb for Philip and his family; and for 800 dollars, with interest from February the 1819, paid for the purchase of Syphax; an amount much more than the hires of these slaves; and therefore and because the said John R. Archer was insolvent, the Court would allow the defendant to withhold said hires in part payment of the amount so due from John R. Archer to the estate of the defendant's intestate; and would, if the administrator required it, order an account between them, as to that subject; but as to no other.

4th. That the accounts directed to be taken by the decree of June 1832, of Frances Tabb's guardianship of Harriet Tabb deceased, and also in relation to the slaves Miller Lee, George and Delphia, were improvidently ordered in this cause; and that the Court would neither consider the same or decree in relation thereto.

It was therefore decreed that Barksdale should deliver to a trustee named, the slave Syphax, to be held by him upon the trusts and to the uses and purposes of the marriage settlement referred to in the bill; and that he should out of the assets of his intestate pay to the plaintiff his costs; and that the defendant John R. Archer should pay the costs of taking the accounts and making the reports ordered by the decree of June 1832. And the cause was continued for the sole purpose of taking an account between John R. Archer and the administrator of Frances Tabb as before indicated, if the administrator should desire it.

In December 1842, Barksdale as the administrator of Frances Tabb, applied to the Court by petition for a rehearing of the decrees of June 1832, and July 1842, on the ground that when he filed his answer, in ignorance and under a misapprehension of the facts as to the title of John R. Archer to the slaves directed by
420 the decree *of June 1832 to be delivered up, he had omitted to state the

full facts which would have sustained the title of his intestate, and indeed had honestly made admissions according to his then belief, which were seriously detrimental to the interests of his intestate's estate. That since the rendition of that decree he had been truly informed of the real circumstances under which said slaves were acquired by his intestate, and had obtained the record which he had filed in this suit, of a suit brought in the County court of Amelia in May 1818, from which it was then apparent that instead of said slaves, or at least the greater number of them, being merely held by the father of the plaintiff in trust, they were then actually owned by him; having been acquired in right of his wife as a distributee of a deceased sister, subsequent to the execution of the aforesaid marriage agreement.

The cause came on again to be heard on the 23d of December 1842, when the Court rejected the petition for a rehearing of the cause; and the defendant Barksdale electing to take the account tendered him by the Court, it was decreed and ordered that John R. Archer do render an account of the hires and profits of the said slaves received by him during the continuance of the life estate of Frances Tabb deceased, before one of the commissioners of the Court, who was directed to state the account and make report thereof to the Court. And thereupon Barksdale applied to this Court for an appeal, which was allowed.

Morson, for the appellant.

Cooke, for John Y. Tabb's administrator.
P. V. Daniel, jr., for John R. Archer.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that although the appellant when he filed his answer
421 in this cause, was ignorant of *all the facts in regard to the title of his intestate to the slaves sold to her by John R. Archer, and described in his bill of sales of the 25th of December 1818, he nevertheless relied on the bill of sale as shewing an absolute title in his intestate to the slaves, and that his intestate had agreed to take for her dower right for that portion of her dower slaves which would belong to Frances C. Archer wife of John R. Archer, at the death of the intestate of the appellant, the sum of 2000 dollars to be paid in slaves; and that said bill of sale was executed in consideration of her having previously agreed to relinquish her right in said dower slaves.

It appears by the decree of the County court of Amelia, of the 29th of May 1818, that the commissioners who were appointed to receive from the intestate of the appellant said dower slaves, and make a division thereof, were directed to allot to the intestate of the appellant one sixty-fourth part of said dower slaves as mother and distributee of her deceased daughter Harriet. The report made by said commissioners shews that the one sixty-fourth part so allotted to the intestate of the appellant as her distrib-

utable share of her deceased daughter's proportion of said dower slaves, was of the value of 1580 dollars; and that the residue of said dower slaves were divided amongst the other distributees of the said John Tabb and said Harriet; whereby each of said distributees received one sixty-fourth part of the slaves as a distributee of said Harriet. And the report further shews, that the slaves allotted to said John R. Archer and wife exceeded the just amount by 211 dollars, which John R. Archer was to pay for owelty of partition. And thus the fact was disclosed by said decree and report, that of the slaves allotted to John R. Archer and wife, he was entitled to receive and did receive, in his own right, unaffected by the marriage articles between himself and wife, slaves to the value of his distributable share in said Harriet's estate

422 *and the said sum paid by him for owelty of partition, making together the sum of 1791 dollars; and which, therefore, he had a clear right to dispose of. And as the decree of the County court of Amelia was filed as an exhibit and read at the hearing, as appears by the interlocutory decree of the 19th day of June 1832, the facts so disclosed were then in the record, and the appellant is entitled to the benefit thereof at any subsequent hearing, and upon the appeal bringing up the record.

The Court is further of opinion, that it sufficiently appears the conveyance of the slaves by the bill of sale of the 25th December 1818, was nothing more than the execution of the agreement and arrangement previously entered into between the parties referred to in the bill filed in the County court of Amelia, as the arrangements made for compounding their respective interests in said slaves; and the surrender of the slaves, and the release of the intestate of the appellant, was made on the consideration that she should retain slaves to the value of the sum of 2000 dollars agreed to be paid to her by each of the distributees, for the surrender of the whole of said dower slaves. And if the said John R. Archer, in disregard of the terms of the marriage articles, after such surrender of the dower slaves, should have improperly disposed of a portion thereof, such misconduct could not affect the title of the appellant's intestate, acquired under an agreement preceding the surrender of any of the slaves.

The Court is further of opinion, that the arrangement by which the beneficiaries under the marriage articles obtained the immediate possession and enjoyment of the dower slaves of the value of 14,039 dollars, for the small additional consideration above the sum of 1791 dollars, being the difference between that sum and the sum of 2200 dollars; the consideration expressed in the bill

423 of the sale of the 25th of December 1818, was so *clearly beneficial to all concerned, as to constitute a proper and reasonable charge against the trust estate; and after the beneficiaries under said marriage articles have received or might have received the profits of said

dower slaves from the time of such surrender, it would be unjust to permit them to disturb the title acquired by the intestate of the appellant, to the slaves conveyed to her in consideration of her surrender and relinquishment; the said Archer having an absolute right to convey to the extent of 1791 dollars, and the residue of the consideration named being inconsiderable when compared with the advantages accruing to the beneficiaries by the arrangement.

The Court is therefore of opinion, that so much of the interlocutory decree of the 19th June 1832, as perpetuated the injunction enjoining the appellant from selling the slaves named in said bill of sale of the 25th December 1818, and the increase of the females, and directed a surrender of said slaves and their increase to the trustee thereby appointed, and ordered the appellant to account for the hires thereof, is erroneous.

The Court is further of opinion, that the slave Sye or Syphax in the proceedings mentioned, being shewn to have been one of the dower slaves allotted to John R. Archer and wife, the sale made of him by said Archer was against the terms of the marriage articles; and there is no error in the interlocutory decree of the 12th July 1842, directing him to be surrendered to the trustee in said decree mentioned.

The Court is further of opinion, there was no error in said decree in holding that certain accounts directed to be taken by the interlocutory order of the 23d June 1832, were improvidently ordered in this cause, and refusing to decree in relation thereto.

The Court is further of opinion, that the interlocutory decree of the 23d December 1842, directing that John R. Archer do render an account of the hires and 424 *profits of the slave Syphax and Philip and family, stated to have been received by him during the continuance of the life estate of the appellant's intestate, is erroneous, the slaves being in fact held by said intestate.

And the Court is further of opinion, that if under the pleadings in this cause, an account could properly be directed in regard to the price alleged to have been paid to John R. Archer for the slave Syphax and his hires and profits, the question as to who would be entitled to the hires has not been put in issue; and the circumstances of the case shew that no account could lead to any beneficial result.

The Court is therefore of opinion, that said decrees in the particulars herein before declared to be erroneous, be and the same are hereby reversed with costs to appellant; and that the same in the particulars herein declared not to be erroneous, be affirmed. And the cause is remanded with instructions to dissolve the injunction awarded on the 25th of February 1829, in respect to the slaves mentioned in the bill of sale of the 25th December 1818, and the increase of the females; to order a restoration of said slaves, together with the increase of the females, to the appellant; and

for an account and payment over to the appellant, of the hires and profits thereof from the time he surrendered the same in pursuance of the interlocutory decree of the 19th June 1832, and also to carry into effect so much of the decree of the 12th July 1842, as directed the surrender of Sye or Syphax to the trustee therein named, if he has not been surrendered; and that as to all other matters the bill be dismissed.

425 *Smith's Adm'r v. Charlton's Adm'r.*

April Term, 1851, Richmond.

(Absent CABELL, P., and MONOURE,† J.)

Judgments—Quando Acciderint—Statute of Limitations.‡—A judgment *quando acciderint* does not come within the operation of the statute of limitations in relation to judgments, 1 Rev. Code, ch. 128, § 5, p. 487. By two Judges in a Court of three.

Warner Lewis of Gloucester county, by his deed dated the 5th of January 1798, conveyed all his estate, real and personal, (except a parcel of land specified in the deed,) which had descended to him from his father, to John Lewis and Wilson Cary Nicholas, in trust for the payment of his debts, then for the support of his family, and then for his children. In November of the same year, Warner Lewis died, and by his will, after providing for his wife, he gave the residue of his estate to his two daughters; and if they died without issue, to his brother John Lewis; who he appointed one of his executors.

It seems that John Lewis was the principal, if not the sole, acting trustee and executor under the deed and will of Warner Lewis. In May 1802, William Wiseham administrator, and Mary Charlton administratrix, of Francis Charlton deceased, recovered a judgment against John Lewis, as the executor of Warner Lewis deceased, for £ 123. 14. 5½., with interest at the rate of 5 per cent. per annum on £ 122. 9. 11½., a part thereof, from the 3d of September 1796, to be paid when assets sufficient should come to his hands, and their costs, 6 dollars

426 14 cents. William Wiseham *died not later than 1805, and Mary Charlton died in 1810 or 1811; and there was no qualification on the estate of Francis Charlton until February 1831, when Robert Anderson qualified thereon as administrator de bonis non. John Lewis died in 1827, when Thomas Smith qualified as his executor.

It seems that after the death of John Lewis the two daughters of Warner Lewis instituted a suit against his executor Thomas Smith, for a settlement of his trustee and executorial accounts; and the case was so proceeded in that a sum exceeding 4000 dollars, principal and interest in 1827, was ascertained to have been in the hands of John Lewis, as trustee and executor, as early as 1815.

In 1840 Robert Anderson instituted this suit against Thomas Smith as executor of John Lewis, for the purpose of subjecting the estate of Warner Lewis deceased, in his hands, to the satisfaction of the judgment recovered by Francis Charlton's former representatives against John Lewis, as the executor of Warner Lewis in 1802. In his bill he set out the foregoing facts, and asked for a decree against the executor of John Lewis for the amount of the judgment.

Smith answered the bill, and relied upon the statute of limitations, and the great lapse of time which had occurred since the judgment in bar of the claim. And he dying, the cause was revived in the name of William P. Smith his administrator; and came on to be heard in October 1844, when the Court decreed in favour of the plaintiff for the amount of the original judgment, 412 dollars 41 cents, with interest at the rate of 5 per cent. on 408 dollars 32 cents, from the 3d of September 1796 till paid, and 6 dollars 64 cents the costs of the judgment, and also the costs of his suit. Whereupon William P. Smith applied to this Court for an appeal, which was allowed.

427 *Harvey and Crump, for the appellant.

In this case thirty-eight years had elapsed from the date of the judgment in 1802, before this suit was brought to enforce the payment of it. In all that time there must have been a considerable estate in the hands of John Lewis, the trustee and executor of Warner Lewis, the debtor; and we have positive proof that as early as 1815 there were assets in his hands more than sufficient to pay this judgment, after all other debts of the testator had been satisfied. It is under these circumstances, when every party to the transaction is dead, without a single circumstance to rebut the legal presumption, and the matter of fact probability, that this judgment has been long since satisfied, that this plaintiff asks a Court of equity to enforce this stale demand. In twenty years a bond will be presumed to have been paid. In the same time a mortgage will be presumed to be satisfied; and in all cases a presumption of payment will arise. *Dunlop & Co. v. Ball*, 2 Cranch 180;

*For monographic note on Judgments, see end of case.

†The case was argued before his appointment.

‡Judgments—Fieri Facias—Pending Injunction.—In *Richardson v. Prince George Justices*, 11 Gratt. 190, it is said: "JUDGE BALDWIN, in delivering his opinion in the case of *Smith's Adm'r v. Charlton's Adm'r*, 7 Gratt. 425, 426, intimates that pending a writ of error or injunction or *cessat*, an action of debt or *scire facias* cannot be brought upon the judgment. He cites no authority for the proposition, and so far as it respects the injunction, it is an intimation thrown out arguendo and by way of illustration. He probably did not advert to the distinction between the nature and effect of an injunction and that of a writ of error or *cessat*. At all events it was a point not at all material to the decision in that case, and the remark of the judge as it respects the injunction, must be regarded as obiter merely." The principal case is also cited in *Hutsonpiller v. Stover*, 12 Gratt. 582; *Wendenbaugh v. Reid*, 20 W. Va. 588.

Winchelsea Causes, 4 Burr. R. 1962; Cope v. Humphreys, 14 Serg. & Rawle 15; Wills v. Washington's adm'r, 6 Munf. 532; Anderson adm'r v. Burwell's ex'ors, 6 Gratt. 405. What is there, then, in this judgment quando, which shall forbid the application to it of this well established rule of law, of equity, of common sense and common justice?

Of the thirty-eight years which elapsed between the rendition of this judgment and the institution of this suit, for seventeen of them there had been a representative of the estate of Francis Charlton. Mrs. Charlton died in 1810 or 1811; and the present representative, Robert Anderson, qualified in 1831. And if there was not a representative during the whole period, it was only the neglect and laches of the persons interested in Francis Charlton's estate. Yet during this whole period of time, these representatives rested quiet
428 *on their rights, if they had any; and unless the judgment had been satisfied, were guilty of such neglect and delay as should have deprived them of all aid from a Court of equity. Pickering v. Id. Stamford, 2 Ves. jr. R. 272; S. C. Id. 581; Deloraine v. Brown, 3 Bro. Ch. Cas. 633.

It has ever been the rule of Courts of equity, having regard to public convenience, as well as to presumptions arising from lapse of time, not to enquire into old transactions, or entertain suits founded on causes of action which had accrued so long that all evidence of their adjustment might have been lost by the destruction of papers or the death of witnesses. Hercy v. Dinwoody, 2 Ves. jr. R. 87. This is a consideration of peculiar importance in this instance, as the claim of the administrator of Charlton is founded on a judgment all the parties to which have been long since dead; and the judgment being against an executor when assets of his testator should come to his hands to be administered, it is dependent on and interwoven with, transactions of such an ancient date, that a Court of equity having a due regard to the public inconvenience which would be caused if such transactions were enquired into, as well as the presumptions arising from a long lapse of time that the judgment itself had been satisfied, should not have entertained the suit. Ray v. Bogart, 2 John. Cas. 432; Ellison v. Moffatt, 1 John. Ch. R. 46; Coleman v. Lyne, 4 Rand. 454; Burwell's ex'ors v. Anderson, 3 Leigh 348; Carr v. Chapman, 5 Leigh 164. Even in cases arising under technical and continuing trusts which are not cognizable in a Court of law, but fall within the proper, peculiar and original jurisdiction of the Court of equity, and which cannot be reached by the statute of limitations, Courts of equity, always averse to stale claims, will
regard the public inconvenience of

429 enquiring into demands which *have long existed without any effort having been made to enforce them. Carr, J., in Carr v. Chapman, 5 Leigh 164.

In this case the administrator of John

Lewis pleaded the statute of limitations; and we submit the case comes clearly within the fifth section of the act 1 Rev. Code, ch. 182, p. 498. That act says that "judgments in any Court of record within this Commonwealth, where execution hath not issued, may be revived by scire facias or action of debt brought thereon, within ten years next after the date of such judgment, and not after." This is a general statute of limitations in relation to judgments. The section under consideration embraces judgments on which executions have not issued, and also judgments on which execution hath issued, but has not been returned. It does not undertake to set out the various kinds of judgments which are intended to be embraced within it, but designates them by a characteristic feature which is common to them all. Not judgments by default, and by confession, and upon verdicts of a jury, and when assets; not judgments of the County court, and Circuit court; not judgments in debt, and detinue, and trover, and trespass, &c., &c., &c., but judgments where execution hath not issued, may be revived by scire facias or action of debt brought thereon, within ten years after the date of such judgments, and not after. The criterion by which it is to be tested whether the judgment is embraced in the first clause of the section, is, whether an execution hath issued upon it. The test is not whether execution could have issued upon it at any time, or can issue upon it at the present time; but the test is whether execution has issued upon it. We submit then that the case of a judgment quando comes clearly within the language of the statute.

We submit further, that the judgment
430 quando comes equally within the mischief intended to be prevented *by the statute. Indeed it would be difficult to point out a mischief which can arise from the delay to prosecute a general judgment to its final and full satisfaction, which may not equally arise from the neglect to prosecute a judgment quando to its final termination. And there are mischiefs arising from delay to which these judgments are especially liable. They are always judgments against the representatives of dead men's estate; and the fact that they involve no personal liability to the representative, but release to him all the assets then in his hands, whilst they relieve him from the trouble and annoyance of a legal contest, induces a facility in yielding to such a judgment by the representative; and it will be generally found that they are, as in this case, judgments by confession. These judgments, if this statute does not apply to them, may be disinterred from their graves at any distant day, to subject, not the person by whose confession or acquiescence they were obtained, but the next or second generation of legatees or distributees of his testator. But we need not speculate upon this subject. The case now under consideration, is an illustration of the consequences which will result

from the exclusion of these judgments from the operation of this statute. In this case, as we have seen, thirty-eight years after this judgment was confessed by the executor of Warner Lewis; after his death and the death of the original plaintiffs; when there was no one living who knew anything about the merits of the case; after the creditor's estate had ceased to be represented for thirty years, a stranger discovers this old judgment, and disinters it from the grave in which it had laid quietly for thirty-eight years, that he may devour the pittance that these female legatees had been enabled to secure from the ruins of their father's estate, after a forty years pursuit of this executor and his representatives.

431 *We have always understood that in the interpretation of statutes the first rule is to look to the language employed; and if that is plain and explicit, it is to be followed. That if there is any doubt upon the language of the statute, as to its proper construction, then the first and most important rule by which the true construction is to be ascertained, is to look to the mischief which it was intended to remedy; and so to construe the statute as to advance the remedy and suppress the mischief. And taking either or both of these rules for our guide in the construction of this statute, we submit that the conclusion is inevitable, that these judgments quando are within the intent and meaning of the statute. And we submit that this conclusion is strengthened by the consideration that if these judgments are not embraced within this statute, they are wholly without limitation, and may be proceeded on at any day however distant.

What then are the grounds on which this Court is asked to decide that these judgments quando are not within the intent and meaning of the statute? It is first insisted that the language of the statute confines the judgments embraced by it to those on which execution may issue at once. We have only to say that the statute does not say so. It is very true that most of the judgments to which the statute applies, are judgments on which executions might have been at once issued; for the very good reason that ninety-nine judgments in every hundred, are of that kind. But as we have already said, the statute is framed not upon the plan of specifying the various judgments which are intended to be embraced in it, but of giving one characteristic feature which is common to all. As to the phraseology used in the statute about reviving some judgments by scire facias, and obtaining executions on others, we think it would not be difficult to show that this language is entirely appropriate to the

432 statute, upon *the construction we give to it. But if it is not precisely and technically correct, it cannot be doubted that it is readily accommodated to our construction of the statute, and every word and phrase may have a precise and proper meaning upon that construction: and surely

these are not objections which are to weigh against the plain language and obvious policy of the statute.

There is, however, another objection to our construction of this statute; and it is the objection which is at the foundation of the argument of the other side. That objection is, that there is no mode of proceeding to enforce the judgment quando, until the plaintiff can allege and prove that assets have come to the hands of the personal representative: And it is insisted, that according to the principles of the common law, a scire facias to have execution upon the judgment, will not lie without the averment and proof of assets; and that the only object is to have execution upon the old judgment.

It will be found on examination that the cases which speak of the necessity of averring and proving that assets had come to hand since the last judgment, upon the proceeding by scire facias, have reference to the issue upon the plea of plene administravit, and the judgment de bonis testatoris, to be rendered upon that issue, which at common law concludes the executor upon the question of his having assets. *Hope v. Bayne*, 3 East's 2; *Dickson v. Wilkinson*, 3 How. U. S. Ct. R. 57; but they have no reference to the proceeding to have another judgment quando against the executor, by which the debt against his testator is re-affirmed and judgment revived precisely in the sense in which a general judgment is revived by scire facias. That this is the correct view of these authorities, is strongly corroborated by the case of *Perryman v. Westwood*, cited 1 Ventr. R. 95, in which where assets in part were found

433 by the jury, there was an award of *execution to that extent, and a judgment quando for the balance of the original judgment. If the uses of the scire facias are to be limited to the obtaining of an execution on the judgment, there can with no propriety be a judgment quando for a part of the first judgment: And if there may be a second judgment quando for a part, with equal propriety may there be a second judgment quando for the whole.

If, however, it be true that the purpose and object of the scire facias upon the judgment quando, at common law, is only to obtain execution on the original judgment, then we say that the mode of proceeding by scire facias to have execution upon these judgments quando, refers itself to the remedy; and is prescribed by no Virginia statute. It is an old mode of proceeding adapted to the law as it then was; and if at the present day, its forms are found to be inapplicable to the law as it now is, the proper remedy is, not to change the law to suit the form, but to adapt the form to the law: And we respectfully suggest that this is peculiarly proper, when the law is a Virginia statute, and the form is an old English form.

But if the English forms of proceeding are too sacred to be modified so as to adapt

them to the present state of the law, we submit that there are other modes of proceeding upon these judgments quando which are not obnoxious to this objection. A judgment quando by its terms and in its effect, ascertains and establishes the debt against the estate of the testator or intestate as firmly and irrevocably as a general judgment. The quando has relation, not to the existence of the judgment, but to its satisfaction. This judgment binds the estate of the testator or intestate so that all the personal estate in the hands of legatees or distributees is liable for its satisfaction. It so binds the personal representative, that if he afterwards pays a debt on which

434 *there has been no judgment, or on which judgment has been obtained subsequent to the judgment quando, out of subsequently acquired assets, he will be guilty of a devastavit. *Parker v. Dee*, 3 Swanst. R. 530, in note. And although at law the creditor would not be allowed to obtain satisfaction of his judgment out of assets in the hands of the personal representative, when the judgment was rendered, yet in equity there can be no doubt that he would be permitted to subject them. Upon this judgment then, as upon any other judgment, an action of debt will lie. It is the conclusive evidence of a debt due from the testator or intestate to the creditor; and upon the commonest principles of law applicable to actions, it must therefore be sufficient to sustain an action: And of this there is no doubt upon authority. *Noel v. Nelson*, 2 Wms. Saund. 219, note 2; *M'Dowall v. Branham*, 2 Nott & M'C. 572; *Taylor v. Holman*, Bull. N. P. 169. What then is to be found in the form of declaring in debt on a judgment quando, which prevents the creditor from proceeding upon it in that way, though no assets have come to his hands since the judgment was rendered. He declares that the testator of the executor was indebted to him in a certain sum of money; and he shews as the evidence of that indebtedness, the judgment which he had recovered against the executor; which is conclusive of the fact of indebtedness. To this action of debt the executor, if he has no assets, may plead plene administravit; and he pleads it precisely as he did in the first action. *Noel v. Nelson*, 2 Wms. Saund. 221; and if the issue upon this plea is found for him, then of course there cannot be a judgment de bonis testatoris, because that at common law would be evidence against the executor in an action for a devastavit, of his possession of assets sufficient to pay the debt: But the plea itself not going to the question of the indebtedness of the testator, the

435 plaintiff *would be entitled to a judgment quando in his favor in this second action, precisely as he was entitled to it in his first. And if it be true that the only object of the scire facias is to enable the plaintiff to obtain execution on the judgment quando; and that by that mode of proceeding he cannot have another judgment quando; then there is this obvious

difference in the results of the two modes of proceeding: For there is certainly nothing in the action of debt upon the judgment which requires that it should be limited to the issue upon the plea of plene administravit, or to the award of execution; but it equally admits and authorizes the judgment quando acciderint.

We submit then with confidence that the plaintiff may proceed either by scire facias or action of debt, and certainly by the latter mode, to revive his judgment quando; revive it in the sense of the statute by obtaining a new judgment: And being thus authorized to proceed upon it, the statute of limitations runs upon it. We have never contended that the statute would run against a judgment upon which no proceedings could be had, or that however general the terms of the statute such a judgment was embraced in it. But we do contend that wherever a scire facias or an action of debt can be maintained on a judgment, that such a judgment is within the intent and meaning of the statute. And this we submit is the distinction between a judgment quando and a judgment with a cessat executio, or upon which there is an injunction or an appeal. In the first as we have endeavoured to shew, the plaintiff may proceed to revive by scire facias or action of debt; in the others there is a positive prohibition of record to his taking any steps to enforce them.

We have thus endeavoured to consider this question on principle, because we are aware that it will be contended by the counsel for the appellee, that there has been no authoritative decision of it by this

436 Court. We *know indeed, that the case of *Braxton v. Woods*, 2 Gratt. 25, was decided by a Court of three, and that one of the Judges put his decision upon grounds peculiar to himself; and therefore that the decision is not an authority binding upon this Court. But we nevertheless refer with confidence to that case as one of high authority, as well for the ability of the argument by which the judgment is sustained, as for the respect which is due to the opinions of the venerable and enlightened Judge who concurred in it. And even if the Court should think that the mode of proceeding sanctioned by the decision in that case, is a departure from the ancient mode of proceeding in such case; as it is a question not of right but of practice, and as the practice so authorized by that case, is most consistent with the security of parties, and the policy of the law, we submit that it should be adhered to by the Court.

Bouldin, for the appellee.

The plea of the statute of limitations presents the only debatable question in this case. There is certainly no ground for imputing laches to the appellee or his intestate's estate. The terms of the judgment itself conclusively ascertain that at the time of its rendition there were no assets out of which it could be satisfied; and such being the case, there was no right at that time to enforce the judgment by exe-

cution, and consequently there could be no default in failing to attempt it. It is true that assets accrued about the year 1815, but there was then no representative of Charlton's estate; nor was that estate represented until 1831; within nine years after which time this suit was brought. Now there could very clearly be no presumption of payment between the accruing of assets in 1815 and the qualification of the appellee as Charlton's administrator in 1831; for between those periods there was no person

in esse to whom payment could
437 *be made; and there has certainly been no pretence of payment to the appellee since 1831. The case stands then simply on a delay of nine years to demand payment of a judgment; and I am aware of no case in which such delay has been held sufficient either to raise a presumption of payment, or to bar a demand on the ground of laches.

It is true that in the case of *Anderson v. Burwell's ex'ors*, 6 Gratt. 405, cited by the counsel for the appellants, this Court applied the doctrine of laches. But that, to use the language of the learned counsel who argued the cause for the appellees, was "a naked, unmitigated case of sleeping for half a century and more;" and there was no successful attempt to explain the delay. In the case of *Burwell's ex'ors v. Anderson*, 3 Leigh 348, however, to which the case just referred to was a sequel, the Court sustained a bill filed after the lapse of some 30 years, expressly on the ground that for a great part of the time the estate to which the legacy was due, was not represented. There is nothing then in the question of laches.

I come now to the real question in the cause, the statute of limitations, 1 Rev. Code, p. 489, § 5. This it is said presents a peremptory bar to the proceeding; and the case of *Braxton v. Woods*, 2 Gratt. 25, is cited to sustain the plea.

It cannot be denied that the learned Judge who delivered the opinion of the majority of the Court in that case, did hold that the statute applied to a judgment quando acciderint; and the Judge who concurred with him must also be regarded as holding the same opinion. But it will be observed that the case was decided by a bare Court, and the third Judge not only did not concur with the majority, but evidently dissented. It was conceded too by all the Judges in that case that the question now under consideration did not arise. The judgment there

was not a judgment quando, but one
438 *of a totally different character. It did not preclude, but invited an enquiry into the statute of the assets; and all that was said about the effect of the statute on a judgment quando, was clearly beside the case. The question, then, is an open one, and must now be adjudicated for the first time.

It is said the terms of the statute are broad enough to embrace a judgment quando, and the mischiefs intended to be

guarded against equally apply to such a judgment.

The object of the statute is to prevent a judgment creditor from sleeping on his rights; to compel him promptly to take out execution on his judgment, by imposing a forfeiture for his failure to do so. Let us examine then the nature and effect of a judgment quando; and see whether it can, by any just construction, be embraced by the terms of this statute.

The judgment quando is wholly unlike a general judgment. It ascertains of record, it is true, like a general judgment, the existence and amount of a debt from the estate of a decedent; but here the analogy ceases. It concedes by its terms that there are no assets out of which it can be satisfied; and confers on the creditor no present right to issue or even to ask for an execution. Indeed, under no circumstances, can an execution issue on such a judgment as a matter of course. It can only issue by special award of the Court, on suggestion and proof of assets accruing since the date of the judgment. This suggestion of assets must be made by scire facias on the judgment, and unless made the scire facias is demurrable. *Mara v. Quin*, 6 T. R. 1; *Noel v. Nelson*, 2 Wms. Saund., p. 241, and notes. So, too, if the suggestion be made and issue be taken on the fact of assets, and it turns out that none have accrued since the date of the judgment, the plaintiff in the scire facias will be nonsuited. *Taylor v. Holman*, Bull. N. P. 169.

439 *From this view of the nature of a judgment quando, it will be seen that an award of execution thereon is by no means a matter of course, as in the case of ordinary judgments. The object of the scire facias on a judgment quando is not to revive a judgment, the vitality of which has been suspended by failure to take out execution thereon within the year. Its function is entirely dissimilar. It is to suggest some new matter, viz., the accruing of assets, which gives the right not to revive, but for the first time to put in motion a judgment previously dormant. It is rather analogous to the scire facias on a recognizance, or on a judgment on a bond with collateral condition, suggesting breaches.

Such being the nature of the judgment quando, and the functions of the scire facias to enforce it, the question arises, is it embraced by the terms of the statute fairly construed. I submit, both on reason and authority, that it is not. What are the terms of the statute? "Judgments in any Court of record within this commonwealth, where execution hath not issued, may be revived by scire facias or an action of debt brought thereon, within ten years next after the date of such judgment, and not after." Now apart from judicial construction, is it possible, upon any just and common sense construction of these words, to resist the plain implication which at once arises, that they refer to judgments capable of being executed at once, but on which "execution hath not issued" within the

year; judgments, the vitality of which had been suspended by such failure to take out execution; and which, by reason thereof, required to be revived by scire facias or action of debt; and not to a judgment incapable in its nature of being forthwith executed, and about which no default can be predicated. The construction we contend for results naturally from the terms of the statute, and accords
440 with the spirit of the *act of limitations, which only imposes a forfeiture on him who has slept on his rights; who has failed to avail himself of a legal remedy; whilst the construction contended for on the other side would lead to the strange result of punishment to a party for failure to do that which under the law he has no right or power to do. That, I submit, would be an anomaly in legislation and judicial construction.

This view of the statute is fortified by the concluding paragraphs of the same section, referring to judgments on which executions have issued but have not been returned. In such cases the creditor is authorized not to revive his judgment, but to "obtain other executions," for the term of ten years from the date of such judgment, and not after. Why this distinction between judgments on which "execution hath not issued" and judgments on which execution hath issued, without being returned? The period of limitation is the same in both cases. Why is the first to be revived by scire facias or action of debt, whilst on the second the creditor is allowed to "obtain other executions?" Obviously, because, by the issue of an execution in the last case the judgment has been already kept alive and needs no revival, whilst in the first the vitality of the judgment has been suspended by the failure to take out execution within the year, and the judgment must necessarily be revived by scire facias or action of debt before execution can issue.

The same distinction is studiously observed in the next section, 1 Rev. Code, p. 489, § 6, saving to persons under certain disabilities the benefit (after disabilities removed) of a "judgment where no execution hath issued, by reviving the same by scire facias or by action of debt;" and where execution hath issued and no return made, giving them, not a revival of the judgment, but "the benefit of the other executions." I submit, then, that it

would be doing the utmost violence
441 *to the terms and spirit of this statute to make it apply to a judgment on which the party has no right, under any circumstances, to issue an execution.

But it is said that the terms of the statute embrace all judgments without distinction, and of course a judgment quando. Now, it is conceded from the bench, and at the bar, and is abundantly sustained by authority, that the statute does not apply to a judgment with a cessat executio, which is a stay by the act of the parties for a definite period, nor to a judgment enjoined by decree of the Court of chancery, which is a stay

by the act of the Court for an indefinite period, nor to a judgment for an annuity payable at a future day. In none of these cases does the statute apply from the date of the judgment. *Hiscocks v. Kemp*, 30 Eng. C. L. R. 182; *Underhill v. Devereux*, 2 Wms. Saund. p. 72, c. 72 f; *Noland v. Cromwell*, 6 Munf. 185. Yet they are all "judgments," and if the terms of the statute are broad enough to embrace a judgment quando, they are alike broad enough to embrace these. Why are they not embraced? Simply because, from the nature of the judgments, or the circumstances attending them, the creditor has no right to issue execution on them. So with the judgment quando; from its terms and character the creditor has no right to issue execution on it. Now the chief difference between a judgment quando and a judgment with a cessat, is, that the former is a stay for an indefinite period by operation of law, whilst the latter is to stay for a definite period by the act of the parties. The effect is the same in both—incompetency to take out execution—and this is the true test of the applicability of the statute.

Should it be urged that the distinction just stated is important, the argument is answered by the case of a judgment enjoined, for that like the judgment quando, is a stay of execution for an indefinite period by act of the Court. Yet the statute does not apply to it.

*The only case I have been able to
442 find in which this question might have been directly adjudicated, is the case of *Lidderdale v. Robinson*, 2 Brock. R. 160. In that case a bill was filed in the year 1820 to enforce a decree when assets, rendered in 1797. The bill alleged that assets had recently accrued, and the claim was enforced after the lapse of twenty-three years, without even raising the question of limitation, although the case was much contested.

But the learned Judge in *Braxton v. Woods*, says that the bar applies to a judgment quando, because a scire facias will lie on it at once and without proof of assets, whilst on a judgment with a cessat, a scire facias would not lie. I have endeavoured to shew that it is the capacity to take out an execution, and not a scire facias, that brings the creditor within the operation of the statute. In all respect, however, I would insist that the distinction suggested does not exist. It is quite as easy to repeat a judgment with a cessat, as a judgment quando, although the operation would be alike useless in both cases, the parties being neither better nor worse off afterwards, than they were before. The scire facias will lie, I think, in neither case; but if in either, then in both.

In the case at bar, there were no assets within ten years after the date of the judgment. If, then, a scire facias had been sued out within the ten years, and had stated the truth, it would, on the authorities already adduced, have been dismissed on demurrer.

It is conceded, however, that the suggestion of assets must be made, but this is treated as a mere form, adopted in order that the scire facias may conform to the judgment. This conformity to the judgment is matter not of form but of substance. The prayer of the scire facias is for an award of execution on the judgment. Now the judgment is itself conditional; its

443 enforcement depending on the accruing of assets; and yet, we *are told, that the happening of that on which alone the right to execute the judgment depends, is unimportant, and its allegation a mere form, because it is the object of the party to obtain, not what he asks for, an award of execution, but a simple renewal of his judgment quando. That is to say, the plaintiff in the scire facias, must allege that which he knows to be false, and ask for that to which he knows he is not entitled, in order to arrive at a mere repetition of the judgment quando!!! Can this be law?

But suppose the scire facias to be sustained, what would be the judgment on it? Not a new judgment quando, on which an execution or scire facias might issue: Such is not the function of the scire facias. "It seeks not a new judgment on which execution is to issue, but an award of execution on the judgment already rendered. The execution issues on that judgment, and the award of it on the scire facias is but the authority to issue it." Steward, J., in *Taylor v. Spindle*, 2 Gratt. 64; Robinson's Forms, passim. The only judgment then that could be entered on such a proceeding would be an award of execution quando acciderint, on the previous judgment. But that would neither be the issuing of an execution nor the unconditional award of execution, nor a judgment on which execution might thereafter be awarded. It leaves the condition of the parties unchanged, only giving to the creditor, what he had before, the right to sue out execution on his previous judgment by scire facias when assets should accrue. After such an entry, a plea that no execution had issued on the judgment quando, within ten years from its date, would be true both in form and in substance, and if applicable to a judgment quando, could not be avoided.

I submit, however, that neither reason nor authority will justify a proceeding, which if it state the truth will be demurrable, and which to be sustained must
444 allege *what is known to be false, and pray for what cannot be granted, in order to attain that which will leave the party precisely where he was before.

There might be some reason to contend that the statute would apply from the accruing of assets; as from that time the creditor would have a perfect right to sue out execution by scire facias. And this principle seems now to be established by the Code of 1850, p. 710. But even this would not help the appellant in this case. When the assets accrued there was no representative of Charlton's estate; and the

bill was filed within the period of limitation, computed from the date of the appellee's qualification as administrator.

On every ground the decree should be affirmed.

DANIEL, J. The judgment upon which the decree sought to be reversed is founded, was rendered in the year 1802. No steps appear to have been taken to enforce the judgment until the institution of this suit in the year 1840.

Thomas Smith the intestate of the appellant William P. Smith, in his answer to the bill, set up two defences, to wit, the statute of limitations, and the presumption of satisfaction arising from the great delay in proceeding upon the judgment. It is insisted in the petition and in the arguments of counsel here, that both of said defences were good, and that the Chancellor erred in overruling them.

The judgment was obtained by William Wischam administrator and Mary Charlton administratrix of Francis Charlton deceased, against John Lewis, executor of Warner Lewis deceased, to be levied of the goods and chattels of the said Warner Lewis deceased, when assets sufficient should come to the hands of the defendant to be administered.

445 It is stated in the bill, and proved by a deposition in the cause, that Wischam the administrator died in 1804 *or 1805, and that Mary Charlton the administratrix died in 1810 or 1811; and Anderson the appellee qualified as administrator de bonis non of the said Francis Charlton in February 1831. Though thirty-eight years, therefore elapsed between the date of the judgment and the commencement of proceedings to enforce it, it appears that for at least twenty years of that period the estate of Charlton was without a representative. There cannot, of course, arise any presumption of satisfaction during this interval, and excluding it, there remains but seventeen or eighteen years upon the lapse of which to rest that defence.

No circumstances in aid of the lapse of time are averred in the answer or disclosed in the proofs. If this, therefore, had been a judgment de bonis testatoris, to be levied presently of the goods, &c., in the hands of the representative, instead of a judgment when assets, I should hardly suppose that the demand to have it satisfied could have been successfully resisted on the score of lapse of time: And when the character of the judgment is adverted to, and the further fact is brought into the statement of the case, to wit, that no assets came into the hands of the representative of Lewis till after the death of both the administrator and administratrix of Charlton, to wit, in 1815, it seems to me that all grounds for a defence, resting upon lapse of time or staleness of demand, is entirely removed.

It remains to be considered whether the statute of limitations presents any bar.

It must be conceded that the words of the 5th section of the statute of limitations, 1

Rev. Code, p. 489, are sufficiently broad to cover the case of a judgment when assets; and two of the members of this Court, (the President and Judge Baldwin,) expressed the opinion, in the case of *Braxton v. Wood's adm'r*, 4 Gratt. 25, that such judgments fell within the scope and design of the statute.

446 *I did not regard the question as fairly arising in that case for adjudication, inasmuch as the judgment to which the bar of the statute was there sought to be applied, was not, in my opinion, a judgment *quando acciderint*, but a judgment *de bonis testatoris*, capable of being at once enforced by execution, without the previous issuing of a *scire facias*. With such views of the nature of the judgment, I did not deem it necessary to express any opinion as to whether judgments when assets came within the meaning of the statute. I did, however, on that occasion, endeavour to investigate the subject, but was unable to find any authority directly bearing on the question, except the opinion of Judge Lomax, expressed in his work on the law of executors and administrators. At page 465, vol. 2, he says, that he regards them as embraced within the provisions of the statute; but he does not vouch any decision, nor does he go into any reasoning in support of the opinion.

A re-examination of the question, with a view to the decision of this case, has been attended by a like result; and I therefore regard the question as an open one.

The words of the statute embrace all judgments, without exception or proviso, "where execution hath not issued," and limit the suing out of a *scire facias*, or the bringing of an action of debt thereon, to the ten years next after the date of the judgments. The 6th section of the statute provides for disabilities appertaining to the persons entitled to the judgments, and existing at the date of the judgments; and gives the further period of five years after the removal of such disabilities, for suing out the *scire facias*, or bringing the action; but no provision is made for the case of disabilities belonging to the judgments themselves. Such disqualifications or disabilities may however be attached to or so connected with the judgments as to

447 render *it legally impossible (for a period) to enforce them by execution, or to revive them by *scire facias*, or to bring an action upon them. To judgments so situated, it will hardly be presumed the Legislature intended any limitation to apply, during the period of their incapacity.

By the common law, the failure of the plaintiff to sue out execution within the year, so far created the presumption of a payment, satisfaction or release of the judgment, as to compel the plaintiff to bring his action on the judgment; and thus give the defendant an opportunity, by pleading, to put in issue such supposed payment, satisfaction or release. By the statute *Westminster 2*, 13 Edward 1, c. 45, a *scire facias* is given to the plaintiff to re-

vive his judgment where he has omitted to sue out execution within the year; and it is now the remedy most usually resorted to for such purpose.

Notwithstanding the year's neglect drives the plaintiff, generally, to his action or *scire facias*, the English cases furnish many exceptions to the rule. As when a writ of error is brought on a judgment, the delay in executing the judgment being imputable to the defendant, execution may issue after the judgment is affirmed, although more than a year and a day have elapsed since the judgment was signed. 1 Salk. 322. So if a plaintiff has a judgment with a "*cessat executio*" for a given time, he may within a year and a day after the expiration of the time allowed by the "*cessat executio*," take out execution without a *scire facias*. 1 Salk. 322. So when the plaintiff is prevented from suing out his execution within the year by the defendant's obtaining an injunction out of chancery, he may upon the dissolution of the injunction, have execution without resorting to the *scire facias*. This was for a time disputed, but is now well settled law.

2 Burr. R. 660. And even where a 448 year after judgment had *expired before the writ of error was sued out, and the judgment is affirmed, or plaintiff in error is nonsuited, or the writ of error discontinued, the plaintiff may sue out execution, the writ of error being held to have revived the judgment. 1 Show. 402.

In most of the States of this Union the same rule prevails either by force of the common law or by virtue of legislative enactment; and the same or like exceptions will be found to obtain. Thus in *Nicholson v. Howsley*, 5 Litt. Sel. Cas. 218, the agreement of the parties to suspend the execution prevented the operation of the one year rule; and in 8 Serg. & Rawle 377, and 3 Binn. R. 160, it was decided that the plaintiff would be excused by such agreement, whether entered on the record or not. And in the case of *the United States v. Harford & Ely*, 19 John. R. 173, it was decided that when the execution is delayed at the request and for the benefit of the defendant, the rule requiring a *scire facias* does not apply. So in *Long v. Morton*, 2 A. K. Marsh. R. 39, where there was a decree against a widow for a tract of land with a reservation of her right of dower, and a period fixed within which she might have it assigned, and providing that if she should by the day fixed have her dower assigned, she might satisfy the decree by surrendering up so much of the tract as might not be allotted to her, it was held that the "*habere facias*" might well issue within twelve months after the day fixed for the allotment.

The language of the first section of our execution law, 1 Rev. Code, p. 524, ch. 134, is "that all persons who have or shall hereafter recover any debt, &c., by the judgment of any Court of record within this Commonwealth, may at their election prosecute writs of *feri facias*, &c., within the year, for taking the goods, &c., &c."

449 *The language of the statute is explicit in confining the peremptory right to sue out execution "within the year." Yet I presume it has not been doubted since the decisions in *Eppes v. Randolph*, 2 Call 186, and *Noland v. Cromwell*, 6 Munf. 185, that this one year's limitation could not avail a defendant where there had been a stay of execution by his own agreement, or by force of an injunction obtained at his instance.

In any of the instances above cited of stay of execution, whether by "cessat executio" or the parol agreement of the parties, or by injunction or supersedeas, I presume it will not be doubted that the plaintiff might at the end and expiration of the time bring his action of debt upon the judgment, instead of suing execution thereon; and that if the judgment had been thus suspended for more than ten years, he might meet the statute of limitations by shewing that though his judgment was more than ten years old, and one upon which no execution had issued, and thus falling within the very words of the statute, yet that it was so situated that no execution could be sued out on it, and therefore that it did not fall within the true meaning and design of the statute.

When a plaintiff in an action against an executor or administrator takes judgment of assets *quando acciderint*, it is well settled that he cannot at any future time proceed to execution on the judgment, without first suing out a *scire facias* to state that assets have come to hand, and to warn the defendant, should he be able to allege any thing against such execution. *Tidd's Practice* 1063.

If after the lapse of ten years from the date of his judgment, upon which no execution hath issued, the plaintiff in his action thereon may successfully meet the plea of the statute by shewing that by the agreement of parties, or by force of an in-

450 junction obtained *by the defendant, he could not in the meantime sue out execution, it is difficult to conceive of any good reason why he may not obviate the force of the plea when tendered to an action of debt on a judgment "quando," by a demurrer or replication objecting that by the very form and nature of the judgment itself he had been prevented from issuing the execution.

In construing the statute its aim and purpose must be looked to, and its language ought to have a fair and reasonable interpretation. The limitations imposed on the right of the plaintiff to maintain an action on his judgment, have reference to and grow out of his conduct in respect to the execution, and necessarily presuppose that the plaintiff had at some time the right to sue out execution which he has failed to exercise. That this is so, is, I think, made still more apparent by looking to the second clause of the section of the statute, now under consideration, which provides that "where execution hath issued and no return is made thereon, the party in whose favour

the same was issued, shall and may obtain other executions, or move against any sheriff or other officer or their security or securities for not returning the same, for the term of ten years from the date of such judgment, and not after." This Court held in the case of *Herrington v. Harkins' adm'rs*, 1 Rob. R. 591, that whilst the right to sue out other executions on a judgment where an execution had been before issued but not returned, was, by this clause, expressly limited to ten years, an action of debt was not embraced in the words or meaning of the clause; and that in all cases where the plaintiff had sued out execution there was no limitation to the period within which an action of debt might be brought on the judgment.

Whilst the second clause of the fifth section prescribes a limitation to the remedies of plaintiffs in the cases where they have so far availed themselves of the 451 *means of enforcing judgment as to sue out execution, but have obtained no return thereon, the first clause of the section was, in my opinion, designed to prescribe the limitation to their remedies, where having a right to sue out executions, they have wholly failed to exercise the right. By the term "judgments" in the first clause, are intended judgments clothed as judgments ordinarily are, with the capacity of being enforced; judgments upon which the plaintiffs have the right to sue out execution. Where the exercise of this right is stayed or suspended by the agreement of the parties, or by the restraints of legal proceedings set on foot at the instance of the defendant, the limitation will not begin to run in favour of the defendant till the time of such stay or suspension has expired. Judgments which shew upon their faces that there is now no right to enforce them by execution, and that such right is to depend on other proceedings yet to be instituted, do not, in my opinion, come within the meaning and operation of the statute at all.

Inasmuch as the assets subjected to the decree in this case came into the hands of the administrator of Lewis after the death of the administrator and administratrix of Charlton, and before the administration de bonis non was granted, and the administrator de bonis non brought suit within the ten years after his qualification, the plea of the statute could, under no aspect of the case, avail the appellant, unless he could shew that the limitation began to run in his favour, not from the time of the coming in of the assets, but from the date of the judgment: And such is the proposition contended for; a proposition which seems to me to run counter to all the analogies of the law. It is argued that though no assets came into the hands of the defendant within ten years after the date of the judgment, it was the duty of the plaintiff, in order to keep alive

452 his claim, to sue out a *scire facias* or to bring an action of debt, within *said period, suggesting that assets had come into the defendant's hands out of

which he had a right to demand execution of his judgment. And though upon an issue, made up on the state of the assets, the plaintiff had confessed that no assets had, since the judgment, come into the hands of the defendant, or such issue had been tried and found against him, (as it must have been in accordance with the fact,) he would have been entitled to take a second judgment *quando acciderint*; that the first judgment would be merged in the second, and that the limitation would again begin to run from the date of the last mentioned judgment. It is said that as, in the original action, the plaintiff may, notwithstanding he admits there are no assets in hand liable to his demand, take a judgment *quando*, there is no reason why, in the proceedings upon the *scire facias*, or in the action upon the judgment *quando*, he may not pursue a like course and take a similar judgment. This reasoning is, I think, founded on a mistaken view of the ends and objects of the two actions. In his original action the plaintiff seeks the accomplishment of two purposes, the judicial ascertainment of the justice of his claim against the decedent, and of his right to have present satisfaction out of the estate of the decedent, in the hands of his representatives. In such action though the administrator shews that there is nothing now in his hands liable to the plaintiff's demand, such defence does, in no way, contravene the right of the plaintiff to prove the original justice and unsatisfied state of his claim against the decedent; nor does it present any reason why the plaintiff should not have satisfaction of his claim out of any assets that may, in future, come into the hands of the representative. Though, therefore, the plaintiff fails in effecting one of the purposes of his suit, there is no reason why he should be denied the accomplishment of the other. The judgment

453 *quando acciderint* has been *moulded by the Courts to meet the exigencies of the case. The sentence of the Court is pronounced in favour of the debt or demand, but its satisfaction is made dependent on the future coming in of assets out of which to pay it. In the second proceeding, or suit, upon the judgment, the gravamen of the complaint, the gist of the action, is the coming in of assets since the judgment, and the failure of the defendant in applying them to its discharge. The suggestion that assets have come to the hands of the representative since the judgment is no mere form or legal fiction, but involves the pith of the controversy, and presents the point on which the action rests. The judgment *quando*, from its very form and nature, is an acknowledgment of the most solemn form on the part of the plaintiff, that he is entitled to be satisfied only out of future assets. If no assets have come to hand since the judgment, the plaintiff has nothing to complain of or on which to found his action. In the case of an ordinary judgment capable of being presently executed, it is true the plaintiff may bring his action of debt

upon it as soon as it is rendered. He is entitled to immediate satisfaction, and the defendant is at once in default if he does not pay it. But it is difficult to conceive of the propriety of a suit where the plaintiff cannot truly allege any grievance, and the defendant is in no default. If the plaintiff fails in proving that assets have since come, &c., he must, I think, go out of Court: Yet I do not see why a failure in his suit, because of its being prematurely brought, should form any bar to a *scire facias* or action brought thereafter when assets have actually come to hand. Should the defendant rely on the verdict and judgment in the proceedings on the former *scire facias* or action on the judgment, the plaintiff might reply and shew that his defeat was occasioned solely by the failure to shew assets, and that assets have come into the hands of the representative since said last

454 mentioned *proceedings. A case has been cited which shews that where the plaintiff in his *scire facias* or action on a judgment when assets, shews that assets of a limited amount not sufficient to satisfy his demand have since judgment come to hand, he may take judgment for so much to be presently levied *de bonis testatoris*, and have judgment *quando* for the balance. I do not perceive the weight of the authority as applicable to a case in which the plaintiff wholly fails to prove assets. If the plaintiff proves assets to any extent, he does to that extent maintain the allegation on which his action rests; and he ought to have judgment accordingly; and as there is no propriety in two judgments of the same character for the same thing, provision in the same judgment is made for the balance of his demand out of the future assets. His original judgment is as it were merged in the second; and any future proceedings for the collection of the demand will be founded on said last mentioned judgment. But where he wholly fails in his proof of assets he only shews that he has been premature in his proceedings, and his demand still rests on his former judgment, exactly as it did before; with the exception that in any future action or *scire facias* the right to shew assets will be confined to the period since the judgment in the unsuccessful proceedings just mentioned. Judgments *quando acciderint* may be rendered against heirs as well as against executors and administrators. In debt against a niece as heir to the uncle, the defendant confessed the bond, but pleaded that nothing in fee simple descended to her besides a reversion of thirty acres, &c., after the death of such a one. It was held that the plaintiff might take a special judgment to recover the debt and damages of the aforesaid reversion, when it should fall in. And in *Fortrey v. Fortrey*, 2 Vern. R. 134, it was decided that where a man obtains judgment against an heir who

455 has a reversion in fee descended to him, the judgment is only of *assets *quando acciderint*; and the creditor cannot by a bill in equity, compel the heir

to sell the reversion, but must expect till it falls in. So in Comyn's Digest, vol. 6, p. 326, Pleader 2, E. 4, Replication, it is said, "after riens per descent pleaded, the plaintiff may pray execution of assets cum acciderint; or if riens per descent præter, he may pray execution of assets confessed; or reply that the defendant had assets ultra; and if he replies assets ultra he may waive it and pray judgment of assets confessed cum acciderint." In Wells v. Bowling's heirs, 2 Dana's R. 41, most of the foregoing authorities are cited, and the further case is put of the title to real estate descending to an heir whilst in the adverse possession of another; and it is said that there is the same reasons in favour of allowing judgments quando against heirs as against executors: that the creditor is not presumed to know the state of the assets in the hands of the heir or executor, and he should not be prejudiced by bringing his suit to establish his debt against the decedent, before assets have come to hand.

Take the case of a suit against an heir on the bond of his ancestor and of a judgment thereupon quando; the heir having no estate, in possession, descended, but having a right to lands which at the death of the ancestor were in the adverse possession of another, and for which the heir has instituted his action. Of lands so situated, the plaintiff could not have execution; but they would be assets when recovered. Pending such adverse possession and controversy, no failure to proceed on his judgment could, I think, prejudice the plaintiff; and I do not perceive any reasons that would bring a judgment against an executor when assets within the operation of the statute that would not apply with equal force to the like judgment just mentioned against the heir.

If I am correct in supposing that no action on a judgment quando against an executor can be maintained *without alleging and proving assets, it follows that, if the statute embraces such judgments at all, it designs to defeat all recovery upon them after ten years, though no assets may come in the mean time into the hands of the representative; the only means of avoiding the operation of the statute, suggested, being the suing out of a scire facias, or bringing an action and taking a new judgment when assets. But whether correct or not in my views of the plaintiff's right to maintain a suit on such a judgment without proving assets, I am satisfied that the statute only embraces judgments that may be enforced by execution without some new proceeding; and that judgments quando stand as they did at the common law, liable, after assets have come to hand, to those presumptions of satisfaction that attach to judgments ordinarily where there has been great delay in proceeding upon them.

An objection to the jurisdiction of the Court is made in the answer. It is not, however, mentioned in the petition, nor noticed in the arguments of counsel, and may, I suppose, be regarded as abandoned.

The circumstances disclosed in the bill and the proofs, in relation to the state of the assets, furnish, I think, proper grounds for the resort to a Court of equity. One of the causes of error assigned is, that the copy of the judgment filed is not properly authenticated. No exception was made to the paper in the Court below, and nothing said of it in the argument here. I have not been able to discover the force of the objection.

I see no error in the decree, and am of opinion to affirm it.

BALDWIN, J. We have to determine in this case whether a judgment quando acciderint against an executor or administrator, not revived or renewed by scire facias or action of debt brought thereon within ten years next after the date of the judgment, is barred by *the statute of limitations, 1 Rev. Code, ch. 128, § 5, p. 457. In 2 Lomax Ex'ors 455, the affirmative construction of the statute is expressed by the learned author; but the question has never been authoritatively decided by this Court. Braxton v. Wood's adm'r, 4 Gratt. 25, was the case of a judgment recovered by confession, "if a sufficiency of assets of the defendant's testator's estate shall remain after payment of debts of superior dignity;" and was decided by the three Judges then sitting to be barred by the statute. In the opinion which I delivered in that case, I had occasion, for the sake of illustration, and the development of the principles belonging to the subject, to express my views of the statutory bar in regard to judgments quando acciderint, and to show their application a fortiori to the judgment we were then considering. In that opinion the President concurred. Judge Daniel delivered a separate opinion, in which he stated his own reasons for concurring in the decision, but was silent in relation to the application of the statute to a judgment quando acciderint.

The question, therefore, in regard to a judgment quando acciderint, is still an open one, and the views of it presented by my opinion in Braxton v. Wood's adm'r, have, in the argument of the present case, been earnestly and ably controverted by the appellee's counsel; but upon grounds, as I conceive, unavoidably narrow and technical. In order that those grounds may be distinctly understood, and to avoid unnecessary repetition, I must here refer to the opinion as reported, to which, after a careful reconsideration, I still adhere.

It is contended, in the first place, on the part of the appellee, that judgments quando acciderint are not at all embraced by the statute. If this be so, then it follows that though assets to many times the amount of such a judgment come to the hands of the executor or administrator, in a few days thereafter, yet the plaintiff *may lie by an indefinite number of years, and then proceed to enforce his demand. It is difficult to conceive any consideration of policy which could have induced the legislature to permit such a result, in the enactment of a law, intended to quiet not only individ-

uals but dead men's estates against antiquated judgments. It is not denied that other judgments *de bonis testatoris* fall within the plain meaning of the statute, and it cannot be denied that a judgment *quando acciderint*, in the case supposed, would fall within the same mischief; and it is remarkable if such an exception was contemplated that it was not indicated by express words.

It is sufficiently obvious that the construction contended for is merely literal, and unwarranted even by that mode of treating the subject. The words of the statute are, "judgments in any Court of record within this Commonwealth, where execution hath not issued, may be revived by *scire facias* or an action of debt brought thereon, within ten years after the date of such judgment, and not after." And the argument is founded upon the word "revived," which it is urged indicates a judgment which has become dead by the failure to sue out execution within the year, and not one upon which no execution could have issued at any time from its rendition. But the word "revived" does not warrant the interpolation of the word "dead," which has never been applied to a judgment, and could not be applied with more propriety to one upon which execution might, than to one upon which it could not, have issued. A judgment on which execution has not issued within the year, is not dead but only sleepeth, and may be awakened not only by *scire facias* or debt, but by suing out execution without either, if the delay has been occasioned by the acts of the defendant, or for his accommodation and at his request. 8 Bac. Abr. 600, 601, 602; *United States v. Harford*, 19 John. 173; and in no case is suing out execution *after the year without *scire facias* void, but only voidable. Id.

The word revived is used in the statute in reference not to the character of the judgment, but to that of the specified remedies, to wit, a *scire facias* or an action of debt, and it has the same meaning in regard to both, that is to say, the renewal of the judgment; in the former remedy by an award of execution, and in the latter by the recovery of a new judgment. And both remedies may be resorted to as well before as after the year. 8 Bac. Abr. 603; 1 Chit. Plead. 355: and either may be preferable to suing out execution, where the plaintiff wishes a judicial decision, in a regular course of pleading and trial at law, upon some question touching the validity or discharge of the judgment. We accordingly find that the period of limitation begins, not from one year after the judgment, but from its date. The statute, it will be seen, embraces the subject of limitations after judgment, by two distinct clauses of the same sentence; the first of which relates to judgments where execution, from whatever cause, has never issued, and the last to further proceedings by execution, where execution has once issued without being returned.

When we come to the spirit and policy of the statute, there is if possible still less difficulty. It is an act of limitation against

judgments, and like other acts of limitation a statute of repose. It bars the judgment by barring the only actions at law by which it can be enforced, the action of debt and the writ of *scire facias* which is a judicial writ, and in that sense an action, open to all the pleadings, evidence and modes of trial applicable to the action of debt. The necessity for a period of limitation is stronger than in most other cases; for the judgment being matter of record perpetuates itself, and cannot be erased even by the concurring act of the parties; while the evidence of its *discharge, or release, or opposing equities, rests for the most part in perishable documents, or the fleeting testimony of witnesses.

I cannot doubt therefore that judgments *quando acciderint* fall within the plain terms and meaning of the statute, as well as all other judgments upon which no execution has ever issued; and that if there be any difficulty in the construction of the statute, it is as to the period of time from which the limitation begins to run, whether from the date of the judgment or the time when assets come to the hands of the executor or administrator: and here it is that we must advert to the nature of the judgment.

A judgment *de bonis testatoris* is compounded of two elements, the recovery against the estate represented by the defendant, and his responsibility for the assets. The first is irrespective of the condition or amount of the assets; the last is dependent upon the assets which have come to his hands to be administered. If the demand in the action be just, he cannot resist the recovery of it against the estate because he has no assets to satisfy it; and on the other hand, he has a right to relieve himself from personal liability, direct or indirect, by shewing that he has fully administered. And if he does so, or the fact be admitted by the plaintiff, how is judgment to be rendered, so as to establish the debt against the estate, and at the same time his full administration of the assets up to the time of his plea? The difficulty arises from his uniting in his own person his individual with his representative interest, so that a judgment against the estate must be rendered through him; and that difficulty is solved by the plaintiff's taking a recovery of his debt against the defendant in his representative character, to be levied of the goods and chattels which were of the decedent at the time of his death, and which since the plea pleaded have

come, or which shall thereafter come, to *his hands to be administered. This is a subsisting judgment against the estate, and may be enforced not only against the same executor or administrator, but against any subsequent personal representative of the estate.

The plea of fully administered therefore, although both in form and substance a plea in bar, is one of a peculiar nature. It can be pleaded only by an executor or administrator, and presents no answer to the justice of the plaintiff's demand; but only serves to shew that the defendant is not accountable there-

for, having no assets of the estate in his hands wherewith to pay it. It is no bar to the recovery of the debt against the estate, but to the present accountability of the then representative. The plaintiff is therefore not bound to take issue upon it, but may admit it to be true, and take his judgment notwithstanding, with a direction that it shall be paid out of assets that may thereafter come to the defendant's hands. If this were not so, and the plaintiff prevented from establishing the justice of his demand by a judgment against the estate, the absurd consequence would follow of absolving the estate therefrom forever, because of its present inability to make payment.

The leading authority upon this point is *Mary Shipley's Case*, 8 Co. 134 a, which was debt on a bond against the executors of the obligor: the defendants pleaded fully administered, and so nothing in their hands: replication that they had assets: the jury found assets in part; and judgment was given for the whole debt, damages and costs; which judgment was affirmed in the Exchequer chamber; for upon the bar which is nothing in their hands, the plaintiff might have prayed judgment immediately; for thereby the debt is confessed, but that she cannot have execution until the defendants have goods of the deceased.

462 *In *Dorchester v. Webb*, Cro. Car. 372, the property of the judgment in *Mary Shipley's Case* was not denied, but the soundness of the opinion upon which it was founded disputed. The report states it was contended that when an executor pleads fully administered the plaintiff may take judgment presently, and expect when the defendant hath assets, for he remains always executor and may have goods of the testator; and for that purpose was cited *Mary Shipley's Case*, that if an executor pleads fully administered the plaintiff may take judgment presently, and expect when he has assets in his hands. On the other hand, the law as stated in *Mary Shipley's Case* was denied, and the difference contended to be that when it is found that the defendant has some assets, though of little value, so as he hath not fully administered, the plaintiff shall have judgment of the entire debt, but he shall not have execution but of as much as is found, and shall not be barred of the residue, and if more assets come afterwards he may have scire facias to have execution thereof; but if it be found that he hath fully administered, or if it be so pleaded and confessed, then judgment shall be against the plaintiff. And so the Court held the law to be.

But in *Noel, &c. v. Nelson*, 2 Wms. Saunders, pt. 2d, p. 214, 226, the principle of *Mary Shipley's Case* was affirmed. The action was debt against executors upon a bond of their testator: the defendants pleaded plene administravit, on which plea the plaintiff prayed his judgment of the debt to be of assets quando acciderint according to the rule in *Mary Shipley's Case*; and the Court gave judgment accordingly; on which judgment the executors brought a writ of error, and insisted on the matter in law, that such judgment

as this ought not to be given, notwithstanding the opinion in *Mary Shipley's Case*; and of such opinion was **Twysden*, Justice, strongly, who denied the said opinion in *Mary Shipley's Case* to be law, and relied much on the opinion of *Jones*, *Bushby* and *Croke*, in *Dorchester v. Webb*, where *Mary Shipley's Case* is denied by them to be law: but *Kelynge*, Chief Justice, *Rainsford* and *Morton*, Justices, held the judgment to be good; and afterwards a precedent being produced where such a judgment was entered according to the opinion in *Mary Shipley's Case*, *Twysden* agreed that the judgment should be affirmed. And the reporter gives the pleadings and judgment in the case, p. 216, which judgment is as follows:

"And the said W inasmuch as the said M and T by their said plea do not deny but that the said writing now here into Court brought is the deed of the said N the testator, nor that the said debt in the said writing specified is a true and just debt, yet unpaid and not satisfied, or otherwise discharged; and inasmuch as the said W cannot deny but that the said M and T have not, nor on the day of the suing out of the original writ of him, the said W, nor ever since hitherto, had any goods or chattels which were of the said N the testator, at the time of his death, in their hands to be administered, prays judgment of his debt aforesaid by him above demanded, to be levied of the goods and chattels which were of the said N at the time of his death, and which shall hereafter come to the hands of the said M and T to be administered: therefore it is considered that the said W recover against the said M and T his debt aforesaid, to be levied of the goods and chattels of the said N, the testator, at the time of his death, and which shall hereafter come to the hands of the said M and T to be administered." And the like form of judgment will be found in 2 *Lilley's Ent's* 505, and in 2 *Lomax Ex'ors* 446.

The principle of *Mary Shipley's Case*, and of *Noel v. Nelson*, has never since the latter case been questioned, *and it is equally applicable whether the plaintiff confesses the plea of fully administered, or takes issue upon it and it is found against him, in the whole or in part. All the cases agree that where the jury find assets in part, the plaintiff shall have judgment for the residue also, to be levied quando. And in *Dorchester v. Webb*, the plaintiff's confession of the plea was very properly considered as standing upon the same footing as a verdict thereupon for the defendant, though the Court erred in the conclusion that there ought in either case to be judgment against the plaintiff. The defence is pleaded in bar of the action, and ought to have the same result whether found or admitted to be true. No reason can be assigned for a distinction, except that in the case of a verdict the defendant has been subjected to costs at the trial, which is no reason for defeating a just debt, but only for allowing such costs to the defendant. And a judgment for the plaintiff quando, after verdict for the defendant upon the plea of fully administered may very

properly be regarded as in the nature of a judgment non obstante veredicto.

The case of *Timberlake v. Benson's adm'r*, 2 Virg. Cas. 348, serves to shew that according to the Virginia practice the plaintiff has judgment quando acciderint, as well where there is a verdict for the defendant upon the plea of fully administered, as where the plaintiff confesses the plea to be true. The General court there held that where an administrator pleads the single plea of fully administered on which the plaintiff takes issue, and the issue is found for the defendant, the verdict is conclusive proof that the defendant has not present assets; but as the plea is an acknowledgment that the intestate is indebted to the plaintiff, and the verdict is not conclusive that the defendant may not have future assets, the judgment ought to be rendered for the plaintiff for his debt and costs, to be levied of the goods of the intestate quando acciderint; but as the
465 defendant *has supported his issue, and to maintain the only plea which he pleaded has been subjected to costs, he ought to have a judgment for the general costs of his defence against the plaintiff. And that where the defendant pleads non assumpsit and fully administered, and issue is taken on both, and both tried, and the first issue is found for the plaintiff, and the second for the defendant, the judgment ought to be for the plaintiff, as in the former case; because as he is obliged to come into Court to establish a debt due to his intestate, he ought to recover not only his debt but his costs also out of the future assets; but as the defendant has supported his second plea, he ought to have a judgment for the costs which he has expended in supporting that issue, that is for his separate costs of that issue.

In *Burnes v. Burton*, 1 A. K. Marshall, Kent'y R. 369, it was held that on a plea of fully administered, if the plaintiff takes issue upon the plea of fully administered, and it is found against him, he must pay costs, but yet have judgment quando acciderint.

In *Miller v. Towles*, 4 J. J. Marshall, Kent'y R. 255, in an action of covenant, on a verdict for the defendant on the plea of fully administered, it was held to be error to render judgment in bar of the action; as the issue acknowledged the justice of the plaintiff's demand, it should have been in his favour for the damages, to be levied quando acciderint.

Wilson v. Hurst, Peters' Cir. Ct. R. 441, was a scire facias against executors on a judgment against their testator; the defendants pleaded payment and no assets: there was a verdict for the plaintiff on the plea of payment, and for the defendant on the plea of fully administered; and the plaintiff prayed judgment quando acciderint, which was directed.

The question whether assets or not is the same after a judgment quando that it
466 was before, except that the *range of it is more limited in point of time. It is open to the like pleadings, evidence, verdict and judgment. See the proceedings in a

scire facias, 2 Wms. Saunders, pt. 2, p. 217-222, upon the judgment quando acciderint in *Noel, &c. v. Nelson*. The defendant may plead plene administravit, 2 Tidd. Prac. 1046, and shew the due administration of the assets which have come to his hands since the former judgment and plea; which question involves not merely the enquiry whether goods and chattels which belonged to the decedent did come to the hands of the executor, but also his administration of them according to law. It is the balance only due from him after allowance of the proper credits which constitutes the assets in his hands. And the defendant might plead and prove judgments recovered against him on debts of higher dignity, and paid or outstanding, to a greater amount.

It is argued that the quando of such a judgment has the same effect as the stay of a judgment by a writ of error, or an injunction, or a cessat executio; during which the statute cannot operate. But the reason is that during the writ of error, or injunction, or cessat, an action of debt or scire facias cannot be brought upon the judgment. This it has been shewn is not so in regard to a judgment quando acciderint, upon which scire facias or debt will lie immediately; and that if there be still no assets in the hands of the executor, the judgment may be revived or renewed by the like judgment. And there is direct authority to the point where assets are found as to part only, 2 Wms. Ex'ors 1231, and there is equal reason where none are in hand.

In the cases put of a writ of error or injunction, the judgment is superseded, and has no effect during the pendency of the proceeding. In the case of a cessat executio, the judgment is in effect superseded, for the suspension is absolute and unconditional, and renders it substantially a judgment
467 in futuro. But a judgment *quando acciderint, so far as the estate is concerned, is immediate, absolute and unconditional, and even as regards the executor the direction as to the levy is not so much a condition as a consequence of his having already accounted for the previous assets. And we must not suffer ourselves to be misled to the supposition that the judgment is conditional, by the appellation given to it with more brevity than accuracy.

Indeed, the whole argument of the appellee's counsel upon this branch of the case arises from his treating the judgment quando acciderint as conditional; and hence he has urged that the statute of limitations does not begin to run until assets have come to the hands of the executor. By this must of course be meant assets properly applicable to the discharge of the judgment; for a plea that no assets at all have come to his hands would not present the bar of the statute, it being at most a denial, instead of an admission, of a once existing cause of action. How then would a plea of the bar of the statute according to his view of it be framed. It would have to set forth the assets received by the executor since the judgment, his credits against the same for the payment of debts

entitled to priority, the date at which a balance against him ought to have been struck, and that more than ten years have elapsed since that time; thus presenting a plain breach of trust on the part of the executor. This would be an anomalous plea of a statute of limitations, and a strange departure from the one in question, which provides that no action or scire facias shall lie upon a judgment but within ten years from its date; a statute moreover designed primarily, in actions against executors, for the protection of the estate, and operating only incidentally and consequentially for the protection of the executor.

A plea of the statute in general terms, that the cause of the scire facias or action did not accrue within ten years would be idle, if
468 no assets at all have come to the *hands of the executor since the judgment; and unavailing, if in point of fact assets have so come to his hands; for the statute could not run during the period of administration of the assets, but only at its close, when a balance struck would shew assets, still remaining in the hands of the executor, from which time only, if at all, could the statute avail anything. But it could not avail anything in any state of the assets; for an executor always continues executor and trustee for the creditors, and cannot plead the statute in exoneration of his personal responsibility for the assets; and the exoneration of his testator's estate by limitation of the statute has reference to the date of the judgment, and not to the accrual or administration of the assets.

It will be seen that the statute is permissive as well as negative. It provides that judgments may be revived or renewed by scire facias or debt brought within ten years next after the date of the judgment, and not after; and upon the point we are now considering it must be taken that judgments quando acciderint fall within the meaning of the law. Now the statute ought to have a fair and liberal interpretation, so as to allow the revival or renewal contemplated, by the modes prescribed, within the period limited, and to prevent it afterwards; and this cannot be done otherwise than by permitting the plaintiff to shew assets in hand if he can, and if he should fail, to place his case in a condition to shew it thereafter. And we must not be deterred from a fair and wholesome construction of the statute by supposed formal difficulties.

It is urged that a scire facias or declaration would be wrong without the statement that since the judgment quando assets have come to the hands of the defendant; and that the statement may be denied, and if so must be proved. But the suggestion in the scire facias is not merely of assets but of sufficient
469 assets; and it cannot be denied that if assets to the amount of *one dollar or even one cent have come to his hands, the revival may be accomplished: then why not by the plaintiff's admission there are none, with a prayer of judgment quando? Surely a distinction which is to defeat forever a debt acknowledged to be justly due, cannot be founded on such a nicety.

And such must be the inevitable result; for the plea would be in bar of the scire facias or action, and not in abatement. The question whether an executor has assets remaining in his hands must in most cases be one of mere probability. Every action, however, against an executor or administrator, is upon that assumption; and it would be very remarkable if the revival or renewal of a judgment quando should be defeated by a mistake or failure of proof of the very nature which led to the judgment itself.

The reason why a scire facias or a declaration upon a judgment quando must state that assets have come to the hands of the defendant, besides the formal one of conformity with the description of the judgment, is that by the omission the plaintiff encounters an estoppel. The judgment itself is conclusive as to the defendant's full administration up to that time, and he has a right to plead fully administered since. It must therefore appear that the plaintiff is not going behind the judgment in search of assets.

The case cited from Buller's N. P. 169, of Taylor v. Holman, was this: "In debt on a judgment against the defendants as executors, suggesting a devastavit, in the original action the defendants had pleaded plene administravit, and the plaintiff had taken judgment of future assets quando acciderint. Lord Mansfield would not allow the plaintiff to give any evidence of assets come to the hands of the defendants before the judgment, for the plaintiff has admitted that the defendants fully administered to that time: And
470 there being no evidence of any assets come to his hands since, the *plaintiff was nonsuited. Taylor v. Holman, at Guildhall Sittings after T. 1764."

The case is not in point, it not being debt to revive the judgment quando, but debt for a devastavit, by which the plaintiff abandoned the pursuit of the estate, and sought to subject the executors personally. It was moreover a nonsuit, which must have been with the plaintiff's acquiescence, the Court having no power, even in England, to direct a nonsuit after appearance, without his consent. Watkins v. Towers, 2 T. R. 275.

Another case cited, of Mara v. Quin, 6 T. R. 1, was this: The plaintiff sued out "a scire facias upon a judgment in an action of debt against the defendant as executrix of Quin. After stating the proceedings in the former action, that the defendant there pleaded other judgments recovered and plene administravit, on which the plaintiff prayed, and the Court adjudged, that his debt should be levied of the goods and chattels of the testator which should thereafter come to the hands of the defendant to be administered, after satisfaction of the other judgments, &c., it proceeded to state that divers goods, &c., of the testator, sufficient to pay as well the other judgments as the plaintiff's, had come to and were in the hands of the defendant to be administered, &c., (without saying that those goods had come to the defendant's hands since his judgment,) and prayed exe-

cution against the defendant to be levied of those goods, according to the form and effect of his said recovery, &c. The defendant pleaded (inter alia) that after the plaintiff's judgment no goods, &c., of the testator had come to the defendant's hands to be administered, &c. To this the plaintiff replied that divers goods, &c., had come to the defendant's hands, &c., (without adding 'since the former judgment, &c.'), and the defendant demurred."

In that case, it will thus be seen, that the plaintiff demurred to the defendant's
471 plea, that since the judgment *no assets had come to his hands to be administered; which demurrer was in the face of the estoppel; and in the argument the plaintiff placed the case upon the ground that he had a right to go behind the judgment to shew prior assets. The plaintiff was unavoidably defeated; and the question is not at all presented, whether he might not have confessed the plea, and taken judgment when assets.

The case of *Lidderdale v. Robinson's adm'r*, 2 Brock. R. 160, has no application. The question whether the judgment was barred by the statute was not and could not be made, for it was not pleaded, and it seems probable the plaintiff, in consequence of his residence beyond sea, came within one of the exceptions of the statute.

It seems to me, therefore clear that whatever may be the state of the assets, or although there may be none, a creditor is entitled to recover judgment against the estate, and keep the same in force by revival or renewal thereof; and that this may always be accomplished by a quando acciderint, the defence of fully administered being personal to the existing executor or administrator, and limited to the time of pleading it, and no bar in effect to the action itself, whether that be founded upon the original demand, or upon the judgment.

On the other hand, I cannot doubt if a creditor sleeps upon his judgment quando acciderint for ten years from its date, instead of taking the proper steps to enforce, revive or renew it, the same is barred by the statute of limitations, as completely as if the judgment were a general one, to be levied of the goods of the testator or intestate, without restriction. If this were otherwise, then as it has been shewn that a plaintiff may at his pleasure confess a plea of fully administered,
472 or no assets, and take judgment quando acciderint, it would *be always in his power, by his own act, to place his demand beyond the reach of the statute.

If it should be thought hard that assets accruing after the ten years cannot be reached for satisfaction of the judgment quando, the answer is, that the same result follows other judgments de bonis testatoris, without regard to the fact whether there be assets in hand within the ten years or not, and also all judgments against persons individually, whether the defendant be solvent or insolvent, within or during that period. It is in vain to say that the want of assets furnishes a presumption against the

satisfaction of the judgment. The Legislature has not deemed it sufficient, and in fact it might often prove fallacious, for the evidence of assets, as well as of release or payment, may be lost, and payment may have been made by the executor in anticipation of future assets, or by some person, or out of some fund, collaterally bound for the debt. It is a wise policy, and cures a defect of the common law, to close the door after such laches and lapse of time, against all such enquiries; a policy of which the present case is an apt illustration. The judgment in question was recovered in the year 1802, by the executors of the original creditor, on a debt contracted in 1798, against the executor of the original debtor, who died in the year 1800. The surviving executor plaintiff in the judgment, died about the year 1810, and the executor defendant therein, not until the year 1827. And this suit to enforce the judgment was brought in the year 1840, against the executor of the defendant in the judgment and the sheriff administrator de bonis non of the original debtor, by the administrator de bonis non of the original creditor, he having qualified as such in the year 1831. After such lapse of time, deaths of parties and shifting representations, what security
473 is there for a correct adjudication upon the merits of a case; and *is any thing more manifest than the wisdom of a complete statutory bar?

In the construction of a statute, where a case falls within the words and within the mischief, upon what principle are we to search for an intent of the Legislature beyond and in conflict with both? Here the application of the statute of limitations to the judgment in question is resisted, in the first place, upon the ground that such a judgment is not within the meaning of the Legislature, and in the next place, upon the ground that if it be, the limitation does not take effect until ten years after assets have come to the hands of the executor. The first proposition imports, that though assets to any amount have come to the hands of the executor within a week from the time of the judgment, the plaintiff may lie by for half a century, and then proceed by scire facias or debt to revive the judgment, though such assets have been entirely administered. The second proposition imports, that within ten years after assets to the amount of a single cent have come to the hands of the executor, though twenty years after the date of the judgment, the plaintiff may still proceed to revive his judgment. And the reasoning which results in these propositions is derived from the state of the law existing before the enactment of the statute, the evils of which it was the purpose of the Legislature to redress.

I can understand very well why the statute is not applicable to a judgment where the plaintiff cannot revive by scire facias or debt; but I cannot understand why it should not apply, merely because the plaintiff cannot sue out execution. The cases relied on, are all cases which occurred in reference to the capacity to sue out execution, after the expiration of a year from the judgment, and

no execution or continuance on the roll within that time. And in that aspect they have no bearing upon the question, whether
474 debt or scire facias *will lie either before or after the year expires. Most of them it is true, in another aspect, serve to repel the statute of limitations, but it is only because of the incapacity to maintain debt or scire facias; as where occasioned by injunction or writ of error, or cessat executio. The case of execution stayed by indulgence or agreement, is no replication to the bar of the statute, for it neither suspends the capacity to maintain debt or scire facias, nor falls within any of the savings of the proviso. Indeed, a replication of an express promise to pay the debt is bad. Day, ex'or of Yates v. Pickett, 4 Munf. 104.

The true question, therefore, is reduced to this, whether a judgment quando acciderint may be revived by scire facias or debt, without proof that assets have come to the hands of the executor; or more properly to this, whether although such a judgment may be so revived if assets to one cent's value have come to his hands, yet if that cent be wanting, and the verdict of the jury so finds, there must be judgment against the plaintiff thereupon, and his debt barred forever. That such must be the effect of such a verdict and judgment results from the rules of pleading, and is expressed by the Judges in Brickhead v. The Archbishop of York, 1 Hobart 197.

In regard to judgments quando acciderint against heirs bound by the obligations of their ancestors, I do not perceive that they throw any light upon the present case, and when the question arises, it will be time enough to consider whether, in the construction of the statute, they do not equally fall within the terms and the mischief, or whether there is a diversity arising out of the nature of the subject, to wit, realty, or out of the relation of ancestor and heir, making the obligation the personal debt of the latter. Davy v. Pepys, 2 Plowd. 440. But as to the case cited of a reversion or remainder expectant upon an outstanding estate for
475 life, *pleaded specially as the only assets by descent, and immediate judgment to be levied of the same when the life estate falls in, it seems to me clear that it differs widely in principle and effect from a general judgment quando, whether against heir or executor; inasmuch as it is a specific appropriation, and impounding, as it were, of the particular subject for the satisfaction of the judgment, and the lien by matter of record is perfect, as much so as that of a mortgage, and of course there can be no room for the application of the statute.

My opinion is, that the judgment sought to be enforced in this suit, is barred by the statute of limitations; and therefore, without considering the other questions discussed in the argument, I think the decree of the Circuit Court ought to be reversed and the bill dismissed.

ALLEN, J., concurred with Judge Daniel.

Decree affirmed.

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Jurisdiction.

I. DEFINITION, NATURE AND KINDS OF JUDGMENTS.

A. DEFINITION.

Judgment of His Peers.—A judgment of his peers means a trial by jury. *Jelly v. Dils*, 27 W. Va. 374.

"A judgment is the 'decision or sentence of the law, pronounced by a court or other competent tribunal, upon the matter contained in the record.' When, after the facts are found, the court pronounces the decision upon them, that is the judgment. That is the judicial act,—the act of the court as a court speaking the sentence of the law, whereas the entering it in the roll, the docket, or the order or judgment book, is an act of a different character, a clerical or ministerial act, one to constitute merely a memorial to attest that the judicial act of pronouncing judgment was in fact done." *BRANNON, J.*, dissenting. *McClain v. Davis*, 37 W. Va. 330, 16 S. E. Rep. 629.

But a sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. *Stephens v. Brown*, 24 W. Va. 284; *Haymond v. Camden*, 22 W. Va. 180.

"Judgments" Preclude "Decrees" under Statute.—It is provided by Code of Va. 1873, ch. 182, sec. 1, that, "a decree for land or specific personal property, and a decree or order requiring the payment of money, shall have the effect of a judgment for such land, property or money, and be embraced in the word 'judgment.'" *Hutcheson v. Grubbs*, 80 Va. 251.

B. ESSENTIAL ELEMENTS.

De Facto Judges—Validity of Judgment.—The judgments and decrees of the judges of the court of appeals, who were in office under military appointment when the state was restored to the Union, holding over and continuing to exercise their office, are valid and binding. *Grimm v. Cunningham*, 20 Gratt. 31, and *note*.

Thus, where a judge by military appointment in Virginia, held a court and tried a criminal after the admission of the state into the Union, his act was held to be valid. *Quinn v. Com.*, 20 Gratt. 138, and *note*.

Incumbent in Office.—But it was held in *Morris v. Ins. Co.*, 85 Va. 568, 8 S. E. Rep. 338, that there could

be no judge *de facto* in any case where there is an incumbent in the office.

Rendition before Commencement of Judge's Term.—

Where a judge was properly elected, and, believing that his term commenced immediately, proceeded to hold court, it was held that although the term of his predecessor had not then expired, he was a judge *de facto*, and his judgments were as valid and binding as if he had been a judge *de jure*. *McCraw v. Williams*, 33 Gratt. 510.

Constituent Parts of a Court.—"In every court, there must be at least three constituent parts, the *actor*, the *reus*, and the *judex*; the *actor* or plaintiff who complains of any injury done, the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain and apply the remedy." 4 Min. Inst. (3d Ed.) p. 195.

Definiteness.

Judgment Subject to Unascertained Credit.—A judgment ought not to be entered on a bond for the sum of money, "subject to a credit for a hogshead of tobacco" without ascertaining its value; but the amount of such credit should in the first place, be ascertained by a writ of inquiry, and judgment should be rendered for the balance. *Early v. Moore*, 4 Munf. 262.

But it seems, that a verdict for a certain sum of money, with interest from a day specified, subject to a credit (without saying on what *day* such credit is to be applied) is not so uncertain as that the plaintiff cannot take judgment upon it, and a judgment, in such case, for the damages aforesaid, in form aforesaid assessed, sufficiently follows the verdict. *Lanier v. Harwell*, 6 Munf. 79.

C. GENERAL NATURE.

Sentence of Law.—A judgment, whether in a criminal or civil case, is the sentence of the law pronounced by the proper tribunal, as the result of the proceedings instituted for the redress of injury or the punishment of offences. *Pifer's Case*, 14 Gratt. 710.

Whether the judgment be the act of the court, or be entered up by the clerk under the statute, the effect is the same. In either case it is the act of the law, and until reversed by the court which rendered it or by a superior tribunal, it imports absolute verity, and is as effectual and binding as if pronounced in a trial upon the merits. *Neale v. Utz*, 75 Va. 480.

"As the judgment is entire, and when a verdict has passed, is the sentence of the law upon the result of the proceedings instituted as aforesaid, it can make no difference whether that sentence is merely for the fine assessed by the verdict, or combined with it and superadded to it, is accompanied with imprisonment; which punishment the law affixes to the finding of the fact, when in the exercise of the legal discretion of the court it is deemed proper to impose it. It becomes, when rendered, an entire judgment upon the facts as found, and in the language of the books finishes the proceedings; and it would seem to follow that as the judgment is the determination of law upon the verdict or particular state of facts, it cannot be divided, and a part of the final sentence be pronounced at one term, and after having to that extent passed entirely from the control of the court, that it should at a subsequent period, take up the same finding and pronounce another sentence in addition to the one

already entered upon the same state of facts. Neither judgment would be interlocutory." *Pifer's Case*, 14 Gratt. 710.

Reasons for Judgment.—Every court ought to state, on record, legal grounds for their judgment; especially subordinate courts, liable to have their judgments reversed in a superior court. *Preston v. The Auditor*, 1 Call 471.

But if a court give a right judgment for a wrong reason, it ought, nevertheless, to be affirmed. *Newell v. Wood*, 1 Munf. 555.

Statute Directory.—The clause in the constitution of West Virginia, requiring the supreme court of that state to "decide every point, fairly arising upon the record, and give its reasons therefor in writing" is directory, and does not affect the common-law doctrine of *res judicata*. *Henry v. Davis*, 13 W. Va. 230; *Hall v. Bank*, 15 W. Va. 323.

Certainty.—The general rule seems to be, that the judgment, being the voice of the law pronounced by the court on the matter in controversy, should be so certain as to leave nothing doubtful or unsettled. Thus, a judgment "that the plaintiff recover damages and expenses according to law, and the rules and regulations of the society" without specifying the amount or nature of damages and expenses, is erroneous for uncertainty. *Stratton v. Mutual Assurance Soc.*, 6 Rand. 22.

Plea of Plene Administravit.—A verdict upon an issue joined on the plea of *plene administravit*, should set forth with sufficient certainty, what portion of the assets, which came to the defendant's hands, was unadministered at the time of suing out the plaintiff's writ. *Rogers v. Chandler*, 3 Munf. 65. See also, *Booth v. Armstrong*, 2 Wash. 301; *Gardner v. Vidal*, 6 Rand. 106.

Thus, a verdict which merely finds that assets sufficient to pay the plaintiff's demand "have come" to the defendant's hands, without saying when, is erroneous. *Gardner v. Vidal*, 6 Rand. 106.

Judgment for Debt and Interest.—But a verdict and judgment which awards the debt claimed in the declaration with interest, subject to a specified credit paid at a specified date, is certain enough. *Barrett v. Wills*, 4 Leigh 114.

Specific Relief at Law.—In an action for breach of a contract to deliver a certain number of shares of corporate stock, a court of law can only award damages for the failure to deliver such stock, and cannot render a judgment that the defendant shall deliver to the plaintiff so many shares of stock. *Orange, etc., R. Co. v. Fulvey*, 17 Gratt. 366.

Judgment is a Contract.—A judgment is a contract of the highest nature, and an act which impairs the obligations of that contract, is unconstitutional and void. *Ratcliffe v. Anderson*, 2 Va. Law Jour. 744.

But a judgment founded on a tort is in no sense a contract. *Peerce v. Kitsmiller*, 19 W. Va. 564.

II. REQUISITES OF A VALID JUDGMENT.

A. WHAT LAW GOVERNS.—The validity of a judgment is to be determined by the laws in force when it is rendered, and is not affected by subsequent changes therein. *Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 24 S. E. Rep. 269; *Kennaird v. Jones*, 9 Gratt. 190.

"If a party shows a defence valid at the time it is passed on by the court, a subsequent change in the law cannot deprive him thereof." *Currin v. Spraul*, 10 Gratt. 148. See also, *Arnold v. Kelley*, 5 W. Va. 446.

Hence, where the law, as it existed at the time the verdict is rendered, provides that judgment shall be entered for the amount found with interest from the date of the judgment, such judgment should call for interest from its date, although the law existing at the time the judgment is entered provides that on verdicts judgment be rendered, with interest from the *date of the verdict*. *Murdock v. Ins. Co.*, 38 W. Va. 407, 10 S. E. Rep. 777.

So also, writs of error in the court of appeals must be disposed of in accordance with the law as it existed at the time of the rendition of the judgment. It must be affirmed, if there is no error therein according to the law as it stood when the judgment was rendered, but, if erroneous, it must be reversed, and such judgment entered as lower court ought to have entered. *Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 24 S. E. Rep. 269.

For example, the legislature has no power to set aside a judgment, or to empower a court to set aside a judgment, rendered before the passage of the act, no matter how erroneous the judgment may be. *Arnold v. Kelley*, 5 W. Va. 446, citing *Griffin v. Cunningham*, 20 Gratt. 81.

B. JURISDICTION—STATEMENT OF RULE.—Before a court can render a valid judgment or decree it is essential that it should have jurisdiction of the person as well as of the subject-matter; if either of these is wanting all the proceedings are void. *Haymond v. Camden*, 22 W. Va. 181. See monographic note on "Jurisdiction."

Error in Exercise of Jurisdiction.—"A judgment pronounced by a court having no jurisdiction is a mere nullity, not only voidable but entirely void. Such a judgment may be assailed anywhere and everywhere, in courts of the last resort, as well as in inferior courts. Wherever proceedings may be had to enforce such void judgment it may be opposed, and the jurisdiction of the court that pronounced it questioned and assailed. There is an obvious distinction between such a case where the court has no jurisdiction to enter the judgment complained of, and a case where the court, having a general jurisdiction over the subject-matter, has erroneously exercised it. In the latter case the judgment cannot be questioned in any collateral proceeding, and if not appealed from is final; but where the court is without jurisdiction its judgment must be treated as a mere nullity, and all proceedings under it, or depending on it are void." *Withers v. Fuller*, 30 Gratt. 547.

C. PARTIES.

1. DEATH OF PARTY.

Judgments for or against Deceased Persons.—Judgments for or against deceased persons are not generally regarded as void on that account. Such judgments have sometimes been upheld in collateral proceedings on the ground that their rendition necessarily implied that the parties were then living, and that this implied finding in support of judgment ought not to be allowed to be impeached by evidence not contained in the record. *McMillan v. Hickman*, 35 W. Va. 705, 14 S. E. Rep. 227.

Civiliter Mortuus.—Thus, where process is served upon a defendant on the day of his conviction for felony, but before the conviction has taken place, a judgment by default is obtained against the defendant while he is confined in the penitentiary, the judgment is not void, but voidable, and cannot be assailed collaterally in a court of equity, or elsewhere. *Neale v. Utz*, 75 Va. 480.

No Suggestion on Record.—Where process has been regularly served on a defendant, and there is no appearance, and the defendant dies before judgment, and his death is not suggested on the record, and after his death judgment is rendered against him, such judgment is not void but voidable, and cannot be collaterally attacked. *King v. Burdett*, 28 W. Va. 601; *Evans v. Spurgin*, 6 Gratt. 107. See also, ch. 134, sec. 1 of the Code of West Virginia.

Death of One of Several Plaintiffs.—The fact that a sole plaintiff, or one of several plaintiffs, is dead at the time of the institution of an action, such death not appearing on the record, does not render a judgment therein void, but only erroneous, and such judgment is a lien on real estate. *Watt v. Brookover*, 35 W. Va. 323, 13 S. E. Rep. 1007; *King v. Burdett*, 28 W. Va. 601.

Judgment Constitutes a Lien.—Where suit is instituted in the name of a party who is dead at the time the suit is brought, and process is duly served upon the defendants, who suffer judgment to be rendered against them without pleading the death of the plaintiff in abatement in proper time during the pendency of the suit, the judgment so obtained is not absolutely void, but is erroneous, and until reversed in one of the modes prescribed by law, constitutes a lien upon the real estate of the defendant, and may be enforced as other judgment liens, and is not subject to collateral attack. *McMillan v. Hickman*, 35 W. Va. 705, 14 S. E. Rep. 227. See *infra*, this note "Lien of Judgment."

Error, How Corrected.—Where the fact of death is apparent in the record of the judgment, its rendition would be error of law, to be corrected by appellate process; and, where it does not appear in the record, but is to be shown *aliunde*, it is called error in fact, to be corrected at common law by writ of error *coram nobis*; but now, under Code of W. Va. 1889, ch. 135, sec. 1, it is corrected by motion in lieu of that writ. *Watt v. Brookover*, 35 W. Va. 323, 13 S. E. Rep. 1007; *Williamson v. Appleberry*, 1 H. & M. 206.

Motion.—A judgment against a defendant, who was dead at the time of its rendition, will be set aside on motion. *Hooe v. Barber*, 4 H. & M. 489.

D. JOINDER OF PARTIES.

Common-Law Rule—On Contract.—It is a well-established rule of the common law, that the plaintiff upon a joint contract must sue all the joint contractors, and bring all of them before the court, and mature this cause against all, or if any could not be brought before the court he must proceed to outlawry against such defendants before he can obtain a judgment against any of them, and he must recover a joint judgment against all the defendants. *Hoffman v. Bircher*, 23 W. Va. 537; *Carlton v. Ruffner*, 12 W. Va. 297; *Beazley v. Sims*, 81 Va. 644.

In a joint action upon contract, the plaintiff must have judgment against all the defendants before the court, or he can have judgment against none. *Jenkins v. Hurt*, 2 Rand. 446; *Early v. Clarkson*, 7 Leigh 83; *Baber v. Cook*, 11 Leigh 606.

Contract Joint or Joint and Several.—At common law in a joint action against several parties, there can be but one final judgment, and it must be for or against all the defendants; and the rule is the same, whether the contract sued on is joint or joint and several, or whether the action is founded on several and distinct contracts, as in a joint action under the statute against the maker and indorser of a note. *Stephoe v. Read*, 19 Gratt. 1; *Moffett v. Bickle*, 21 Gratt. 280; *Muse v. Bank*, 27 Gratt. 252; *Gibson v. Beveridge*, 90 Va. 696, 19 S. E. Rep. 785.

But in an action upon the joint contract of three defendants, the plaintiff, to sustain his action, must prove that all three joined in the alleged contract; for if it appear that one of the defendants was not a party to the contract, though the other two were, the plaintiff must fail in this joint action. *Rohr v. Davis*, 9 Leigh 80.

In an action on a contract against two defendants, though one of them confesses a judgment, if the other proves a defence that goes to the foundation of the entire contract sued on, there must be final judgment in favor of both defendants. *Steptoe v. Read*, 19 Gratt. 1.

"Where all the joint defendants are before the court, and the action as to any of them is not barred by any defence personal to any of such defendants, and one of such joint defendants in court confesses judgment in the action, and the action is further proceeded in against the other joint defendants, the court cannot enter a final judgment upon such confession, and if it does in fact enter up a formal judgment thereon such formal judgment entered under such circumstances is a nullity, nor does such formal entry of such judgment acquire any validity because the plaintiff agreed to accept the same, unless at the same time he discontinues his action against the other defendants. As such *cognovit actionem* has none of the force or effect of a judgment while the action is waiting the trial of the issues as to the other joint defendants, it is wholly immaterial, whether the issues be tried at the same term at which such confession of judgment is entered, or at any subsequent term, for until the trial of the issues as to the other defendant, the confession awaits the final judgment upon the verdict, jointly against all defendants, or none, notwithstanding such *cognovit actionem* and the formal judgment thereon against the defendant who confessed said judgment. When such confession has been made and the issues are tried as to the other defendants it is the duty of the court to enter judgment upon the verdict jointly against all the defendants, or against none of them." *Hoffman v. Bircher*, 23 W. Va. 551.

Exceptions to the Rule.—It is a rule of the common law, that upon joint contracts the action must be against all the joint contractors and, as a general rule, the judgment must be against all or none of them. But this is not a universal rule. When a defendant in such an action pleads matter which goes to his personal discharge, such as bankruptcy, infancy, or any matter that does not go to the action of the writ; or pleads or gives in evidence a matter which is a bar to the action as against him only, and of which the others could not take advantage, judgment may be given for such defendant and against the rest. *Moffett v. Bickle*, 31 Gratt. 280; *Snyder v. Snyder*, 9 W. Va. 415; *Choen v. Guthrie*, 15 W. Va. 104; *Beazley v. Sims*, 81 Va. 647; *Taylor v. Beck*, 3 Rand. 316; *Carlon v. Ruffner*, 12 W. Va. 297; *Hoffman v. Bircher*, 22 W. Va. 537. See also, Code W. Va., ch. 181, sec. 19, and ch. 125, sec. 52.

Contract Joint or Joint and Several.—The general rule at common law that in a joint action against several parties, there can be but one final judgment, and it must be for or against all the defendants, does not apply where the plea of one of the defendants admits the contract and sets up a discharge by matter subsequent, as bankruptcy, or where he sets up a personal disability at the time of the contract sued on, as infancy. And these exceptions apply equally, whether the contract is joint, or joint

and several. *Steptoe v. Read*, 19 Gratt. 1; *Bush v. Campbell*, 26 Gratt. 403; *Wamsley v. Lindenberger*, 3 Rand. 478.

On Tort.—In an action of trespass against eleven defendants for arrest and false imprisonment, all pleaded the statute of limitations and not guilty; upon issue joined eight were found guilty, two not guilty, and against one the jury omitted to find any verdict, whereupon a joint judgment was entered against the eight for damages and costs, and it was held proper to enter this judgment against those found guilty, as it did not appear that they were prejudiced by this omission to find a verdict. *Jones v. Grimmet*, 4 W. Va. 104.

Statutory Rule.—The act, Va. Code of 1849, ch. 177, sec. 19, applies to actions on contract against two or more defendants, where the defence of some of the defendants is personal to themselves, though that defence is that they never were parties to the contract sued on, as *non est factum*. *Bush v. Campbell*, 26 Gratt. 403.

Code Va. 1860, ch. 177, sec. 19, applies only to cases in which some of the defendants are discharged upon the grounds of defence merely personal; and where the ground of defence goes to the foundation of the entire contract, the case remains as at common law. *Steptoe v. Reed*, 19 Gratt. 1, and *note*. But see *Choen v. Guthrie*, 15 W. Va. 107.

Joint Plea of Nonassumpsit.—But Va. Code 1887, sec. 3396, which provides that "in an action founded on a contract against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants against whom he would have been entitled to recover, if he had sued them only" has no application where the defendants file a joint plea of *nonassumpsit*, and there is nothing in the record which shows expressly or impliedly, that the defence relied on is merely personal to one defendant, and does not concern his codefendant. *Gibson v. Beveridge*, 90 Va. 696, 19 S. E. Rep. 785.

Judgment against Those Served.—Under Va. Code, ch. 167, sec. 50, where only one of several defendants is served with process, judgment is properly rendered against the defendant served. *N. & W. R. Co. v. Shippers' Compress Co.*, 83 Va. 272, 2 S. E. Rep. 120; *Gray v. Stuart*, 33 Gratt. 351.

Writ Served on Part.—Where a writ is served on only a part of the defendants, the others being returned no inhabitants of the county, the court may render judgment against those upon whom the writ is served. *Merchants' & Mechanics' Bank v. Evans*, 9 W. Va. 373. For Code Va., ch. 167, sec. 50, changes the common-law rule that all defendants in actions *ex contractu* must be summoned, before judgment can be had against any, by providing that judgment may be had against one defendant served with process, and a discontinuance as to others, or at the plaintiff's election, subsequent service of process and judgment, *in the same suit* against the other defendants. *Beazley v. Sims*, 81 Va. 644.

Under Va. Code 1887, sec. 3396, providing that where, "in any action against two or more defendants, the process is served on part of them, the plaintiff may proceed to judgment as to any so served, and either discontinue it as to the others, or from time to time, as the process is served as to such others, proceed to judgment as to them until judgments be obtained against all," judgment may properly be entered against several defendants on whom process is served, though return is made that another defendant is dead. *Dillard v. Turner*, 87

Va. 600, 14 S. E. Rep. 123. See also, *Newberry v. Sheffey*, 89 Va. 286, 15 S. E. Rep. 548.

It is provided by Code of West Virginia, ch. 181, sec. 19, and Code of Virginia 1860, ch. 177, sec. 19, "That in an action founded on a contract against two or more defendants, although the plaintiff may be barred as to any one or more of them he may have judgment against any other or others of the defendants against whom he would have been entitled to recover, if he had sued them only." In construing this statute, the Virginia court held in *Bush v. Campbell*, 26 Gratt. 428, and *Muse v. Farmers' Bank*, 27 Gratt. 254, that the plaintiff may bring his joint action against the defendants alleged to be jointly bound, and recover against some of them, although his action is barred by a defence which showed that no such joint contract with the said defendants ever existed. But these two cases were disapproved of by the West Virginia court in *Hoffman v. Bircher*, 23 W. Va. 587, they being of opinion that the rigidity of the common-law rule was relaxed by the legislature only so far as to permit the plaintiff, in his action against all the joint contractors, to recover against one or more of them, although the action be barred as to the others, where the plaintiff's declaration shows that he could have recovered against any one of them *separately*, if he had *sued them only*, and where he proves at the trial the contract as alleged.

It seems to be well settled that under the Code of Virginia 1860, ch. 177, sec. 19, judgment may be given in favor of some of the defendants at one time and against others at another time. *Bush v. Campbell*, 26 Gratt. 428, and *note*; *Moffett v. Bickle*, 21 Gratt. 280; *Muse v. Farmers' Bank*, 27 Gratt. 252.

Where Part Only Appear and Plead.—But it is not error to try a cause against a part of the defendants who have appeared and pleaded, and when there is an office judgment not set aside as to the other defendants. *Hood v. Maxwell*, 1 W. Va. 219.

Test as to Whether Several Judgment Is Proper.—It was held in *Hoffman v. Bircher*, 22 W. Va. 587, that a several judgment can be recovered against one or more defendants under the statute where the plaintiff's declaration shows that he could have recovered against any of them *separately*, if he had *sued them only*.

But separate judgments may be taken, *during the same term* upon a joint bond. *White v. Tally*, 5 Call 98.

Dismissal of Scire Facias.—A judgment against one of two defendants in a joint action, is not affected by the judgment of the circuit court dismissing a *scire facias* to revive the judgment, for a variance between the writ and evidence. *Gray v. Stuart*, 33 Gratt. 351.

Joint and Several Bond.—Where there was an action upon a joint and several bond, against six obligors, and the capias (which was against them all) was executed, on two only, it was held that the plaintiff was not bound to sue out further process against the rest, but might take judgment against those two. *Moss v. Moss*, 4 H. & M. 293.

Reversal as an Entirety.—A joint judgment against two parties, where the service of notice is improperly executed as against one party, is erroneous, and must be reversed as to both. *Vandiver v. Roberts*, 4 W. Va. 493. See also, *Gregory v. Marks*, 1 Rand. 286. See *infra*, this note, "Reversal."

"Where a judgment is erroneous as to one and is reversed as to one, when the judgment is joint, it must be reversed as to all. Execution must issue

against all or none. This is undoubtedly the common-law rule. * * * There is a manifest distinction, however, between an erroneous judgment and a void judgment. The first is a valid judgment, though erroneous, until reversed, provided it is the judgment of a court of competent jurisdiction. The latter is no judgment at all. It is a mere nullity. The first cannot be assailed in any other court but an appellate court. The latter may be assailed in any court, anywhere, whenever any claim is made or rights asserted under it." *CHRISTIAN, J. Gray v. Stuart*, 33 Gratt. 351.

See also, when a verdict is set aside as to one issue, it must be set aside *in toto*. *Gardner v. Vidal*, 6 Rand. 106.

E. PLEADINGS AND ISSUES.

1. **NECESSITY OF DECLARATION.**—The judgment is not void though no declaration was filed in the cause, and can only be avoided by the proper proceedings taken in due season in the court which rendered the judgment. *Terry v. Dickinson*, 75 Va. 475.

Sufficiency of One Count.—In an action of detinue there are two counts in the declaration. The first does not allege property in the plaintiff. The second does allege it. The court refuses to allow the defendant to demur to the several counts. The jury find expressly that the property belongs to the plaintiff. Upon this showing of facts, the court held that although the first count is defective, yet as the second is good, and as the jury have found that the property belonged to the plaintiff, the defendant is not injured by the refusal of the court to allow the demurrer to be filed, and it is no cause for reversing the judgment. *Binns v. Waddill*, 33 Gratt. 588.

Demurrer.—Judgment should be given for the plaintiff where the court overrules a demurrer to the declaration and each count thereof, when it should have sustained the demurrer to the first count, because of the informal and imperfect manner in which the cause of action is stated therein. The defendant demurred to the evidence, and the facts proven did sustain the second count in the declaration, and would have sustained the first count, had it been drawn as it should have been. *Stolle v. Aetna Fire & Marine Ins. Co.*, 10 W. Va. 546.

F. ISSUE MUST BE JOINED—GENERAL RULE.—It is well settled, that if a verdict has been rendered without any issue being joined, it is a mere nullity, and no judgment can be properly rendered upon it, whether it be in a civil or criminal action. *Brown v. Cunningham*, 23 W. Va. 109. For where trials by jury have been had without issue joined they have invariably been set aside as wholly unauthorized by law. This has been repeatedly held in Virginia before, and in West Virginia since its formation, and must be regarded as settled law, correctly announcing the common-law rule on that subject. *Stevens v. Talliaferro*, 1 Wash. 155; *Kerr v. Dixon*, 2 Call 379; *Taylor v. Huston*, 2 H. & M. 161; *Wilkinson v. Bennett*, 3 Munf. 316; *Sydnor v. Burke*, 4 Rand. 161; *McMillion v. Dobbins*, 9 Leigh 423; *Rowans v. Givens*, 10 Gratt. 250; *Railroad Co. v. Gettle*, 3 W. Va. 376; *Railroad Co. v. Christie*, 5 W. Va. 325; *Gallatin v. Haywood*, 4 W. Va. 1; *Railroad Co. v. Faulkner*, 4 W. Va. 180; *State v. Conkle*, 16 W. Va. 736; *State v. Douglass*, 20 W. Va. 770; *Ruffner v. Hill*, 21 W. Va. 159; *Preston v. Salem Imp. Co.*, 91 Va. 583, 22 S. E. Rep. 486.

These decisions were rendered in a great variety of cases: in actions of debt, detinue, trespass on the

case, *assumpsit*, writ of right, indictments and ejectments. In *Ruffner v. Hill*, *supra*, which was an action of ejectment, the grounds of these decisions are stated thus: "By the common law the court had no right to make up the issue and impanel a jury to try it; but the parties by their pleading must first come to an issue, and then it is tried by a jury. Where, therefore, the record shows that the parties by their pleadings have not come to any issue, but nevertheless the record shows that the issue was tried, this issue must either have been illegally made up by the court or by blunder; it must have been assumed to have been made up by the parties, when in fact it was not."

Effect on Judgment.—If a jury be impanelled to try the issue joined when, in reality, no issue is joined, the judgment must be reversed, and the verdict set aside, notwithstanding it was against the party who failed to meet, by a negative on his side, the affirmative matter pleaded on the other side. *Wilkinson v. Bennett*, 3 Munf. 314; *Totty v. Donald*, 4 Munf. 490; *Taylor v. Huston*, 2 H. & M. 161; *Stevens v. Talliaferro*, 1 Wash. 155; *Kerr v. Dixon*, 2 Call 379; *Hood v. Maxwell*, 1 W. Va. 319.

If the intervention of a jury is waived and the evidence is heard by the court and judgment rendered, without issue having been joined, it is as equally erroneous as though the case had been tried by a jury. *B. & O. R. Co. v. Faulkner*, 4 W. Va. 181; *Stevens v. Talliaferro*, 1 Wash. 155.

"In numerous cases, both in Virginia and in this state, it has been decided that a judgment entered upon the verdict of a jury sworn to try the issue joined, when no issue is in fact joined, or where there were more than one plea, and no issue had been joined on some one of such pleas, such judgment will, for that reason only, be set aside by the appellate court." *Bennett v. Jackson*, 34 W. Va. 63, 11 S. E. Rep. 734; *State v. Douglass*, 20 W. Va. 770; *State v. Conkle*, 16 W. Va. 736; *B. & O. R. Co. v. Faulkner*, 4 W. Va. 180; *Gallatin v. Haywood*, 4 W. Va. 1; *B. & O. R. Co. v. Christie*, 5 W. Va. 325; *B. & O. R. Co. v. Gettle*, 3 W. Va. 376; *Stevens v. Talliaferro*, 1 Wash. 155; *Taylor v. Huston*, 2 H. & M. 161; *Kerr v. Dixon*, 2 Call 379; *Wilkinson v. Bennett*, 3 Munf. 316; *Sydnor v. Burke*, 4 Rand. 161; *McMillion v. Dobbins*, 9 Leigh 422; *Rowans v. Givens*, 10 Gratt. 550; *Cawood's Case*, 2 Va. Cas. 537, 543.

Thus, if a circuit court enter up a judgment on the verdict of a jury, sworn to try the issue joined in any case civil or criminal, including an action of ejectment where no issue has been joined, or no plea filed by the defendant, such judgment will for such reason only be reversed by the appellate court. *Ruffner v. Hill*, 21 W. Va. 152.

No Charge in Bill or Answer.—Matters not charged in the bill or averred in the answer, and not put in issue in any manner by the pleadings in the cause, are not proper to be considered at the hearing, and should have no weight in determining the cause. *Smith v. Lowther*, 35 W. Va. 300, 13 S. E. Rep. 999; *Burley v. Weller*, 14 W. Va. 264. See also, *Hunter v. Hunter*, 10 W. Va. 321.

Demurrer to Evidence.—When there is a demurrer to the evidence, an unconditional verdict on its face, by the jury, is not error, provided the demurrer to the evidence be afterwards passed upon and determined by the court, but it is error in the court to render judgment upon the verdict of the jury in such case regardless of, and without determining, the demurrer to the evidence. *Green v. P., W. & Ky. R. Co.*, 11 W. Va. 685.

Similitur.—But the want of a *similitur* will not, after a trial, vitiate the verdict, and, as provided by Code Va. 1860, ch. 181, sec. 3, it is not error after verdict. *Brewer v. Tarpley*, 1 Wash. 363; *B. & O. R. Co. v. Faulkner*, 4 W. Va. 180.

G. DETERMINATION OF ALL ISSUES.—Where in an action of detinue for five slaves, the jury find for the plaintiff as to four of them, without also finding for the plaintiff or defendant, as to the fifth, the verdict will be set aside and a *venire facias de novo* awarded. *Butler v. Parks*, 1 Wash. 76.

Moreover, where issues are joined on the pleas of *cul tel record*, and the act of limitations, if the jury find for the plaintiff on the second plea, and the court, without taking any notice of the first plea, enters judgment, such judgment ought to be reversed, notwithstanding, on previous pleadings, which by consent were set aside, the court had pronounced that, in fact, there was such a record. *Gee v. Hamilton*, 6 Munf. 32.

If a defendant pleads and demurs to the whole declaration, and the demurrer is overruled, judgment ought not to be entered, without first trying the issues joined on the other pleas. *Waller v. Ellis*, 3 Munf. 88.

H. CONFORMITY TO PLEADINGS AND PROOF.—It is a well-settled rule of pleading that judgment or decree can only be entered on the case as made by the pleadings; and evidence of matter not noticed on the pleadings will be of no avail, though it might show a right to a further judgment or decree. *Weldley v. Shenandoah Iron, etc., Co.*, 33 Va. 763, 3 S. E. Rep. 376; *Hubbard v. Blow*, 4 Call 224; *Gregory v. Peoples*, 30 Va. 335; *Edichal Bullion Co. v. Columbia Gold Min. Co.*, 37 Va. 641, 13 S. E. Rep. 100; *Kent v. Kent*, 32 Va. 305; *Mundy v. Vawter*, 3 Gratt. 518. See *Swope v. Chambers*, 3 Gratt. 319.

No Count.—If there be no count in the declaration based on the claim specified in a bill of particulars which by statute is declared to be no part of the declaration, the items it contains cannot be proved, and no recovery can be had therefor. *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. Rep. 303.

No Plea.—A judgment for the plaintiff in *assumpsit*, should be set aside, and a new trial granted, if there was no plea by the defendant. *Johnson v. Fry*, 36 Va. 695, 12 S. E. Rep. 973, 14 S. E. Rep. 183. See also, *Petty v. The Frick Co.*, 36 Va. 501, 10 S. E. Rep. 386.

Judgment Generally on All the Pleadings.—In debt on a bond with collateral condition, if the plaintiff, by replication to the plea of conditions performed, charge the breach defectively, but fully avoids, by other replications, such other pleas of the defendant as go to the foundation of the action, to which replications, demurrers are improperly filed; and the court enters judgment for the defendant, *generally*, upon all the pleadings, such judgment is erroneous; it should only be that the faulty replication is not sufficient in law, etc., and therefore that the plaintiff takes nothing, etc. *Lane v. Harrison*, 6 Munf. 573.

Conformity to Proof.—Upon a bill for specific execution of an agreement, the agreement alleged in the bill must be proved by the evidence, and specific execution can only be decreed of the same agreement so alleged and proved, and specific execution must not be directed of a different contract. *Pigg v. Corder*, 12 Leigh 60.

A court of equity can only decree upon the case made by the pleadings, though the evidence may show a right to a further decree. *Mundy v. Vawter*, 3 Gratt. 518.

Limiting Relief to That Sought by Pleadings.—

Where a bill is filed for the sole purpose of having a certain paper, purporting to be a deed, declared a nullity, the court cannot decree, upon such pleadings, that it be converted into a valid and proper deed, this not being prayed for in the bill. *Miller v. Smoot*, 86 Va. 1050, 11 S. E. Rep. 982.

Damages beyond Those Claimed—Interest.—Greater damages cannot be recovered than are declared for and laid in the conclusion of the declaration; but the restriction is confined to the principle of recovery, and does not affect the interest that may be allowed thereon by the jury. *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 39 S. E. Rep. 336. See *Cahill v. Pintony*, 4 Munf. 371, where it was held that if the jury, in an action of assumpsit, find for the plaintiff a larger sum than the amount of damages laid in the declaration, with interest from a day fixed in their verdict, the plaintiff may release the surplus beyond that amount and take judgment for the balance, with interest as aforesaid.

In an action of covenant, the verdict for a larger sum than the damages laid in the declaration, or stated in the writ, must be set aside, and a new trial awarded. *Cloud v. Campbell*, 4 Munf. 214; *Lewis v. Arnold*, 18 Gratt. 454. See *Alleman v. Kight*, 19 W. Va. 201.

Where the principal and interest, due on a bond amount to more than the penalty, and damages are found by the verdict, judgment ought not to be entered for the penalty and costs, to be discharged by the principal and interest with the damages so assessed in the cost; but for the penalty and damages if not exceeding those laid in the writ. But if damages found by the jury exceed those in the writ, a new trial ought to be granted unless the plaintiff will release the excess of damages; if this be done, judgment may be entered for the penalty, with the residue of the damages so found, and costs. *Tenant v. Gray*, 5 Munf. 494.

A verdict and judgment, in debt upon a sheriff's official bond to recover damages sustained by the relator by reason of a false return of *nulla bona* on a *A. fa.* sued out by the relator, for more damages than the claim in the warrants, are erroneous; and the error is not cured by the verdict, under the statute of jeofails. *Gibson v. Governor*, 11 Leigh 600.

Debt on Bond.—But it has been long well settled that in debt upon a bond, with collateral condition, damages may be assessed beyond those laid in the declaration, if the penalty is sufficient to cover them. *Peerce v. Athey*, 4 W. Va. 22; *Payne v. Ellzey*, 2 Wash. 143; *Johnstons v. Meriwether*, 8 Call 523; *Winslow v. Com.*, 2 H. & M. 459.

If the damage be laid high enough in the writ, though the jury find more than are laid down in the declaration, the writ may be referred to for the purpose of amendment, and the judgment will be sustained. *Palmer v. Mill*, 3 H. & M. 502.

Effect of Releasing Excess.—But the court reversing the judgment for such error, will not direct a new trial, if the relator will release the excess of damages, recovered beyond the just amount, but upon such release of the excess, will direct judgment to be entered for the just amount of damages. *Gibson v. Governor*, 11 Leigh 600.

So also, a judgment will be supported by a forthcoming bond, which is taken for more than the sum due by the execution, where the plaintiff releases the excess, which release, it seems, may be even after judgment. *Scott v. Hornsby*, 1 Call 41; *Harri-son v. Marr*, 1 Call 47.

If a judgment of a county or corporation court,

being for less than \$100, exclusive of costs, is reversed by a superior court of law, upon a writ of supersedeas, whereupon judgment is entered that the plaintiff take nothing by his bill, etc., he cannot appeal to the court of appeals; notwithstanding his declaration demanded a larger sum than \$100. *Henry v. Elcan*, 2 Munf. 541. See *Melson v. Melson*, 2 Munf. 542.

Judgment for Aggregate Sum.—A notice that a motion will be made for a judgment against a sheriff, for the amount of his receipt for sundry executions for fines, "as appears by the copy of said receipt," is sufficient, without mentioning the aggregate sum due, the separate amount of each execution, or the time when delivered to the sheriff. And a judgment thereupon for the aggregate sum due, without distinguishing the amount of each execution, will be sustained, if conformable to law in other respects. *Segouine v. Auditor*, 4 Munf. 398.

Affirmative Relief to Defendant.—In an accounting, the defendant may have an affirmative judgment if the balance found due is in his favor. *Hill v. Sutherland*, 1 Wash. 128; *Fitzgerald v. Jones*, 1 Munf. 150.

Judgments beyond Issues Erroneous.—A notice to a sheriff and his sureties being of a motion for a balance of certain land, property and taxes, and the judgment being for a balance due upon these and also for a license, this is error for which the judgment will be reversed in the appellate court. *Monteith v. Com.*, 15 Gratt. 172.

Judgments Must Conform to Issues Raised.—It is an elementary principle of our jurisprudence, that jurisdiction of the subject-matter and the parties is essential to the conclusiveness of a judgment or decree. And though a court may obtain jurisdiction rightfully, yet its decrees may be void, because, in the progress of the cause, it has exceeded its jurisdiction. Thus, where a suit is brought in the county court, by a widow, for the sole purpose of having her dower assigned, and the court, after assigning dower, of its own accord decreed a sale of the residue of the land, the court transcended its jurisdiction, and its decree of sale is void. *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. Rep. 36.

Want of jurisdiction makes a judgment a nullity, and it may be so treated by any court in any proceeding, direct or collateral, a judgment being valid to the extent of the court's jurisdiction, and invalid beyond. Thus, in summary proceedings under Va. Code 1873, ch. 76, sec. 9, circuit courts have jurisdiction to appoint, change and remove church trustees, but not to determine how they shall administer their trust, and a judgment entered as to the latter is void. *Wade v. Hancock*, 76 Va. 620.

Judgment Must Be Based on Allegations.—If matter appear in the answer of a defendant in equity, which is not alleged in the bill, it cannot justify a decree for the plaintiff against the defendant, though it might have been ground for such a decree, if it had been alleged in the bill. *Eib v. Martin*, 5 Leigh 132.

Judgment Restricted to Allegations.—No rule is better settled than that a judgment or decree must be restricted to the case made by the pleadings, no matter what the evidence may show. *Potomac Mfg. Co. v. Evans*, 84 Va. 717, 6 S. E. Rep. 2; *Mundy v. Vawter*, 3 Gratt. 518; *Campbell v. Bowles*, 30 Gratt. 652.

But in detinue, if the jury find for the plaintiff, the slaves, if to be had, or £250 for each slave, and damages 1*d*; and the court renders judgment for the slaves, if to be had, and if not, the price

found by the jury, with the damages and costs, it is not error [though no price or value be laid in the declaration]. *Bates v. Gordon*, 3 Call 555.

Immaterial Variance between Pleadings and Proof.—Though it is true, however, that the case stated in the complaint must be sustained by the evidence, this rule will not forbid relief to the plaintiff where the case proved does not *materially* vary from the case stated; as where two deeds are charged to be without consideration, and intended to delay and hinder the plaintiff, and the proof is that the second being a deed to the trustee for the separate use of the debtor's wife, was without valuable consideration. *Campbell v. Bowles*, 30 Gratt. 652.

Moreover, a plaintiff must allege as well as prove the facts on which he claims relief. He cannot obtain relief on any ground not alleged in his bill. *Currey v. Lawler*, 29 W. Va. 111, 11 S. E. Rep. 897.

For a plaintiff is no more entitled to recover without sufficient averments in his bill, than he is without proof of his averments when properly made. The one is as essential as the other, and both must concur or relief can not be granted. *Pusey v. Gardner*, 21 W. Va. 469.

A recovery for abandonment of treatment by a physician may be had under a declaration charging that he "carelessly, negligently, improperly and unskillfully conducted himself," in the treatment, and that the injury resulted from his "careless, negligent, improper, and unskillful attention." *Lawson v. Conaway*, 37 W. Va. 159, 16 S. E. Rep. 564.

I. CONFORMITY TO VERDICT.—In an action for defamation the trial court has no power to enter judgment for five dollars only, where the verdict was for that sum and costs; if the verdict is irregular, it should be set aside and a new trial awarded. *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. Rep. 791. See also, *Lee v. Tapscott*, 3 Wash. 376.

Judgment Not Supported by Verdict.—Where, upon a trial for murder, the jury finds the prisoner guilty of involuntary manslaughter, and assesses upon him a fine of five hundred dollars, it is error for the court to enter a judgment discharging the prisoner. Such a judgment is not supported by the verdict. *Price v. Com.*, 4 Va. Law Jour. 426, 33 Gratt. 819, 36 Am. Rep. 797.

But where in an action of debt on a check, the declaration demands a sum certain with interest, and the verdict is simply for "the amount of the debt in the declaration mentioned," then, under sec. 2853 of the Va. Code, judgment may be given "for the principal and charges of protest, with interest thereon from the date of such protest." Such a judgment is in conformity both with the verdict and the statute. *Lake v. Tyree*, 90 Va. 719, 19 S. E. Rep. 787.

In *Turberville v. Self*, 4 Call 580, although the county court gave no judgment on the verdict, the district court affirmed it with damages, and the court of appeals (probably from oversight), did the same.

Failure of Clerk to Enter Judgment on Verdict.—The clerk of a county court having by mistake failed to enter a judgment on a verdict, and an appeal being taken, such appeal ought to be dismissed, notwithstanding the county court afterwards, during the pendency of the appeal, corrects the error, by having a judgment entered and certified to the district court. *Tatum v. Snidow*, 2 H. & M. 542.

Amount.—In an action for damages the judgment should be for the amount assessed by the jury as damages and interest on this amount from the day

the judgment is actually rendered, and not from the first day of the term at which the judgment is rendered. *Hawker v. B. & O. R. Co.*, 15 W. Va. 623.

J. NON OBSTANTE VEREDICTO.—Judgment may be rendered in favor of the plaintiff against the defendants only, and need not be absolute and against all others. *McClung v. Echols*, 5 W. Va. 204.

When Rendered for Plaintiff.—Where the only issue, in an action, is upon a plea in confession and avoidance, upon which a verdict has been found for the defendant, and it is afterwards decided that such plea is bad in substance, judgment should be entered for the plaintiff *non obstante veredicto*. *Mason v. Bridge Co.*, 28 W. Va. 640.

When Rendered for Defendant.—An action for deceit, practiced in a sale, not being maintainable against the personal representative of the deceased, therefore, though there is a verdict for the plaintiff, judgment *non obstante veredicto* should be rendered for the defendant. *Boyles v. Overby*, 11 Gratt. 202.

Verdict Unambiguous—Plaintiff's Case Defective.—If a verdict is imperfect by reason of any ambiguity or uncertainty, so that the court cannot say for which party judgment ought to be given, a *venire de novo* ought to be awarded. *Brown v. Ralston*, 4 Rand. 504. But if the verdict be not ambiguous or uncertain in itself, but the case made by the plaintiff is a defective case, or defective title, then the judgment should be for the defendant, and a *venire de novo* should not be granted. *Brown v. Ferguson*, 4 Leigh 37, 24 Am. Dec. 707.

III. FORM OF JUDGMENT.

A. CERTAINTY.—If the judgment is ambiguous in its terms, the appellate court cannot make it certain, upon the ground that the clerk of the county court might have moulded it into form, because it was only an entry on the minutes. *Humphreys v. West*, 3 Rand. 516.

Uncertainty as to Amount.—A judgment subject to an uncertain credit is erroneous. The amount of the credit should be first ascertained by a writ of inquiry, and judgment should be rendered for the balance. *Early v. Moore*, 4 Munf. 262.

In *Ross v. Gill*, 1 Wash. 87, the judgment was for one amount (£490) to be discharged by the payment of a lesser amount. This last clause was held surplusage, and unwarranted by law, but, as the plaintiff did not complain, it was regarded as a release of so much of the judgment. At all events it was a defect of which the defendant could not complain.

Judgment on Caveat.—A judgment, on a caveat, that no grant shall issue to the caveatee on his inclusive survey, where it appears that he has any other claim or survey, by which he may possibly hold a part of the land, ought to be so worded as not to affect his right under such claim or survey. *Preston v. Harvey*, 2 H. & M. 55.

B. CONDITIONAL JUDGMENTS.—A judgment with a condition that execution is to be stayed for ninety days to await the decision of the court of appeals, is a conditional judgment, and valid; it is competent for the court which rendered it to deal with it in a summary way and see that its terms are complied with. "It is said in 1 Tidd's Practice 509, that when a judgment is confessed upon terms, in the king's bench, it being in effect but a conditional judgment, the court will take notice of it and see the terms performed; but when the judgment is acknowledged absolutely, and a subsequent agree-

ment made, this does not affect the judgment; and the court will take no notice of it, but put the party to his action on the agreement." *Bank of Old Dominion v. McVeigh*, 32 Gratt. 590.

In *Myers v. Williams*, 85 Va. 631, 8 S. E. Rep. 433, a judgment allowing a conditional credit was sustained.

IV. INTERLOCUTORY AND FINAL JUDGMENTS.

Finality of Judgment.—At common law, no matter how long a term might last, a judgment did not become final until it ended, and the court had no power to direct an execution upon it. Until then, in the quaint language of Coke, "the record remains in the breast of the court and in their remembrance, and therefore the roll is alterable during that term as the judges shall direct; but when the term is past, then the record is in the roll, and admits of no alteration, averment or proof to the contrary." The inconvenience and injustice sometimes occasioned by this rule induced the legislature to provide a remedy, and sec. 3600 of the Code of Va. was enacted, which provides that, "any court, after the fifteenth day of the term, may make a general order allowing executions to issue on judgments and decrees after ten days from their dates, although the term at which they are rendered be not ended," etc., but this section was not intended to, and does not, impart to such judgments, the quality of finality so as to deprive the court, during the term, of the power to correct, or if need be, annul an erroneous judgment. This statute manifestly enlarged the power of the court, and imparted to it an authority which at common law no court possessed. *Baker v. Swineford*, 97 Va. 112, 33 S. E. Rep. 542.

When a circuit court, upon appeal, reverses the final judgment of the county court and retains the cause for a new trial, the judgment of the circuit court is such a final judgment as is the subject of a writ of error. *Crawford v. Railroad Co.*, 26 Gratt. 467; *Brambaugh v. Wissler*, 26 Gratt. 463, and *note*.

Cause Sent Back.—But where a cause is sent back for a new trial, the judgment is not final. *Omohundro v. Omohundro*, 27 Gratt. 824.

Must Be Judgment of Dismissal.—Under Va. Code, sec. 2454, no writ of error lies in an action at law until there is a final judgment; but the sustaining or overruling of a demurrer to a declaration is not a final judgment; to make it final there must be a judgment of dismissal. *Gillespie v. Coleman*, 98 Va. 276, 36 S. E. Rep. 877. See also, *Hancock v. R. & P. R. Co.*, 3 Gratt. 328; *Trevillian v. Louisa R. Co.*, 3 Gratt. 326. *Contra*, *Jeter v. Board*, 27 Gratt. 910, and *note*. See monographic *note* on "Appeals."

It was held in *Elliott v. Hutchinson*, 8 W. Va. 453, that the words "final judgment" contained in, and as employed in, the fifty-third section of chapter one hundred and twenty-five of the Code of West Virginia, means the "final judgment" mentioned in the forty-sixth section of said chapter. In other words they mean the "final judgment" mentioned in said forty-sixth section, which every judgment entered in the office of the case wherein there is no order for an inquiry of damages becomes final, by operation of that section, unless it is set aside by the defendant appearing and pleading to issue, as provided by the forty-seventh section of said chapter. And a rule in an action at law requiring the plaintiff to elect by the next term whether he will proceed at law or in chancery, is not, in the meaning of Va. Code 1873, ch. 178, sec. 2, a final judgment, and

the appellate court has not jurisdiction to review it. *Priddy v. Hartsook*, 81 Va. 67.

Final in County Court, Final in Superior Court.—Though a judgment of a superior court of law, reversing a judgment of a county court, and directing other pleadings in the cause, be interlocutory in its character, yet the finality of the judgment in the county court imparts its character to the judgment of the superior court, so as to authorize an appeal to the court of appeals. *Cowling v. Nansemond Justices*, 6 Rand. 349; *Morgan v. Ohio River R. Co.*, 30 W. Va. 17, 19 S. E. Rep. 583.

Where on a *supersedeas* to a judgment of a county court, the circuit court reverses the judgment, but omits to give such judgment as the county court ought to have given, and retains the cause, the judgment of reversal by the circuit court must be regarded as final in its appellate character, and a *supersedeas* will lie from the court of appeals. *Janey v. Blake*, 8 Leigh 88; *Morgan v. Ohio River R. Co.*, 30 W. Va. 17, 19 S. E. Rep. 583.

Effect of Issuing Execution.—Where a court authorizes executions to issue upon judgments recovered during the term, the judgments become final from the time when execution may issue, and cannot afterwards be set aside by the court. *Enders v. Burch*, 15 Gratt. 64.

Eminent Domain Proceedings.—But where the court has not acted upon the report of commissioners in a proceeding to condemn land, there is no final judgment, and therefore no appeal can be taken from an overruled motion by the lower court to set aside the original order appointing the commissioners. *Pack v. C. & O. R. Co.*, 5 W. Va. 118.

Interlocutory Judgments.—Where any further action of the court is necessary to give the complete relief contemplated by the court, or where but one of the questions which the court is called upon to settle, is determined by the judgment, and the others are reserved until a future time for determination, then the judgment or decree is interlocutory and not final. *Cocke v. Gilpin*, 1 Rob. 20; *Shirey v. Musgrave*, 29 W. Va. 181, 11 S. E. Rep. 914; *Hill v. Als*, 27 W. Va. 215.

In civil cases, judgments are either interlocutory or final. Interlocutory, as where the right of the plaintiff is established by a failure to plead or a withdrawal of a plea, but where the damages are not ascertained, and for which the intervention of a jury is necessary. On the return of this enquiry, the right to recover having been established, final judgment is entered up. But whenever final judgment is entered after the writ of enquiry is awarded and executed, or after a verdict on the merits, such final judgment finishes the proceedings, nothing more remains for the court to do, and execution may be done in pursuance of the judgment. *Pifer's Case*, 14 Gratt. 710.

Confession of Judgment Interlocutory.—A confession of judgment by one of several joint defendants, is only interlocutory, until the final decision of the cause as to the rest; and the confessing defendant must receive the same judgment as his codefendants. *Taylor v. Beck*, 3 Rand. 316. See generally, monographic *note* on "Judgments by Confession" appended to *Richardson v. Jones*, 12 Gratt. 53.

V. JUDGMENTS IN REM.

"A judgment *in rem* I conceive to be an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for the purpose. Such an adjudication,

being a most solemn declaration, from the proper and accredited quarter, that the status of the thing adjudicated upon is as declared, excludes all persons from saying the thing adjudicated upon was not such as declared by the adjudication." *Bruff v. Thompson*, 31 W. Va. 16, 6 S. E. Rep. 358.

VI. INTEREST.

No Demand in Declaration.—Judgment cannot be given for interest, if the declaration does not demand interest. *Hubbard v. Blow*, 4 Call 224. See monographic *note* on "Interest" appended to *Fred v. Dixon*, 27 Gratt. 541.

From What Time Allowed.—In an action for damages the judgment should be for the interest on the amount assessed by the jury as damages from the day the judgment is actually rendered, and not from the first day of the term at which the judgment is rendered. *Hawker v. B. & O. R. R. Co.*, 15 W. Va. 628. See *Mercer v. Beale*, 4 Leigh 189.

Where a judgment or decree is made for the payment of money it shall be for the aggregate of principal and interest due at the date of the verdict, if there be one, otherwise at the date of the judgment or decree, with interest thereon from such date, except in cases where it is otherwise provided. *Baer's Sons, etc. Co. v. Packing Co.*, 42 W. Va. 359, 26 S. E. Rep. 191, citing *Hawker v. B. & O. R. Co.*, 15 W. Va. 628.

Interest Charged from Date of Verdict.—Upon a payment in an action for a tort depending when the act, Code, ch. 177, sec. 14, p. 678, went into operation, it is proper to charge interest from the date of the verdict. *Lewis v. Arnold*, 13 Gratt. 454.

Judgment on Nil Dicit or Non Sum Informatus.—In a debt on a bill penal, a judgment entered upon *nil dicit* or *non sum informatus*, ought not to be reversed on the ground that the declaration, though describing the bill penal correctly as to the principal sum, penalty and date, omits to mention that the debt is payable, "with interest from a day prior to the date," and that the judgment, in conformity with the bill penal, is entered for the penalty, to be discharged by the principal, with such interest, and costs. *Harper v. Smith*, 6 Munf. 389. See *Mosby v. Taylor*, *Gilmer* 173.

Interest on Damages.—Interest is not due on the damages, until after judgment, against a public collector. *Gaskins v. Com.*, 1 Call 194. See also, *Gibson v. Governor*, 11 Leigh 600.

Interest on Aggregate of First Judgment.—Upon a *scire facias* against bail, it is error to give a judgment for the aggregate amount of principal, interest, and costs of the first judgment, with interest thereon. *Bowyer v. Hewitt*, 2 Gratt. 193.

Interest upon Costs.—It was held in *McRea v. Brown*, 2 Munf. 46, that the 5th section of the act passed January 20, 1804, entitled, "An act concerning the proceedings in courts of chancery, and for other purposes," did not authorize a judgment for interest upon the costs of suit.

Right to Interest as Affected by Verdict.—Where a declaration calls for a sum certain with interest, and the verdict is simply for the amount of the debt mentioned in the declaration, then under sec. 2853, of the Va. Code, the legal effect of the verdict is a finding of interest also. *Lake v. Tyree*, 90 Va. 719, 19 S. E. Rep. 787.

Replevy Bond—Judgment for Interest.—Judgment ought not to be entered on a three months' replevy bond, for interest from a day anterior to the date of the bond, but it may be for interest from that

date, on the rent and costs of the duties added together. And if the bond be taken, including interest from a day anterior to its date, such erroneous interest may be deducted, and judgment entered for the right sum. *Williams v. Howard*, 3 Munf. 377.

Rate of Interest.—A judgment upon the default of the sheriff, or other officer responsible for fines collected, ought not to be rendered for interest at the rate of fifteen per cent. per annum; but for five per cent. damages, and five per cent. per annum interest, on the whole amount, as in the case of public taxes. *Segouine v. Auditor*, 4 Munf. 398.

Illustration.—Thus, when a decree is entered in a cause ascertaining and fixing the aggregate amount of the plaintiff's debt and giving interest on such aggregate from the date of the decree, as prescribed by statute (Code W. Va., ch. 181, sec. 16), a subsequent decree cannot be entered in the same cause several years thereafter, to reaggregate such debt by calculating interest on the first aggregate sum to the date of the latter decree, then adding this interest to the sum of the first decree and giving interest on the second aggregate from the date of the last decree. *Tiernan v. Minghini*, 28 W. Va. 314.

Constitutionality of Statutes.—The 16th section of ch. 181, of Code W. Va. providing, that when a judgment or decree for the payment of money, shall be for the aggregate of the principal and interest due at the date of the judgment or decree, with interest thereon from that date, does not violate the provision of the constitution of the United States, prohibiting any state to pass a law impairing the obligation of contracts. *Fleming v. Holt*, 12 W. Va. 144.

Abatement of Interest—Absence in Enemy's Lines.—After judgment is obtained for a debt, both principal and interest, the court has no more power to abate any part of the interest, on the ground that the creditor was within the enemy's lines, than to abate the principal. The matter has passed into judgment, and it is too late, then, to raise the question of such abatement. *Rowe v. Hardy*, 97 Va. 674, 34 S. E. Rep. 625.

"Judgments and decrees for money being contracts of the highest character, of course, and for reasons before stated, to abate any portion of the interest included in them, would necessarily impair their obligation. Moreover by such judgments and decrees, the rights of the parties, in whose behalf they were rendered, to the money ordered to be paid, whether principal or interest, have become vested, and cannot be divested, as provided by the act of the assembly. *Griffin v. Cunningham*, 20 Gratt. 31." *Roberts v. Cocke*, 28 Gratt. 207; *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. Rep. 481.

It was held in *Roberts v. Cocke*, 28 Gratt. 207, that so much of the act of April 2, 1872, as empowers the courts to review judgments and decrees, upon motion, and to abate interest as provided therein is repugnant to the United States constitution and the constitution of Virginia, and therefore void. See, in accord, *Linkous v. Shafer*, 28 Gratt. 775; *Kent v. Kent*, 28 Gratt. 840; *Pretlow v. Bailey*, 29 Gratt. 212; also, *Crawford v. Fickey*, 41 W. Va. 544, 23 S. E. Rep. 602.

Entry of Judgment for Interest.—On a motion by a sheriff against his deputy, where judgment has been obtained by the commonwealth against him for taxes, judgment must be entered for the principal sum, and the interest, and not for the penalty

to be discharged by that sum and interest. *Asberry v. Calloway*, 1 Wash. 72.

VII. RENDITION AND ENTRY OF JUDGMENTS.

A. CERTAINTY AS TO PARTIES, AMOUNTS, DATES.—If the entry of the judgment, taken in connection with the record of the case in which it is made, has the requisite certainty of a judgment as to parties, amounts, dates, etc., the judgment is valid. *Bank of Old Dominion v. McVeigh*, 32 Gratt. 530.

If a declaration in debt be blank as to sums, the date of the obligation, the assignment thereof to the plaintiff, and as to damages, a judgment rendered thereupon is erroneous, and ought to be reversed, and the suit dismissed with the costs of both courts. *Blane v. Sansum*, 2 Call 495.

Entry for Certificates.—Judgment cannot be entered, in a suit at common law, for certificates. *Graves v. Webb*, 1 Call 443.

Judgment for Confederate Notes.—It seems that a judgment on a contract for the payment of confederate notes, should be entered for confederate notes; the scale of depreciation must be applied at the day when the money was payable. *Dearing v. Rucker*, 18 Gratt. 426.

Sheriff Includes His Commissions.—Where before the act of 1794, the sheriff, in taking a forthcoming bond, included his commissions on the debt, judgment should be entered for the sum due without the commissions. *Worsham v. Eggleston*, 1 Call 48.

Entry of Judgment against Sheriff.—In an action upon a sheriff's bond in the name of the commonwealth, for the benefit of a person aggrieved by the misconduct of the sheriff, the judgment should be entered for the penalty, to be discharged by the payment of the damages assessed and costs, "and such other damages as may be hereafter assessed upon suing out a *scire facias*, and assigning new breaches, by the plaintiff or any other person or persons injured." *Bibb v. Cauthorne*, 1 Wash. 91.

Judgment against Sheriff—Return—Escape.—A judgment cannot be entered against the defendant and sheriff, upon his return that the writ was executed on the defendant; the proper remedy against the sheriff for an escape being a separate suit. *Waugh v. Carter*, 2 Munf. 333.

Entry of Judgments at Different Times.—Where in a proceeding at law against several parties, judgments against one or more are entered at one time, and against others at another time, one execution may be issued against all. *Walker v. Com.*, 18 Gratt. 13.

Mistake in Entry.—In an action on a nonnegotiable note in which the homestead exemption is waived, the statement in the entry of the judgment that the homestead is waived does not vitiate the judgment. The judgment in this respect will be amended and affirmed. *Long v. Pence*, 98 Va. 584, 25 S. E. Rep. 593.

Judgment in Penal Bond.—Judgment on a penal bond should be for the penalty, to be discharged by the payment of the sum actually due. *Moore v. Fenwick*, Gilmer 214.

Writ of Inquiry—Joint Assessment.—In detinue for several slaves, if their value be jointly assessed in the verdict, judgment ought not to be entered, but a writ of inquiry to ascertain their respective values should be awarded. *Cornwell v. Truss*, 2 Munf. 196.

Power of Court.—"In whatever respect the clerk may have erred in entering judgment, the court may on proper evidence, nullify the error by making the judgment entry fully and correctly express the

judgment rendered." 1 Green Judgm. sec. 73; *Davis v. Trump*, 43 W. Va. 191, 27 S. E. Rep. 397.

B. COSTS.—"The general principle is, that costs are considered as an appendage to the judgment, rather than a part of the judgment itself; that they are considered, in some sense, as damages, and are always entered, in effect, as an increase of damages by the court. This doctrine is to be found in 3 Bl. Com. 399." *ROANE, J. M'Rea v. Brown*, 2 Munf. 47; *Douglass v. McCoy*, 24 W. Va. 725.

Judgment for Costs in Favor of Successful Judgment.—It was held in *Pates v. St. Clair*, 11 Gratt. 23, that before the act, Code of Va. 1849, p. 706, sec. 9, providing that where there shall be a judgment for the defendant's costs in a suit brought in the name of one person for the benefit of another, such judgment shall be against that other; a judgment may be rendered for costs in favor of a defendant, against a person for whose benefit a suit was brought, when the defendant succeeded in the case.

C. COIN AND CURRENCY.

Judgment for Sterling Money Value.—In an action of debt upon a protested bill of exchange drawn for sterling money, if the declaration is for the *current money value* of the sum for which the bill was drawn, the judgment being for the sum so demanded, will be reversed on a writ of error. The suit should have been for the sterling money. *Scott v. Call*, 1 Wash. 115; *Skipwith v. Baird*, 2 Wash. 166. In the latter case, *Scott v. Call* was distinguished on the ground that the damages were considered as being laid in current money, whereas they ought to have been laid in sterling money.

In an action of debt on a bond, the judgment is always entered for the penalty to be discharged by the principal and interest; and if that exceed the penalty, the defendant has his election, and may satisfy it by paying the penalty. *Atwell v. Towles*, 1 Munf. 175.

A sterling judgment may be reduced into currency at the time of entering judgment on a forthcoming bond. *Scott v. Hornsby*, 1 Call 41.

Fixing Rate of Exchange.—It is necessary on judgments for sterling money, that the court should fix the rate of exchange. *Taylor v. M'Clean*, 8 Call 557.

Penalty in Current Money.—After the verdict for the plaintiff, in debt on a bond, the penalty of which was in current money, with condition to pay so much sterling money, the judgment should be for the current money mentioned in the penal part of the bond, to be discharged by the sterling money in the declaration, and the court ought to settle the rate of exchange, which on an appeal should appear on the record. *Terrell v. Ladd*, 2 Wash. 150.

D. ENTRY NUNC PRO TUNC.—The power of courts to make entries of judgment and orders *nunc pro tunc*, in proper cases and in furtherance of the ends of justice, has been recognized and exercised from the earliest times; and the period in which the power may be exercised is not limited. *Weatherman v. Com.*, 91 Va. 796, 22 S. E. Rep. 349.

Unlawful Detainer.—Where, in an action of unlawful detainer, the jury finds for the plaintiff, and a stay of the issuance of a writ of possession for sixty days is entered to allow the defendants to apply to the circuit court for a writ of error and supersedeas, and they fail to present their petition therefor during the two following terms, it is proper at the third term to enter judgment *nunc pro tunc* as of the time the stay was granted, under the provisions of Va.

Code 1887, sec. 8124, which provides that "all causes upon the docket of any court, and all other matters ready for its decision, which shall not have been determined before the end of a term, whether regular or special, shall, without any order of continuance, stand continued to the next term." *Van Gunden v. Kane*, 88 Va. 501, 14 S. E. Rep. 834.

Entry Nunc Pro Tunc by Justices without Notice.—It has been held where two justices presided at a trial at which a verdict was rendered, but no judgment thereon was entered, and subsequently, nearly two years afterwards, the same justices, without notice, met and undertook to enter a judgment upon the verdict *nunc pro tunc*, that such entry *nunc pro tunc* was unauthorized and illegal, and was properly treated by the circuit court as a nullity. See Code of W. Va., ch. 50, sec. 114; *McClain v. Davis*, 87 W. Va. 830, 16 S. E. Rep. 629.

Signing by Judge.—A judge may sign a day's proceedings in the order book at the next term *nunc pro tunc*. *Weatherman v. Com.*, 91 Va. 798, 22 S. E. Rep. 849. See Va. Code, sec. 8114.

Judgment on Covenant of Married Woman.—A judgment on a covenant of a married woman against her separate estate may be entered as a personal judgment against her. *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. Rep. 917.

Judgment Erroneously Entered in Singular Number.—The validity of a judgment against two defendants is not affected because of a merely clerical error in entering the same against them in the singular number, "defendant," instead of the plural number, "defendants." *Roach v. Blakey*, 89 Va. 707, 17 S. E. Rep. 228.

Summary Entry.—A judgment ought never to be given, in a summary way, in favor of any plaintiff who does not bring himself fully within the terms of the act under which he proceeds. *Stuart v. Hamilton*, 2 H. & M. 48.

E. ENTRY IN VACATION.—A court has no power to enter an order or judgment in vacation, unless so authorized by statute. *Kinports v. Rawson*, 29 W. Va. 487, 2 S. E. Rep. 85; *Johnson v. Young*, 11 W. Va. 673; *Monroe v. Bartlett*, 6 W. Va. 441.

Surplusage.—Where judgment is recovered for a certain sum of money, dischargeable by the transfer and delivery, in six months, of certain stock, and the stock is not delivered within the time, the court cannot, on motion for execution on the judgment, presume that the sum stated in the judgment is the amount the plaintiff was entitled to recover, and rejecting the latter part of the judgment as surplusage, award execution thereon for the money. *Orange, etc., R. Co. v. Fulvey*, 17 Gratt. 366. But see *Ross v. Gill*, 1 Wash. 90, in which the judgment was for £490 to be discharged by the payment of £420 and the court held that the latter part was no part of the judgment, but merely surplusage.

Where the judgment directs that the plaintiff shall recover his freedom, "and that he be discharged from the imprisonment in the declaration," the latter clause will be regarded as mere surplusage, as the first part of the judgment had the effect to discharge the plaintiff from the custody of the defendant. *M'Michen v. Amos*, 4 Rand. 184.

Signing by Judge—Statutes Directory.—"The authorities generally hold that statutes relating to the recordation of deeds and the docketing of judgments are merely directory, and the failure of the clerk or other officer to comply with their provisions cannot affect the rights of parties claiming under such deeds or judgments. In *Beverley v. Ellis*, 1

Rand. 102, it is decided that where a deed is duly proved, or acknowledged and left with the clerk for recordation, it is considered as recorded from that time, although it was never recorded, but lost by the negligence of the clerk. In *Rollins v. Henry*, 78 N. Car. 842, it was held that the requirement of the statute that a judge shall sign all judgments rendered in court is merely directory, and his omission to do so will not vitiate it as to strangers." *Shadrack v. Woolfolk*, 32 Gratt. 718.

VIII. JUDGMENTS ON AWARDS.

Award in Submission in Pais.—An order of a circuit court setting aside an award made by arbitrators upon a submission *in pais* of matters as to which there is no action pending but which provides that the award shall be made the judgment of the court, is such a final judgment that a writ of error will lie from it to the supreme court. *Tennant v. Divine*, 24 W. Va. 887.

See monographic note on "Arbitration and Award" appended to *Bassett v. Cunningham*, 9 Gratt. 684.

A. ENTRY.

Entry as Judgment of Court.—If, pending a suit, the parties by an order of the court, refer the matter in controversy to arbitrators, whose award is to be made the judgment of the court; and, afterwards, by an agreement under seal, appoint a substitute for one of them; agreeing that an award, to be made by the remaining referees and such substitute, shall be entered as the judgment of the court; such award may be so entered, without any previous order of the court confirming the appointment of such substitute. *Manlove v. Thrift*, 5 Munf. 493.

No Pending Suit.—Nor is it essential to give the circuit court jurisdiction to enter an award as the judgment of the court upon a submission *in pais* of matters as to which there is no pending suit, that the agreement should declare in terms, that the submission shall be entered of the record. *Tennant v. Divine*, 24 W. Va. 887.

Payment to Sheriff.—Where it is agreed in the submission to arbitrators that the money awarded to the plaintiff is to be paid to the sheriff, for the benefit of the plaintiff's creditors, the judgment should be so entered. *Conpland v. Anderson*, 2 Call 106.

Refusal to Enter Judgment According to Award.—But a court's refusal to enter a judgment according to an award, without proceeding to determine the controversy, is not a judgment, from which an appeal can be taken. *Manlove v. Thrift*, 5 Munf. 493.

Time of Entry of Judgment.—A submission to arbitration, by rule of court, of a matter of controversy in a suit pending, is not within the statute concerning awards, and so, the court may proceed to judgment on an award at the same term to which it is returned. *Wheatley v. Martin*, 6 Leigh 62.

Reference Denying Pendency of Suit.—If there be an order of reference made during the pendency of a suit, the award in pursuance thereof, need not lie in court two terms before judgment is entered, as it is not within the act of assembly, upon awards. *Holcomb v. Flournoy*, 2 Call 433.

Filing Objections—Waiver.—It is not necessary that the award should lie in court two days before judgment, if the party offers exceptions; for that is a waiver. *Mitchell v. Kelly*, 1 Call 379.

Objections to Entry as Judgment of Court.—But *ex parte* affidavits may be read against or in support of objections to the entering of an award as the judg-

ment of the court, especially where they are not objected to in such courts, but they should be given much less weight than testimony taken in court or on notice subject to cross-examination. *Tennant v. Divine*, 24 W. Va. 387.

B. DEATH OF PARTY AFTER SUBMISSION.—

After submission to arbitration by rule of court, if the plaintiff dies, and the suit is revived by his administrator and the administrator of the plaintiff and the defendant proceed in the arbitration, without any new submission, and an award is made, the death of the plaintiff does not avoid this submission and the award is good. *Wheatley v. Martin*, 6 Leigh 62.

IX. JUDGMENTS ON APPEAL.

Leave to Apply to Trial Court for Relief.—Where on a bill for specific performance, the contract proved varies from that set up in the bill, and the contract proved is clear and certain in its terms, and is such as a court of equity might properly enforce, and the court below decrees a specific execution of the contract set out in the bill, the decree must be reversed; but the appellate court will not dismiss the bill; it will remand the cause to the court below, to put the plaintiff to his election, whether to have a specific performance of the "contract as proved," or to have the same rescinded, and the parties put in *status quo*. *Baldenberg v. Warden*, 14 W. Va. 397.

A. REMAND WITHOUT DECISION.—But where judgment has been rendered on an indictment for an injury done with intent to maim, etc., the appellate court will not on reversing the judgment enter such judgment as the circuit court ought to have rendered but will remand the case for a proper judgment to be entered on the verdict. *State v. Mooney*, 27 W. Va. 546.

However, where the circuit court entered judgment for solitary confinement, for a period different from that indicated by the statute, the appellate court will reverse this judgment and enter the proper judgment. *Brooks' Case*, 4 Leigh 669; *Murry's Case*, 5 Leigh 720; *Hall's Case*, 6 Leigh 615.

Rendering Final Judgment.—Where a circuit court, in rendering a judgment against a defendant convicted of a misdemeanor, adds to its judgment an order requiring the defendant to give a peace bond, the case, on writ of error, will be reversed and the proper judgment will be entered by the appellate court without remanding it to the court below. *State v. Gould*, 26 W. Va. 259.

Relief between Coappellees.—"The decree being deemed right in all respects as it affects the questions in controversy between the appellants on the one hand, and each and all of the appellees on the other, I think the court cannot take cognizance, on this appeal, of any question between the appellees. The power of the court to take cognizance of such questions arises only when, on the questions between the appellants on the one hand, and one or more of the appellees on the other, a decision is made which directly or incidentally disturbs the rights of one or more of the appellees, as settled by the decree appealed from. When such disturbance is the consequence of the decision of the question between the appellants and the appellees, there must necessarily result the questions that arise from the new position in which the rights of the appellees are placed; and of such questions the court of appeals has cognizance, and they should be

decided by the court." *Powell v. White*, 11 Leigh 309.

Explanation of Judgment.—The court of appeals, in affirming a judgment will add any explanation, which may be necessary to make it correctly understood. *Mayo v. Purcell*, 8 Munf. 248.

Failure to Direct That Evidence Be Received.—But if a superior court of common law, in reversing a judgment and awarding a new trial, assigns the reason to be that certain evidence should have been received on the former trial, but fails to direct that, upon a new trial, such evidence shall be received, the court of appeals, in affirming its judgment, will add the proper direction concerning the evidence. *Brooke v. Shelly*, 4 H. & M. 206.

B. MODIFICATION AND AMENDMENT.

Power of Court to Modify.—It seems to be the rule that an appellate court may amend or correct a judgment for clerical or trivial errors and mistakes, or may add to its judgment any provision that may be necessary to do justice between the parties, such as where judgment is rendered for more damages than are laid in the declaration, or for a sum greater than the debt. *Lewis v. Arnold*, 13 Gratt. 454; *Alleman v. Kight*, 19 W. Va. 201; *Linsey v. McGannon*, 9 W. Va. 155. See *Peters v. Neville*, 26 Gratt. 549; *Mustard v. Wohlford*, 15 Gratt. 329; *Stanard v. Brownlow*, 8 Munf. 229.

District Courts.—A district court has no power or jurisdiction to reverse, alter or amend a judgment given at a former term of the court, which had been entered on the order book, and signed by a judge in open court. *Halley v. Baird*, 1 H. & M. 24.

Correction by Same Court.—For an error in the judgment of a court can never be corrected by the same court. *Gordon v. Frazier*, 2 Wash. 130.

1. TIME OF AMENDMENT—GENERAL RULE.—The rule at common law is that during the term wherein any judicial act is done, the records are in the breast of the court and in their remembrance and may be amended; but after the term no amendment can be made, except of a mere clerical misprision. *Ca-wood's Case*, 2 Va. Cas. 527; *Manion v. Fahy*, 11 W. Va. 496; *Smith v. Knight*, 14 W. Va. 749; *Bank v. Jarvis*, 26 W. Va. 785; *Bunting v. Willis*, 27 Gratt. 158; *Lingle v. Cook*, 32 Gratt. 262; *Kelty v. High*, 39 W. Va. 381, 1 S. E. Rep. 561; *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. Rep. 588; *Barnes v. Com.*, 92 Va. 794, 23 S. E. Rep. 784.

Generally the judgment of a court is under and subject to its control during the term at which it is rendered, and it may set aside the judgment, at any time before the end of the term without notice, but when that term ends such judgment becomes final and passes beyond the control of the court, unless perhaps a motion be made during such term to set it aside, and such motion is continued until the next term. *Green v. Railroad Co.*, 11 W. Va. 686; *Price v. Com.*, 4 Va. Law Jr. 426, 33 Gratt. 819, 36 Am. Rep. 797.

Judgment Interlocutory.—"Even after the close of the term, however, the court may modify or set aside any judgment or decree made at a former term, if it be interlocutory and not final in character. 1 Black, Judgm. § 308; *Wright v. Strother*, 76 Va. 857. But, after the term, the court has no power to modify or annul any final judgment or decree, except in law cases for certain causes by writ of error *coram nobis* or motion, under chapter 184 of the Code, and in chancery for certain causes, and in certain cases by bill of review or motion under said chapter. The final judgment or decree ends the case, and neither the parties nor the subject-

matter in litigation are any longer before the court, and, therefore, any subsequent action in the case, being without parties or subject-matter before the court, is null and void unless made under some lawful mode of review. *Ruhl v. Ruhl*, 24 W. Va. 279; *Crim v. Davisson*, 6 W. Va. 465; *Hall v. Bank*, 15 W. Va. 228; *Battaille v. Maryland Hospital*, 76 Va. 68; *Johnson v. Anderson*, 76 Va. 766; 1 Freem. Judgm. § 96." *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. Rep. 588.

Judgment Final.—But a final judgment or decree of one term of a court cannot be impaired or set aside at another term, because of the close of the first term, unless upon such proceedings as the law points out for review. *Crawford v. Fickey*, 41 W. Va. 544, 23 S. E. Rep. 662.

A court can set aside at one term an order made in the progress of the cause at a former term, which is interlocutory, but not a final judgment. An order which merely sustains a demurrer to a declaration, or strikes out a court or item of claim, but followed by no judgment as to it, is interlocutory in nature, and the count or item of claim may be reinstated in the declaration at a subsequent term. *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 20 S. E. Rep. 699.

Moreover, until the court adjourns for the term, no one, unless expressly authorized to do so, can act under a decree or judgment entered at that term, except at his peril. During the term all the proceedings are in the breast of the court, and under its control, and liable to be stricken out, altered or amended during the term, and that without notice to the parties. *Clendenning v. Conrad*, 91 Va. 410, 21 S. E. Rep. 818, citing *Green v. P. W. & Ky. R. Co.*, 11 W. Va. 686.

May Grant Certificate of Judgment.—But the court of appeals will direct their clerk to grant a certificate of their judgment, during term time, if it be absolutely necessary to attain the justice of the case. *Brown v. Crippin*, 4 H. & M. 173.

End of Term—Modification—Amendment.—After the end of the term, however, the court has no power to modify or annul any final judgment or decree, except in certain causes, by writ of error *coram nobis* or motion under § 134 of the West Virginia Code. *Barbour County Court v. O'Neal*, 42 W. Va. 295, 26 S. E. Rep. 182; *Crawford v. Fickey*, 41 W. Va. 544, 23 S. E. Rep. 662, citing *Ruhl v. Ruhl*, 24 W. Va. 279; *Morgan v. R. Co.*, 39 W. Va. 19, 19 S. E. Rep. 589; *Wright v. Strother*, 76 Va. 857; *Green v. R. Co.*, 11 W. Va. 686.

Judge's Recollection, Evidence Aliunde.—Or unless there is something in the record by which amendments can be safely made, but they cannot be made upon the individual recollection of the judge, or upon proofs *aliunde*. *Barnes v. Com.*, 92 Va. 794, 23 S. E. Rep. 784.

Omission to State Entry of Plea, Joinder of Issue.—As it is error in a court to amend a record, after the term at which the judgment was rendered, therefore, if the record omits to state that a plea was entered, and issue joined, the court cannot, after the term at which judgment was rendered, direct a plea to be entered, *nunc pro tunc*, upon the evidence of the clerk that a plea was filed, and issue joined. *Sydnor v. Burke*, 4 Rand. 161.

Action Presumed Right.—When a judgment is set aside by the court during the term at which it was rendered, the appellate court will presume that it was rightfully set aside, unless the contrary affirm-

atively appears by the record. *Green v. Railroad Co.*, 11 W. Va. 686.

Correction at Subsequent Term.—On the other hand, that a court has a right at a term, subsequent to the one at which a judgment is rendered, to correct, by an order *nunc pro tunc*, a clerical error or omission in the original entry, is indisputable. The error, whether of omission or commission, must appear from the record in which the entry of judgment is made. *Black, Judgm.* 131; *McClain v. Davis*, 37 W. Va. 330, 16 S. E. Rep. 639.

For example, such a clerical error as entering a judgment in the office without awarding an inquiry of damages, may properly be corrected at a subsequent term. *Shelton v. Welsh*, 7 Leigh 175.

But if the jury finds a right verdict, and the district court records it wrongly, entering judgment upon it as recorded, they cannot correct the error by the true verdict, at a subsequent term. *Freeland v. Field*, 6 Call 12.

Discretion of Court.—Until the the term ends, every judgment or decree may for good reason be modified or set aside in whole or in part. The court has a discretion to do this, in the exercise of which the supreme court will not interfere except for the most cogent reasons. *Parkersburg Nat. Bank v. Neal*, 28 W. Va. 744.

C. CLERICAL ERRORS OR MISTAKES.

Common-Law Rule.—"At the common law, an error committed by the court, not in a point of judgment, but such as might be called a misprision of the court, could be amended; but no misprision of the clerk was amendable after the term." *Com. v. Winstons*, 5 Rand. 546.

If an error is merely clerical the appellate court will correct and affirm the decree, but if it be judicial, the decree will be reversed, with costs to the appellee in either event. *Bee v. Burdett*, 23 W. Va. 744. See also, *Renick v. Ludington*, 20 W. Va. 511.

Allowance of Too Much Interest.—Where an action is brought on a note, which was executed at the time when five per centum was the legal rate of interest, upon which the defendant acknowledged the action for the principal with interest from the date of the note; on which acknowledgment a judgment was rendered for the principal, with interest at the rate of six per centum per annum; this is not a mere clerical error, but one which can only be rectified by an appellate court. 1 Rev. Code 512; *Bent v. Patten*, 1 Rand. 25.

But where a judgment is rendered by default in the general court, upon motion, on a bond due the commonwealth; but the clerk, in entering the judgment, only allows interest from a date posterior to that, from which by the terms of the bond, interest was to run; this error may be amended, upon motion to the general court, at a succeeding term. 1 Rev. Code 512, § 108; *Com. v. Winstons*, 5 Rand. 546.

It seems, moreover, that where the clerk erroneously enters judgment upon *nil dicit* in the county court, or an office judgment in the county or circuit courts, for interest from the date of the bond with a penalty, when it should have been with interest from the day of payment, as provided for in the bond, such error is a clerical mistake, amendable by the court, at a subsequent term. *Eubank v. Sandige*, 4 Leigh 308.

Erroneous Entry at Rules.—A judgment at rules in the clerk's office of a county court ought to be entered as of the last day of the succeeding quarterly term, but, if it be entered as at rules only, it

is merely a clerical misprision, and therefore amendable. *Digges v. Dunn*, 1 Munf. 56.

Where the clerk enters the "common order," when he should have issued a new summons, this is a clerical misprision by the clerk, and the office judgment may be amended under Va. Code 1873, ch. 177, §§ 5 and 6, p. 1135.

Executor—Judgment De Bonis Propriis.—Where a judgment by default *de bonis propriis* is erroneously entered against an executor, it is a clerical error to be amended upon motion to the lower court, and is not a ground of appeal to the higher court. *Sneed v. Coleman*, 7 Gratt. 300, 56 Am. Dec. 112.

Error in Order of Court.—But an error in the order of the court, or an omission to make an entry in the order book is not a clerical, but a judicial error. *Cawood's Case*, 3 Va. Cas. 527.

Failure of Clerk to Notice Memorandum.—Where the clerk enters up a judgment by *nil dicti*, in debt on bond for the payment of tobacco, without noticing a memorandum indorsed on the bond, such mistake is merely clerical and amendable upon motion, at a subsequent term. *Gordon v. Frazier*, 2 Wash. 130.

Bond for \$188, Declared on as Bond for \$108.—On the other hand, where an action of debt is brought upon a bond for \$188, but is declared on as a bond for \$108, the bond being in fact for \$188, this is not such a clerical error as may be amended under the 108th section of the statute of jeofails, 1 Rev. Code, ch. 128, p. 512. *Compton v. Cline*, 5 Gratt. 137.

Error Must Be Apparent.—Where, by an error of the clerk, a judgment by confession is entered, instead of a *nil dicti*, this is not such a clerical misprision as can be corrected by the court at the next term, under either the first or the fifth sections of ch. 181, of the Va. Code, p. 680, which only applies where the error appears in some part of the record. *Richardson v. Jones*, 12 Gratt. 53.

Error Must Appear of Record.—The amendments authorized by Va. Code, ch. 181, § 5, p. 181, providing for the reversal and amendment of judgments in certain cases in the same court, at a subsequent term, or by the judge in vacation, are to be based upon something in the record, and not upon the recollection of the judges who presided at the trial, or by evidence *aliunde*. *Powell's Case*, 11 Gratt. 822; *Richardson v. Jones*, 12 Gratt. 53.

Copy of Judgment Does Not Show Where or When It Was Rendered.—It was held in *Cox v. Thomas*, 9 Gratt. 312, that though the copy of the judgment against the high sheriff in the record, does not show in what court or when it was rendered, it is a mere clerical omission in copying the judgments into the record, and if these facts appear from any other part of the record, it will be held sufficient in the appellate court, when the objection was not made in the court below.

Informality in the Entry.—Any informality in the entry of the judgment by the clerk must be corrected in the court below, and is no ground for reversal in the appellate court. *Roach v. Blakey*, 89 Va. 707, 17 S. E. Rep. 228.

Error in Taxation of Costs.—Where the appellate court has a case before it properly on other grounds, it will correct any error in the court below as to costs, though it would not for that alone reverse. *Farmers' Bk. v. Woodford*, 84 W. Va. 480, 12 S. E. Rep. 544.

If an appeal is taken from a decree of the circuit court to the court of appeals and the case is within its jurisdiction, the matter in controversy must be

inquired into and determined, and if the decree be found to be right, in all other respects, and erroneous as to costs, the court of appeals will not reverse the decree, because of such error, as to costs; but may, in the proper case, correct the decree, as to the error, and affirm it, as corrected. *Jones v. Cunningham*, 7 W. Va. 707; *Railroad Co. v. Harness*, 24 W. Va. 511.

A judgment for costs in favor of the "overseers of the poor for the use of the woman," where the case proceeds in the name of the woman, is not an error, of which the defendant can complain. *Tennant v. Brookover*, 12 W. Va. 338.

Justices' Judgments—Good Grammar—Tenses.—By § 180, ch. 50 of the W. Va. Code, all formalities in the entry of a justice's judgment are dispensed with, and it is sufficient if the truth be stated so as to be intelligible. "Good grammar is not essential to a good judgment. The mistake of a proper tense will not render a justice's judgment unintelligible or invalid. Justices are not usually educated men, learned either in the intricacies of law or grammar, hence their records must be scanned with the greatest leniency." *Davis v. Trump*, 43 W. Va. 191, 27 S. E. Rep. 397.

Statutory Provisions.—Section 2451 of the Va. Code, provides for the correction of such errors as misprisions of the clerk and what may be termed clerical misprisions of the court. This has been the construction heretofore placed upon the statute. It has no application to errors in the reasoning and conclusions of the court about contested matters. *Shipman v. Fletcher*, 91 Va. 473, 23 S. E. Rep. 458. See also, *Rees v. Conococheague Bank*, 5 Rand. 326.

Amendments to Support Judgment.—The amendments authorized by Va. Code, ch. 181, § 5, p. 681, providing for the reversal and amendment of judgments in certain cases in the same court, are amendments to support the judgments, not amendments to give ground for reversing it. *Powell's Case*, 11 Gratt. 822.

Correction on Motion.—Under Va. Code, 1873, ch. 177, § 5, upon notice to the opposite party, his agent, or attorney at law or in fact, the court wherein the decree is rendered, may on motion, correct such decree as to any clerical error therein where there is sufficient in the record to enable the court to safely amend the same. *Dillard v. Dillard*, 77 Va. 820.

The power of amendment, allowed by 1 Rev. Code 512, § 108, applies to a motion as well as to an action, and extends to the general court. *Com. v. Winstons*, 5 Rand. 546.

Applies to Mistakes and Misrecitals.—The second clause of § 5, ch. 184 of the W. Va. Code, authorizes amendments and corrections only in cases of mistakes and misrecitals when the same may be safely amended from some other part of the record. The clause is confined to mere clerical and not judicial errors. Judicial errors, where the judgment is not by default, can be corrected only by an appellate court. *Stringer v. Anderson*, 23 W. Va. 483. See also, *Connor v. Fleshman*, 4 W. Va. 693; *Railroad Co. v. Harness*, 24 W. Va. 511.

Applies to Judgments by Default, and to Decrees Confessed.—Va. Code, § 3451, applies only to judgments by default and to decrees on bills taken for confessed, and to cases of mistake or miscalculation, for which no appeal lies to the supreme court. *Thompson v. Carpenter*, 88 Va. 702, 14 S. E. Rep. 181; *Stringer v. Anderson*, 23 W. Va. 482.

D. WRIT OF ERROR CORAM NOBIS.

When It Lies.—A writ of error *coram nobis* lies where some defect is alleged in the process or execution thereof, or some misprision of the clerk, or some error in the proceedings arising from a fact not appearing upon their face, as where judgment is rendered against a party after his death, or who is an infant or *feme covert*. *Gordon v. Frazier*, 2 Wash. 180; *Bent v. Patten*, 1 Rand. 26; *Richardson v. Jones*, 12 Gratt. 53.

When It Does Not Lie.—But a writ of error *coram nobis* does not lie to correct any error in the judgment of the court, nor to contradict or put in issue a fact directly passed upon and affirmed in the judgment itself. If this could be done there would be no end to litigation, and little security for the titles to property. *Richardson v. Jones*, 12 Gratt. 53.

Insanity.—A writ of error *coram nobis*, or a motion in lieu of it, is not a proper process to reverse a judgment, because the defendant was insane at the time of its rendition, as the judgment can be attacked for such cause only in equity. *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. Rep. 816.

Death before Judgment Obtained.—But an injunction ought not to be granted on the ground that the plaintiff was dead before the judgment was obtained in his name. This error should be rectified by a writ of error *coram nobis*. *Williamson v. Appleberry*, 1 H. & M. 206.

Where a clerk commits a merely clerical error in entering up a judgment, the injured party may if he please, proceed by writ of error *coram nobis*, which is a plain, cheap, summary, and complete remedy at law, but the proceeding now, is merely by motion to the court. *Gordon v. Frazier*, 2 Wash. 180; *Goolsby v. St. John*, 25 Gratt. 146.

Limitation to Proceedings.—The statute of limitations of writs of error, if it applies to writs of error *coram nobis* at all, cannot be relied on without being pleaded. *Eubank v. Ralls*, 4 Leigh 308.

E. REVERSAL—GROUNDS.

Harmless Error.—Where it is proper that the court, and not the jury, should pass on a matter, and find thereon, but a jury finds upon it, and the court renders judgment; if the judgment is the same as the court should have given if it had expressly found on such matter, this error is harmless, and not a cause for reversal. *Miller v. White*, 46 W. Va. 67, 33 S. E. Rep. 332.

Nor will judgment be reversed for errors not prejudicial to the complaining party. *Johnson v. Jennings*, 10 Gratt. 1.

Error of Few Cents.—A judgment regularly obtained should not be set aside for an error of a few cents in the amount for which the judgment should have been rendered. The rule *de minimis lex non curat* should be applied. *Ramsburg v. Kline*, 96 Va. 465, 31 S. E. Rep. 608.

Judgment Includes Both Declaration and Bill of Particulars.—A judgment sustaining a demurrer to both the declaration and bill of particulars will not be reversed for having included both, where the counsel agreed in writing that the case as made by both should be considered. *King v. Norfolk, etc., Ry. Co.*, 99 Va. 625, 39 S. E. Rep. 701.

Imperfect Statement in Bill of Exceptions.—In *Beattie v. Tabb*, 2 Munf. 254, judgment was reversed, because the bill of exceptions stated the facts imperfectly. See also, *Barrett v. Tazewell*, 1 Call 215.

Refusal to Strike Out Special Plea.—A judgment will not be reversed, on appeal for refusal to strike out a special plea of matter which could have been

admitted under the general issue, since a judgment can only operate as an estoppel as to facts which are specially pleaded. *C. & O. R. Co. v. Rison*, 99 Va. 18, 37 S. E. Rep. 320.

Refusal to Grant Continuance.—But a judgment may be reversed on the ground that a continuance of the cause should have been granted, instead of ruling the party to trial when unprepared. *Hook v. Nanny*, 4 H. & M. 157.

Jointure.—In averring a jointure in bar of dower, the failure to state in the plea, that the husband "being seized in fee of the premises" made the jointure, is not a substantial defect, nor sufficient to authorize the reversal of a judgment for the tenant, the defendant having failed to assign it as a cause of demurrer. *Ambler v. Norton*, 4 H. & M. 23.

Erroneous Instruction.—A judgment for the plaintiff ought not to be reversed, on the ground that the court, at the instance of the defendant, gave an erroneous instruction to the jury. *Murrell v. Johnson*, 1 H. & M. 450; *Preston v. Harvey*, 2 H. & M. 55.

"A judgment will not be reversed by the appellate court for an erroneous instruction, if it can clearly see that the losing party could not have been prejudiced by it. In *Kincheloe v. Tracewells*, 11 Gratt. 587, 609, this court said: 'If the questions involved in the instructions, are decided erroneously the judgment should not on that account be reversed, if the court can see from the bill of exceptions that they did not and could not affect the merits of the case before the jury.'" *Danville Bank v. Waddill*, 37 Gratt. 448; *Binns v. Waddill*, 32 Gratt. 588, and *note*.

Judgment Depending on Prior Judgment.—A judgment depending on a prior judgment, which prior judgment is reversed, may be reversed without error apparent on the record of the subsequent judgment, other than the connection between the subsequent and the prior reversed judgment. *Conway v. Hall*, 1 Va. Cas. 6.

Admission of Improper Evidence.—But a judgment ought not to be reversed on the ground that improper evidence offered to the jury by the appellant, was admitted by the inferior court, where it appears that such evidence did not influence the verdict. *Hamlin v. Harriss*, 2 H. & M. 550; *Harrison v. Brock*, 1 Munf. 22.

Admission of Illegal Evidence.—So also, a judgment ought not to be reversed on the ground that the court below admitted illegal evidence, or gave an erroneous instruction to the jury, unless it appears that some injury could possibly have resulted therefrom to the party appealing. *Preston v. Harvey*, 2 H. & M. 55.

Compelled to Join in Demurrer to Evidence.—Nor ought a judgment to be reversed on the ground that the court erroneously compelled the other party to join in a demurrer to evidence. *Harrison v. Brock*, 1 Munf. 22. See also, *Rheims v. Ins. Co.*, 39 W. Va. 672, 20 S. E. Rep. 670.

Exclusion of Evidence—Relevancy.—Moreover, the judgment of a court shall not be reversed for excluding evidence, unless the case stated in the record shows the relevancy of the evidence excluded. *Rowt v. Kile*, 1 Leigh 216.

Re-examination of Witnesses.—And a judgment will not be reversed because the court permitted witnesses to be recalled for further examination in chief, unless the second examination was palpably improper. *Tate v. Bank*, 96 Va. 765, 33 S. E. Rep. 478; *Burke v. Shaver*, 92 Va. 352, 23 S. E. Rep. 749; *Brooks v. Wilcox*, 11 Gratt. 411; *Fant v. Miller*, 17 Gratt. 187.

Joint and Several Note of Three.—A judgment cannot be set aside on the ground that the note upon which the judgment was rendered, was the joint and several note of three persons, while the action was brought and judgment obtained against only two of them. No evidence could be introduced on that subject until after the judgment had been set aside. Such evidence might be used after the judgment was set aside in order to prevent a new judgment, but not to set aside a judgment already in force. *Ramsburg v. Kline*, 96 Va. 465, 31 S. E. Rep. 608.

Effect of Striking Out Part of Erroneous Judgment.—When a plaintiff, who has recovered a judgment which, as rendered, is clearly erroneous, seeks to avoid a reversal by striking out a part of the judgment, it is incumbent on him to satisfy the court either by materials in the record or by fair presumption, that this can be done without injustice to the defendant. If he cannot do this, the defendant is entitled to have the erroneous judgment reversed. *Orange, etc., R. Co. v. Fulvey*, 17 Gratt. 366.

Rule under Statute.—Under Va. Code 1873, ch. 177, § 1, judgment will not be reversed for any defect, imperfection, or omission in the pleadings, unless, in the court below, there was a demurrer. The statute is held to cure a defective statement of a good cause of action, but will not validate a declaration which does not state any cause of action at all. *Roanoke Land & Imp. Co. v. Karn*, 80 Va. 589; *Laughlin v. Flood*, 8 Munf. 273; *Boyles v. Overby*, 11 Gratt. 202.

1. EXTENT OF REVERSAL.

Reversal of Part of Judgment.—A judgment may sometimes be set aside in whole or in part only. *Enos v. Stansbury*, 18 W. Va. 477. See also, W. Va. Code, ch. 131, § 19.

Though at common law a joint judgment erroneous as to one must be reversed as to all, still this rule does not apply to void judgments, which are mere nullities. *Gray v. Stuart*, 33 Gratt. 351.

Reversal as to One Party.—At common law, a judgment erroneous as to one is erroneous, and must be reversed, as to all; but in equity, under the statute, if only one appeals from a joint decree, and the rights of the parties stand on different and separable grounds, there may be a reversal only in part. *Vance Shoe Co. v. Haught*, 41 Va. 275, 23 S. E. Rep. 553; *Midkiff v. Lusher*, 27 W. Va. 439; *Hoffman v. Bircher*, 23 W. Va. 587; *Gray v. Stuart*, 33 Gratt. 351.

Where the principal and sureties are sued jointly, and the judgment is erroneous as to the sureties, it must be reversed as to all, although the judgment would have been good against the principal, if he had been sued alone. *Munford v. Overseers of the Poor*, 2 Rand. 313.

Where an office judgment is obtained against two defendants on a promissory note, and is erroneous as to one, it ought to be set aside as to both. *Cole v. Pennell*, 2 Rand. 174.

Joint Judgments.—But a joint judgment cannot be reversed as to one defendant, and affirmed as to the other. *Jones v. Raine*, 4 Rand. 386.

Valid as to One.—Though at common law a joint judgment erroneous as to one must be reversed as to all, yet such is not the rule when the judgment is valid as to one party and absolutely void as to another. *Gray v. Stuart*, 33 Gratt. 351.

Effect on Execution.—When a judgment is set aside, the execution which is issued upon it falls with it,

without any express order to quash the execution. *Ballard v. Whitlock*, 18 Gratt. 235.

Procedure.—A judgment can be set aside or altered only in the mode prescribed, and by the court or officer invested with jurisdiction to do so by law. *Marshall v. Cheatham*, 88 Va. 31, 13 S. E. Rep. 308.

Disposition of Case on Reversal.—Where the county court has decided in favor of the putative father, and the overseers of the poor have spread the facts upon record by an exception, and taken an appeal to the circuit court, that court upon reversing the judgment of the county court, should not send the cause back for a new trial, but should render a judgment in favor of the overseers of the poor for the amount appearing due, but without interest. *Willard v. Overseers of the Poor*, 9 Gratt. 139.

If the right judgment be rendered in the county court, and upon an appeal to the district court, the clerk sends up an erroneous record, on which the judgment is affirmed, that court will, upon a view of the record of the county court, reverse that of the district court, and direct them to issue a writ of *certiorari* for the true record, so that the right judgment may be given. *Williams v. Strickler*, 8 Call 231.

Where a pecuniary judgment has been rendered against a defendant in a criminal case, and he pays, and upon appeal the judgment is reversed, the cause will be remanded to the court below, for an order of restitution to be made therein, if the money is yet in the hands or power of the court. *Old v. Com.*, 18 Gratt. 915. See *Anderson v. Dudley*, 5 Call 529.

Giving Such Judgment as Inferior Court Should Have.—An appellate court ought not to reverse the judgment, without proceeding to give such judgment as the inferior court should have given. *Darby v. Henderson*, 8 Munf. 115; *Blane v. Sansum*, 2 Call 496; *Smith v. Walker*, 1 Wash. 135. See *Anderson v. Nagle*, 12 W. Va. 98; *Anderson v. Dudley*, 5 Call 529.

District Court.—A district court ought not, in any case, merely to reverse the judgment of a county court in *general terms*; but should proceed to render such judgment as the county court ought to render. *Mantz v. Hendley*, 2 H. & M. 308.

Where the court below has given judgment for the plaintiff in a *scire facias*, against bail, for too large an amount, the appellate court will reverse the judgment, and enter judgment for the proper sum. *Bowyer v. Hewitt*, 2 Gratt. 193.

It is the constant course of the court to look into the whole record, and to give the judgment which the court below ought to have given. *Baird v. Mattox*, 1 Call 257.

"Upon reversing a judgment at law, we must enter such judgment as the court below ought to have entered, and we can entertain no motion here for amendment." *TUCKER, P. Wilson v. Bank of Mt. Pleasant*, 6 Leigh 570.

Constitutional Law.—Section 35 of art. 8 of the W. Va. Constitution, does not authorize the setting aside of the judgments therein specified and the granting of new trials thereon. The judgments must stand, until by due process of law it is ascertained that they were rendered "because of acts done according to the usages of civilized warfare in the prosecution of the war," and when so ascertained such judgments are nullities. *Williams v. Freeland*, 19 W. Va. 599; *Griffie v. Halstead*, 19 W. Va. 602; *Peerce v. Kitzmiller*, 19 W. Va. 565; *White v. Crump*, 19 W. Va. 583.

2. AWARD OF DAMAGES ON AFFIRMANCE.

Affirmance—Statute.—The statute allowing damages on affirmance (Acts of 1830-31, ch. 11, § 32, Suppl. to R. C. p. 149), does not apply to the affirmance of a judgment imposing an amercement or fine; the amercement or fine not being a debt or damages, within the meaning of that act. But though the judgment of affirmance in such case awards damages according to law for retarding the execution, yet as no specific damages are thereby adjudged, and the law gives none, the error is merely formal, and the appellate court will disregard it. *Abrahams' Case*, 1 Rob. 675.

Effect of Statute on Pending Cases.—A statute awarding damages on affirmance does not apply to cases pending when the statute went into effect. *Beatty v. Smith*, 2 Hen. & M. 395.

Amount of Damages Awarded.—1 Rev. Code, ch. 109, § 32, p. 149, provides that "Henceforth, upon the affirmance of any decree or judgment whatsoever, of any inferior court by any appellate court, no damages shall be awarded to the party prevailing, beyond legal interest on the debt or damages, or profits of property adjudged, and the costs." See *Mulliday v. Machir*, 4 Gratt. 1, for this statute.

It was held in *Guerrant v. Tayloe*, 2 Call 208, that if there be a judgment against a sheriff, for the amount of money levied on an execution with the thirteen per cent. damages, and he appeals, the appellee, by waiving the ten per cent. damages, for retarding the execution, and taking a simple affirmance of the judgment, may still have his fifteen per cent. damages, according to the judgment of the court below.

No Damages on the Costs.—Where the appellate court reverses the judgment as to costs, the successful party is not entitled to damages on the costs. *Hudson v. Johnson*, 1 Wash. 10; *M'Rea v. Brown*, 2 Munf. 46.

X. JUDGMENTS IN CRIMINAL CASES.

A. PRESENCE IN COURT.—Unless expressly authorized by statute, no court can give judgment of imprisonment, or other corporal punishment, unless the defendant is present in court. *Com. v. Crump*, 1 Va. Cas. 172; *State v. Campbell*, 42 W. Va. 246, 24 S. E. Rep. 875.

Rule Modified by Statute.—In Virginia, however, the rule of the common law that judgment for corporal punishment can be pronounced against a man only when he is personally present is, in cases of misdemeanor, modified by Va. Code, § 4076, providing that no *capias* to hear judgment shall be necessary in any prosecution for a misdemeanor, but that the court may proceed to judgment in the absence of the accused, and if such judgment requires confinement in jail the court may make such order as may be necessary for the arrest of the person, against whom such judgment is, and for the execution thereof. *Shiffett v. Com.*, 90 Va. 386, 18 S. E. Rep. 838; *Price v. Com.*, 33 Gratt. 819.

Therefore, as in a misdemeanor, the personal presence of the defendant is not necessary at the trial; a verdict and judgment for the fine may be found and rendered in his absence; and after the term he must neither move for a new trial nor in arrest of judgment. But until final judgment he may so move. *Pifer's Case*, 14 Gratt. 710.

Reason for Rule.—"Where a man is to receive any corporal punishment, judgment cannot be given in his absence and the reason is that there is a *capias pro fine*, but no process to take a man and put him on a pillory." *Pifer's Case*, 14 Gratt. 710.

Record Must Show Presence.—It seems to be well settled that, in order to sustain a judgment of conviction, the record must show that the prisoner appeared in person, and not by attorney. *Sperry v. Com.*, 9 Leigh 623, 33 Am. Dec. 261; *Hooker v. Com.*, 13 Gratt. 763, and *note*.

Rendition at Same Term.—But, where, at the same term of the court, it sets aside an erroneous judgment and renders a proper one, it is not necessary that the defendant should be present in court when the second judgment is entered. *Price v. Com.*, 4 Va. Law Jour. 426, 33 Gratt. 819, 36 Am. Rep. 797.

Verdict Wrong—Court Should Render Proper Judgment.—Where on trial of the issue on an indictment for burglary, the jury returned a verdict of guilty as charged in the indictment, and the prisoner moved in arrest of judgment, which the court overruled, and sentenced the prisoner to the penitentiary, it was held that the judgment could not be rendered on the verdict, and the court should, on the verdict, have rendered a proper judgment for petit larceny. *State v. Hupp*, 31 W. Va. 355, 6 S. E. Rep. 919.

Sentence by Circuit Court.—A prisoner being sentenced by the court of oyer and terminer before which he was tried, to confinement in the penitentiary for a shorter term than is authorized by the law for the offence of which he was convicted, the circuit court of Henrico county and the city of Richmond may, upon the proper proceedings had before that court, correct the error and sentence the prisoner for the shortest period fixed by the statute for the offence of which he was convicted. *Logan's Case*, 5 Gratt. 692.

Fine.—Where on a prosecution for a misdemeanor, there is a verdict against the defendant for a fine, and the court enters up a judgment thereon for the fine and costs, and directs a *capias ad audiendum* against the defendant, and at a subsequent term sentences him to six months' imprisonment in the county jail, it was held that the judgment for the fine and costs was final, and no further judgment could be rendered in the case. The judgment for the imprisonment was therefore erroneous. *Pifer's Case*, 14 Gratt. 710.

Rendition for Fine Only.—Where an offence is punishable with fine and imprisonment, a superior court may render judgment for the fine only. *Com. v. Crump*, 1 Va. Cas. 172.

Verdict on Bad Count.—But where the verdict is based on a bad count the court cannot sentence thereon. *State v. Cottrell*, 45 W. Va. 337, 32 S. E. Rep. 163.

Several Distinct Terms.—A prisoner convicted of several distinct felonies may be adjudged to undergo several distinct terms of confinement in the penitentiary, the several imprisonments to commence respectively, from and after the expiration of prior imprisonments adjudged against him. *Com. v. Leath*, 1 Va. Cas. 151.

Recital of Judgment.—"It is hardly necessary to say that a mere recital in a felony case that judgment was entered cannot be treated as equivalent to a judgment. The record must affirmatively show the sentence itself. *Spurgeon's Case*, 86 Va. 652, 10 S. E. Rep. 979. And as this is not shown by the record in the present case, it follows that there was nothing upon which the writ of error from the circuit court could operate, and, consequently, that the proceedings in that court were *coram non iudice* and

vold. *Saunders v. Com.*, 79 Va. 522." *Read's Case*, 90 Va. 168, 17 S. E. Rep. 855.

Entry of Proper Judgment.—Where the lower court enters an erroneous judgment or sentence, the judgment will be reversed for this error, and the proper judgment entered. *Brooks' Case*, 4 Leigh 669; *Murry's Case*, 5 Leigh 720; *Hall's Case*, 6 Leigh 615.

Case Must Be Remanded.—But under W. Va. Acts 1893, ch. 18, § 19, the circuit court, on reversing the judgment of an inferior court in whole or in part, because erroneous, is not permitted to enter up such judgment as the inferior court should have rendered, but it must "remand the same back" that a final judgment may be entered. *State v. Bluefield Drug Co.*, 41 W. Va. 638, 24 S. E. Rep. 640; *State v. Mooney*, 27 W. Va. 546. But see *State v. Gould*, 26 W. Va. 258.

XI. ACTIONS ON JUDGMENTS.

Judgment Conditioned on the Existence of Assets.—An action of debt or *scire facias* may be brought upon a judgment "when assets," or "if assets"; and if upon the plea of *plene administravit*, issue is found for the executor or administrator, the plaintiff may take another judgment when assets. *Braxton v. Wood*, 4 Gratt. 25.

In this case the court said: "The plaintiff in thus proceeding upon his judgment *quando acciderint* accomplishes one of two objects, both of which are perfectly legitimate. If he can show that further assets unadministered have come to the defendant's hands since the former judgment, or rather since the former plea of fully administered, he converts his qualified judgment *quando acciderint* into an absolute judgment *de bonis testatoris*, and thereby obtains priority over other creditors in equal degree who have not recovered judgment. If he fails in this, still he revives and keeps alive his former judgment, so as to enable him to subject any assets which may yet accrue after the second judgment.

There is express authority to prove that in a *scire facias* upon a judgment *quando acciderint*, where assets are found as to part, judgment shall be given to recover so much immediately, and the residue of assets *in futuro*. *Perryman v. Westwood*, cited in 1 Vent. 95, and Sid. 448; 2 Wms. Ex'ors, 1231; 3 Tidd's Pract. 1019. I have seen no case where upon such a proceeding and no assets whatever found, judgment has been given for satisfaction out of future assets; and I have seen none to the contrary. But there is no reason for a distinction between a partial and a total failure of assets. If the *scire facias* ought to be barred or abated as to the whole where it is found there are no present assets, the same result ought to follow in regard to any part as to which there is the same finding; and if it is proper to take judgment *quando acciderint* as to part where there are not present assets to satisfy that part, it is equally proper, the like state of things existing, to take such judgment in regard to the whole."

See monographic note on "Debt, the Action of" appended to *Davis v. Mead*, 13 Gratt. 118.

A judgment when assets refers to the time of the plea pleaded, and, as to assets received after that time, no enquiry can be made in that suit. *Gardner v. Vidal*, 6 Rand. 106.

Creditors' Bills.—A foreign judgment is a debt, upon which a suit in equity can be maintained to avoid a fraudulent or voluntary conveyance without first obtaining a judgment at law under Code W. Va. 1868, ch. 133, § 2. *Watkins v. Wortman*, 19 W. Va. 78.

Effect of Pending Appeal.—An action may be maintained upon a judgment in Virginia, rendered by the court of Texas, notwithstanding the pendency of appellate proceedings of Texas, but the Virginia court may order that no execution shall be issued on the judgment obtained in such action, provided the defendant gives bond and security conditioned to satisfy the judgment and pay all damages, cost and fees, etc., in case the writ of error pending in Texas shall be determined adversely to the defendant. *Piedmont, etc., Co. v. Ray*, 75 Va. 821.

Record Destroyed Pending Appeal.—Also, where a defendant, against whom a judgment was rendered took an appeal therefrom, but pending the appeal, the record of the judgment was destroyed by fire, nevertheless the plaintiff is entitled to recover by action of debt on the judgment, notwithstanding the appeal taken from the judgment. *Newcomb v. Drummond*, 4 Leigh 57.

Effect of Supersedeas.—Under art. 4, § 1, of the Constitution of the United States, and the act of congress of May 26, 1790, a writ of error, not operating as a supersedeas, from the supreme appellate court of Texas to a judgment of a district court of that state, will be regarded as having the same effect in Virginia as in Texas. *Piedmont, etc., Co. v. Ray*, 75 Va. 821.

Issuance of Execution.—1 R. C. 1819, p. 499, ch. 128, sec. 5, declaring that where execution has issued and no return is made thereon, the party in whose favor the same was issued may obtain other executions for ten years from the date of the judgment and not after, does not bar such party from maintaining an action of debt on the judgment after ten years. *Herrington v. Harkins*, 1 Rob. 591; *Fleming v. Dunlop*, 4 Leigh 338, opinion of TUCKER, P. But see *Dabney v. Shelton*, 82 Va. 849, 4 S. E. Rep. 605.

Executors and Administrators.—At common law, joint obligations and joint judgments could only be enforced against the surviving obligors or defendants. The death of any of such obligors, or defendants, absolved their personal representatives from all responsibility. *Roane v. Drummond*, 6 Rand. 182.

But under statute, where a joint judgment is obtained against two defendants, and one dies, an action of debt on the judgment lies against the representative of the deceased defendant; the law respecting partitions, joint rights and obligations, 1 Rev. Code 359, being applicable to joint judgments. *Roane v. Drummond*, 6 Rand. 182.

Action by Administrator De Bonis Non.—An administrator *de bonis non* may maintain an action of debt, on a judgment obtained by the executor. *Dykes v. Woodhouse*, 8 Rand. 287; *Wernick v. McMurdo*, 5 Rand. 51.

Persons in Representative Capacity.—But a personal judgment or decree against an executor or administrator, or administrator *de bonis non*, who is sued in his representative character only, is fatally erroneous. *Jones v. Reid*, 12 W. Va. 350, 29 Am. Rep. 455; *Spotswood v. Price*, 3 H. & M. 123; *Pugh v. Jones*, 6 Leigh 299; *Wills v. Dunn*, 5 Gratt. 384; *Humphreys v. West*, 3 Rand. 516.

Judgment to Be Discharged by a Lesser Sum.—In an action of debt on a judgment for a certain sum to be discharged by a lesser; if the declaration demands a wrong sum, and no special demurrer is filed, the error is cured by the statute of jeofails, there being enough in the declaration to show the true amount of the judgment. A verdict which finds an erroneous sum, "that being the debt in the declaration

mentioned," is substantially good, the sum being surplusage, and the conclusion of the verdict being, of itself, sufficient to show the real sum demanded. *Roane v. Drummond*, 6 Rand. 182.

Extent of Recovery.—A high sheriff, against whom a judgment is rendered, for the default or misconduct of his deputy, is entitled to recover of the deputy, not only the amount of the original judgment, but all additions thereto arising from the coroner's commissions included in a forthcoming bond, costs of the judgment on that bond, and costs and damages on appeals, or writs of supersedeas, until its affirmance by the court of appeals. But a judgment in his favor against the deputy, if rendered for more damages than have been recovered against himself, ought to be reversed with costs. *Stowers v. Smith*, 5 Munf. 401.

Limitation to Sue.—The Act of 1 Rev. Code, ch. 128, § 5, p. 480, limiting proceedings upon judgments, applies to judgments "when assets" or "if assets" and will begin to run from the date of the judgment. *Braxton v. Wood*, 4 Gratt. 25.

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Revival against Personal Representative.—Moreover, a judgment obtained against a testator in his lifetime, and not revived against his personal representative after his death, within five years from the time of his qualification, is barred by the statute of limitations. *Peyton v. Carr*, 1 Rand. 436.

A. PLEAS.

1. NUL TIEL RECORD.

Foreign Judgment.—If the court rendering a judgment is a foreign court, it is not judicially known by us as a court of record, and its judgments are not considered as records, hence it follows that the plea of *nul tiel record* is bad, because it is not applicable to foreign judgments. *Draper v. Gorman*, 8 Leigh 628.

"The maxim of the law is, that the judgment of a court of general jurisdiction, imports absolute verity, and its truth cannot be questioned, either by showing, otherwise than by the record itself, that the court had no jurisdiction, or that its jurisdiction was fraudulently obtained. Both upon the merits of the cause of action, and upon all jurisdictional facts, the record imports absolute verity in law, and is to be tried by the court upon inspection of the record only. Hence at law, the validity of the judgment can be put in issue by the plea *nul tiel record* only, and if on inspection it turns out that the plea is not true, there is an end of the controversy. If its validity is to be impeached from without some other appropriate remedy must be found." *Wandling v. Straw*, 25 W. Va. 692. See *Smith v. Johnson*, 44 W. Va. 278, 29 S. E. Rep. 509.

2. NIL DEBET.—The plea of *nil debet* is not a good plea to an action of debt on a judgment of another state of the Union, for the reason that the judgments of sister states, being regarded as domestic judgments, are conclusive in other states, and hence the merits cannot be re-examined. *Kemp v. Mundell*, 9 Leigh 12.

In an action of debt brought in Virginia upon a judgment of the circuit court of the District of Columbia, a plea of *nil debet* is proper, but a special plea, alleging that the judgment was recovered on a bill of exchange drawn while the party was in a

state of intoxication is an improper plea. *Draper v. Gorman*, 8 Leigh 628.

District of Columbia.—In was the unanimous opinion of the court in *Draper v. Gorman*, 8 Leigh 628, that the judgments of the District of Columbia are to be regarded as foreign judgments in the courts of Virginia, and hence the plea of *nil debet*, in action on such judgment, would be a good plea. The court based its opinion on the ground that the full faith and credit clause of the constitution of the United States and the acts of congress did not apply to the District of Columbia but only to the states.

In an action of debt on judgments of the courts of Kentucky the plea of *nil debet* is not a good plea. That plea assumes that the judgment is not conclusive, and if issue were taken on the plea, the plaintiff would waive the conclusive effect of his judgment; this he can only assert by a demurrer to the plea. *Clarke v. Day*, 2 Leigh 172.

"It is abundantly clear that the plea of *nil debet* is, in this view of the case, the proper plea. The proceedings of a foreign court are never looked upon as a record, because they have not the force of a record. This position requires neither argument nor authority for its support." *TUCKER, P. Draper v. Gorman*, 8 Leigh 628.

BROOKE, J., in *Kemp v. Mundell*, 9 Leigh 17, in referring to his opinion in *Clarke v. Day*, 2 Leigh 172, said: "I then entertained the opinion I do now,—that the judgments of our sister states, under the constitution of the United States and the acts of congress in pursuance thereof, are to be treated as domestic judgments; and that the effect of such judgments in the state from which they come, is a question of law, not a question of fact as in the case of foreign judgments. And I was surprised to hear it argued to the contrary in this case."

Thus, it will be observed that where the courts decide that a judgment of another state is a domestic judgment, and hence conclusive, the plea of *nil debet* is inadmissible, but, on the other hand, where they decide that such judgment is a foreign judgment, and for that reason not conclusive upon the courts of the home state, then the plea of *nil debet* is admissible. *Clarke v. Day*, 2 Leigh 172; *Draper v. Gorman*, 8 Leigh 628.

Defence of Want of Jurisdiction.—In any action or proceeding at law upon a judgment of a court of general jurisdiction between the parties thereto, in which such judgment may properly be used as evidence of the right thereby established, the defendant as a matter of defence at law cannot show that the court did not acquire jurisdiction of the defendant, except by an inspection of the record. *Wandling v. Straw*, 25 W. Va. 692.

How Plead.—Where the defence of want of jurisdiction is set up, such defence ought to be specially pleaded, and cannot be made under the plea of *nul tiel record*, nor *nil debet*. *Bowler v. Huston*, 30 Gratt. 266.

General Issue.—"In those states, where the plea of *nil debet* is held to be a good plea to an action of debt on the judgment of a sister state, the defendant may impeach the justice of it under the plea of *nil debet*, upon the ground that he never had notice of the proceeding. But the party may also plead the matter specially, even in those states. And in those states in which *nil debet* is not a good plea, it is obvious, that the defendant is compelled to plead the special matter." *TUCKER, P. Wilson v. Bank of Mt. Pleasant*, 6 Leigh 570. See also, *Draper v. Gorman*, 8 Leigh 628.

Duplicity in Plea.—In *Wilson v. Bank of Mt. Pleasant*, 6 Leigh 570, the defendants pleaded that they never executed the power under which the judgment sued on was confessed, and that they had no notice of the commencement or pendency of the suit in the state where the judgment was rendered. The court held that an objection to the plea on the ground of duplicity was not sustainable.

Amendment of Declaration.—Upon trial of the issue of *nil tiel record*, the court may allow an amendment of the declaration; and, if the defendant consents, may proceed with the trial. But if the suit be in the same court in which the judgment was rendered, it is error to inspect a transcript only, instead of the original record. *Anderson v. Dudley*, 5 Call 529.

Abstracts as Evidence.—An abstract as applied to records means ordinarily a mere brief, and not a copy from which it is taken, and a paper writing being only an abstract of an alleged judgment, and attested as an abstract, although attested by the clerk of the court in which the judgment was rendered, cannot ordinarily be read as proof of the alleged judgment, where the existence of the judgment is denied. *Dickinson v. Railroad Co.*, 7 W. Va. 391.

XII. EQUITABLE RELIEF AGAINST JUDGMENTS.

A court of chancery, under our system of jurisprudence, is not invested with power to annul a judgment, set aside the verdict of the jury and order a new trial at law. It may act on the parties, but not directly on the judgment, nor on the court which rendered it. A judgment by a court having jurisdiction to render it, can be vacated only by some direct proceeding at law, either in the court in which the judgment was recovered or some other court having appellate jurisdiction. *Wynne v. Newman*, 75 Va. 811.

Refusal to Decide Points of Law.—Wherever a case is fully and fairly tried in a court of law, the decision is so far binding, that it can only be examined by an appellate court, and the chancery court cannot interfere, but if the court of law refuses to decide points of law, or to reserve them, it will submit such points to the jury, and if they decide inequitably, chancery may interfere. *Picket v. Morris*, 2 Wash. 255.

Suppression of Evidence.—If the parties in an action at law are at liberty by the issue to go fully into the examination of the evidence, and having done so, a verdict is found, after a fair trial, a court of chancery ought not to direct another trial, unless a part of the evidence was suppressed by the court. *Ambler v. Wyld*, 2 Wash. 36.

But the rule now is that after the cause has been once fully decided, by a court of common law, equity will not grant relief against the judgment. *Terrell v. Dick*, 1 Call 546.

Judgment on Forthcoming Bond.—Judgment on a forthcoming bond, cannot be relieved against in equity on the ground that a slave which, by the condition of the bond, was to be forthcoming on a given day, had run away and could not be produced, even if a more valuable slave was offered in his stead. *Cole v. Fenwick*, *Gilmer* 134.

Failure to Secure Evidence.—But where the judgment debtor could not secure the evidence for his defence until too late to move for a new trial, relief will be granted against the judgment in equity. *Vathir v. Zane*, 6 Gratt. 246; *Harvey v. Seashol*, 4 W. Va. 115.

Gaming Debt.—A court of equity has jurisdiction to relieve against a judgment founded on a gaming

debt, although the party failed to defend himself at law, and gives no good reason for such failure, and though he made no effort to obtain a new trial in the common-law court. *Skipwith v. Strother*, 3 Rand. 214; *White v. Washington*, 5 Gratt. 645.

Where a judgment has been obtained against the obligor, on a bond for money won at gaming, and in the absence of any fraudulent representations by the obligor, a court of equity will relieve the obligor against the judgment on the ground of the original turpitude of the transaction. *Woodson v. Barrett*, 2 H. & M. 80, 3 Am. Dec. 612.

Trust and Confidence.—In a case involving trust and confidence, and in which it appears reasonable to allow the complainant the benefit of the defendant's oath, relief may be given in equity, although the party neglected to make the proper defence at law. *Spencer v. Wilson*, 4 Munf. 130.

Defect of Title.—Where a purchaser comes into a court of equity for relief against a judgment at law, on the ground of a defect in the vendor's title to a part of the tract of land purchased, it is not enough for him to allege such defect or want of title; he must prove an actual eviction, or superior title in some other person. *Yancey v. Lewis*, 4 H. & M. 390. See *Amick v. Bowyer*, 8 W. Va. 7.

Remedy by Statute.—Generally, a party to a judgment or decree against him, who has been proceeded against by order of publication must obtain relief, if he has defence against the claim on which the action or proceeding in which the judgment or decree is had, by adopting the remedy prescribed by the statute in such cases. *Vance v. Snyder*, 6 W. Va. 24.

A. GROUNDS OF RELIEF—GENERAL RULE.—It has become a principle, and maxim of equity, as well settled as any other whatever, that a party will not be entertained in a court of equity, on a bill seeking relief against a judgment at law, which has been rendered against him in consequence of his default upon grounds which might have been successfully taken in the court of law, unless some reason founded in fraud, accident, surprise, or some adventitious circumstances beyond the control of the party be shown, why the defence was not made in that court. *Alford v. Moore*, 15 W. Va. 597; *Braden v. Reitzenberger*, 18 W. Va. 286; *Holland v. Trotter*, 22 Gratt. 141; *Knapp v. Snyder*, 15 W. Va. 434; *Meem v. Rucker*, 10 Gratt. 509; *Smith v. McLain*, 11 W. Va. 654; *Shields v. McClung*, 6 W. Va. 79; *Alleman v. Kight*, 19 W. Va. 201; *Black v. Smith*, 13 W. Va. 800; *Price v. Harner*, 17 W. Va. 523; *Sayre v. Harpold*, 38 W. Va. 553, 11 S. E. Rep. 16; *Haseltine v. Brickey*, 16 Gratt. 120; *Mackey v. Mackey*, 29 Gratt. 158; *Goolsby v. St. John*, 25 Gratt. 146; *Turner v. Davis*, 7 Leigh 237; *Chapman v. Harrison*, 4 Rand. 336; *Vanlew v. Bohannon*, 4 Rand. 537; *Farmers' Bank v. Vanmeter*, 4 Rand. 553; *Bierne v. Mann*, 5 Leigh 364; *Harnsbarger v. Kinney*, 13 Gratt. 511; *Ayres v. Morehead*, 77 Va. 588; *Barnett v. Barnett*, 83 Va. 504, 2 S. E. Rep. 733; *Cabell v. Roberts*, 6 Rand. 580; *Fenwick v. McMurdo*, 2 Munf. 244, approved in *Oswald v. Tyler*, 4 Rand. 37. See *Thompson v. M. & M. Bank*, 3 W. Va. 651; *Coleman v. Anderson*, 29 Gratt. 425; *Hudson v. Kline*, 9 Gratt. 379.

"It would perhaps seem strange, that a court of equity should not possess the power of relieving against a judgment at law, obviously unjust, and against the right of the cause. In cases of fraud, surprise, accident, trust, and the like, where that court has complete jurisdiction, it is within its peculiar province to grant relief, where the parties can-

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Where a judgment has been obtained against the obligor, on a bond for money won at gaming, and in the absence of any fraudulent representations by the obligor, a court of equity will relieve the obligor against the judgment on the ground of the original turpitude of the transaction. *Woodson v. Barrett*, 2 H. & M. 80, 3 Am. Dec. 612.

Trust and Confidence.—In a case involving trust and confidence, and in which it appears reasonable to allow the complainant the benefit of the defendant's oath, relief may be given in equity, although the party neglected to make the proper defence at law. *Spencer v. Wilson*, 4 Munf. 180.

Defect of Title.—Where a purchaser comes into a court of equity for relief against a judgment at law, on the ground of a defect in the vendor's title to a part of the tract of land purchased, it is not enough for him to allege such defect or want of title; he must prove an actual eviction, or superior title in some other person. *Yancey v. Lewis*, 4 H. & M. 890. See *Amick v. Bowyer*, 3 W. Va. 7.

Remedy by Statute.—Generally, a party to a judgment or decree against him, who has been proceeded against by order of publication must obtain relief, if he has defence against the claim on which the action or proceeding in which the judgment or decree is had, by adopting the remedy prescribed by the statute in such cases. *Vance v. Snyder*, 6 W. Va. 24.

A. GROUNDS OF RELIEF—GENERAL RULE.—It has become a principle, and maxim of equity, as well settled as any other whatever, that a party will not be entertained in a court of equity, on a bill seeking relief against a judgment at law, which has been rendered against him in consequence of his default upon grounds which might have been successfully taken in the court of law, unless some reason founded in fraud, accident, surprise, or some adventitious circumstances beyond the control of the party be shown, why the defence was not made in that court. *Alford v. Moore*, 15 W. Va. 597; *Braden v. Reitzenberger*, 18 W. Va. 286; *Holland v. Trotter*, 22 Gratt. 141; *Knapp v. Snyder*, 15 W. Va. 484; *Meem v. Rucker*, 10 Gratt. 509; *Smith v. McLain*, 11 W. Va. 654; *Shields v. McClung*, 6 W. Va. 79; *Alleman v. Kight*, 19 W. Va. 201; *Black v. Smith*, 13 W. Va. 800; *Price v. Harner*, 17 W. Va. 523; *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. Rep. 16; *Haseltine v. Brickey*, 16 Gratt. 120; *Mackey v. Mackey*, 29 Gratt. 158; *Goolsby v. St. John*, 25 Gratt. 146; *Turner v. Davis*, 7 Leigh 237; *Chapman v. Harrison*, 4 Rand. 336; *Vanlew v. Bohannon*, 4 Rand. 537; *Farmers' Bank v. Vanmeter*, 4 Rand. 553; *Bierne v. Mann*, 5 Leigh 364; *Harnsbarger v. Kinney*, 18 Gratt. 511; *Ayres v. Morehead*, 77 Va. 588; *Barnett v. Barnett*, 83 Va. 504, 2 S. E. Rep. 733; *Cabell v. Roberts*, 6 Rand. 580; *Fenwick v. McMurdo*, 2 Munf. 244, approved in *Oswald v. Tyler*, 4 Rand. 37. See *Thompson v. M. & M. Bank*, 3 W. Va. 651; *Coleman v. Anderson*, 29 Gratt. 425; *Hudson v. Kline*, 9 Gratt. 379.

"It would perhaps seem strange, that a court of equity should not possess the power of relieving against a judgment at law, obviously unjust, and against the right of the cause. In cases of fraud, surprise, accident, trust, and the like, where that court has complete jurisdiction, it is within its peculiar province to grant relief, where the parties can-

not obtain it at law. * * * I admit, that the courts of law and equity should be confined within their proper spheres, and that the line which separates their respective jurisdictions should be carefully guarded." *Picket v. Morris*, 2 Wash. 272.

It is not the province of courts of equity to see that justice is done, in the abstract. in all possible cases, but only to lend its aid, when from any cause, without his own default or neglect, a party defendant at law, cannot have justice done him in the courts of law; and this is true, where the discounts, abatements or damages, which are claimed to be set off in equity, arise out of a breach of the same contract on which the judgment at law is founded. *Cabell v. Roberts*, 6 Rand. 580.

Error in Judgment.—But error in a judgment at law, however apparent, is no ground for relief in equity, but the party must show some special equitable circumstances, such as fraud or surprise, to entitle him to the interposition of a court of chancery. *Turpin v. Thomas*, 2 H. & M. 189.

Mere Error in Law Court.—So chancery will not enjoin a judgment at law and grant a new trial merely for error in the law court, but only because of fraud, accident, surprise, or some adventitious circumstance unknown to the party before judgment, and beyond his control. *Graham v. Bank*, 45 W. Va. 701, 82 S. E. Rep. 245.

Mere Error in Law.—Moreover, a court of equity will not relieve against the judgment, on the ground of error in law only; it must appear that justice requires its interposition, that the party was prevented from obtaining it by the legal forms of pleadings, or by some fraud, accident, or mistake. *Kincaid v. Cunningham*, 2 Munf. 1.

Judgment Contrary to Equity.—No rule of law is better settled than that a court of equity will not relieve against a judgment on the ground of its being contrary to equity unless the defendant was ignorant of the ground of defence, or was prevented from availing himself of it by fraud or accident, unmixed with fault or negligence on his part. *Gentry v. Allen*, 32 Gratt. 254; *Richmond Enquirer Co. v. Robinson*, 24 Gratt. 548.

Negligence of Agents.—But equity will not relieve against a judgment at law if the omission of the defendant to avail himself of his defence at law was unmixed with any negligence in himself or his agents. *Richmond Enquirer Co. v. Robinson*, 24 Gratt. 548.

Thus the negligence of an officer of a corporation, in allowing a judgment to be rendered against his corporation as garnishee when the debt had been previously assigned to another party, and notice thereof had been given to another officer, will exclude the corporation from relief in equity against the judgment. *Richmond Enquirer Co. v. Robinson*, 24 Gratt. 548.

Parties Plaintiff.—No person can enjoin a judgment at law, to which he is not a party, but if he is aggrieved, he should pray an injunction to the execution. *Jordon v. Williams*, 3 Rand. 501.

B. BILLS FOR NEW TRIALS AND INJUNCTION.

1. DEFENCES NOT AVAILABLE AT LAW.—In general, any facts which prove it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing

himself of such judgment. *Wallace v. Richmond*, 26 Gratt. 67.

"It may be stated as a general principle, in regard to injunctions after a judgment at law, that any facts which prove it to be against conscience to execute such judgment, and of which the injured party could not have availed himself in a court of law, and of which he might have availed himself in a court of law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgments.

* * * Neither will a court of equity relieve against a judgment at law where the case in equity proceeds upon a defence equally available at law, but the plaintiff must establish some special grounds for relief. And this doctrine goes still further, for it is the general rule that a defence cannot be set up as a ground for a bill in equity for an injunction which has been fully and fairly tried at law, although it may be the opinion of a court of equity that the defence ought to have been sustained at law." *Ensign Mfg. Co. v. McGinnis*, 30 W. Va. 532, 4 S. E. Rep. 782. See *Lewis v. Wyatt*, 2 Rand. 114; *Stafford v. Carter*, 4 Gratt. 63; *Franks v. Morris*, 9 W. Va. 664; *Spotswood v. Higgenbotham*, 6 Munf. 318; *Ayres v. Morehead*, 77 Va. 566.

A court of equity will never enjoin a judgment, on the ground that it would have been reversible if the proper steps had been taken in the court of law, but by mistake a confession of judgment had been entered. *Bank v. Vanmeter*, 4 Rand. 558.

Plaintiff Entitled to Credits.—Where on a bill of injunction, to stay proceedings on a judgment at law, if it appear from the commissioner's report, not excepted to by the defendant, that the plaintiff is entitled to a credit which the defendant failed to give, the court ought not to set aside the order for account, and dismiss the bill, on the ground that the plaintiff had neglected to carry into effect a previous order referring, by consent of the parties, the accounts between them to a different commissioner; but the last order having been made on the defendant's motion, the report being excepted to for want of notice, to the plaintiff, of the time and place of taking the account, and such exception appearing well founded, a new account ought to be directed. *Roberts v. Jordans*, 3 Munf. 486.

If a bill of injunction to stay proceedings on a judgment, charges the plaintiff at law with having failed to do an act on which the equity of his claim depends, and in his answer, he takes no notice of that allegation, the court, on the hearing, will consider this an admission that he has not done the act in question, and will decree against him without any exception to the answer, or any interlocutory order taking the bill for confessed in part. *Page v. Winston*, 3 Munf. 298.

Reasons for Rule.—After a trial at law, new trials should not be granted by a court of equity, merely because injustice may have been done at law. A party, to entitle himself to a new trial, must show that he has been guilty of no *laches*; that he has done everything that could be reasonably required of him, to obtain relief at law. A bill for a new trial, is watched by equity with extreme jealousy. It must see that injustice has been done, not merely through the inattention of the parties, but for such causes as, in cases of complicated accounts, where the party has not made defence, because it was impossible for him to do it effectually at law, or

where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has an unconscientious advantage at law, which equity will either put out of the way or restrain him from using. But, without circumstances of this kind, equity never interferes to grant a new trial of a matter, which has already been discussed in a court of law, and over which the court of law had full jurisdiction. Per CARR, J. *Faulkner v. Harwood*, 6 Rand. 125; *Arthur v. Chavis*, 6 Rand. 144.

Judgment on Fraudulent Deed of Trust.—Where property conveyed by a deed of trust is seized in execution by judgment creditors of the grantor and sold, an indemnity bond being given, and in an action by the trustee on the bond the judgment creditors set up that the deed was fraudulent, but failed to prove it, and judgment is rendered against them, and subsequently they filed a bill in equity on the ground of after-discovered evidence, establishing the fraud as to some of the debts secured, and asking for an injunction against the judgment, that a new trial be granted, for an accounting by the trustee and for general relief, it was held, among other things, that the complainant had a right to call for an account of the trust subject, and to have it disposed of among all the parties according to their respective rights. *Billups v. Sears*, 5 Gratt. 81.

Trial of Caveat.—Although a party may be let into a court of equity, on grounds which he could not have used on the trial of a *caveat*, and which, in fact, make another case (in reference to that which he might have availed himself of on such trial), or upon a case suggesting and proving that he was prevented by fraud or accident from prosecuting his *caveat*: he is not to be sustained in a court of equity on such grounds as were or might have been brought forward on the trial of the *caveat*. *Noland v. Cromwell*, 4 Munf. 155. But see *Christian v. Christian*, 6 Munf. 584.

Right to Redeem Property.—Where a bill shows an equitable right in a wife to redeem her husband's property from a tax sale, under a statutory provision, and the defence could not have been pleaded at law, equity will grant an injunction at her suit against a judgment in ejectment for possession against her husband, based on the tax title. *Sperry v. Gibson*, 3 W. Va. 522.

Condemnation Proceedings.—A court of equity does not interfere with judgments at law unless the complainant has an equitable defence of which he could not avail himself at law, or had a good defence at law which he was prevented from availing himself of by fraud or accident unmixed with negligence in himself or his agents. Thus equity has no jurisdiction to declare a judgment in condemnation proceedings null and void because it constitutes a cloud upon the title, where the complainant is out of possession of the land. He has a complete remedy at law in an action of ejectment for the recovery of the land. *L. & N. R. Co. v. Taylor*, 93 Va. 226, 24 S. E. Rep. 1012.

"Now I do not say, that the county court, sitting as a court of law, could not upon motion, in a summary way, try these questions; but I do say, that in that mode, it would not have afforded as safe or as convenient a tribunal for the trial of them, as a court of equity upon regular pleadings and proofs. And this consideration, it will be recollected, forms one of the grounds in equity for assuming jurisdiction. But there is another, perhaps a stronger ground. The indorsement of the execution for Crawford's bene-

fit, gave him nothing but an equitable right, which could have no weight in a court of law, belonged exclusively to equity, and must finally have brought the cause there for decision." *Crawford v. Thurmond*, 3 Leigh 85.

It is a clearly-established principle, that a judgment of a court of common law, though erroneous, given on a legal question, shall never be corrected or disturbed in equity, upon grounds which were proper for the consideration of the common-law courts, unless the applicant to the court of equity can show some particular circumstances to have taken place, operating as an impediment to his availing himself of those grounds upon the trial at law, for a court of equity, ought not, by a side wind, to undertake to reverse a common-law judgment, although from principles before established in other cases, they would probably reverse the judgment, if regularly brought before them, on the common-law side of the court. And it is better even in the eye of a court of equity, that an individual should suffer an injury, arising from his own acts and conduct, than that court should, with the view of relieving him, usurp a jurisdiction prohibited by law, and break down the partitions wisely established in our judiciary system. *Branch v. Burnley*, 1 Call 147.

Judgment on False Return of Process.—"One line of cases holds that a party who had been injured by a judgment rendered in his absence may have relief in equity if he can succeed in showing that he was not summoned, and did not hear of the proceedings in time to make defence or to obtain a new trial, and that he has a meritorious defence. *Freem. on Judgm. sec. 495*. Another class of cases holds that a court of equity cannot grant relief in such a case unless the false return of service was procured or induced by the plaintiff, or he can in some way be connected with the deception; thus likening the case to those cases in which the defendant has been prevented from setting up his defence by the trickery or fraud of his adversary. The rule of this latter class of cases is perhaps the better doctrine. The risk of opening a judgment or decree on an allegation which, like that of the failure to serve process, or the want of notice, depends upon the uncertain testimony of witnesses, is so great that the injured party should be left to his remedy in the same case where relief can be had in that case, or to his remedy against the officer who has made the false return, unless that return was in some way procured or induced by the plaintiff, or he is in some way responsible for the defendant's want of notice of the suit, or of the proceedings therein." Per *BUCHANAN, J. Preston v. Kindrick*, 94 Va. 760, 27 S. E. Rep. 588. See *Ramsburg v. Kline*, 96 Va. 465, 31 S. E. Rep. 608.

Unauthorized Appearance by Attorney.—When a defendant, by bill in equity, seeks to nullify a judgment at law obtained against him without service of process, upon the unauthorized appearance by attorney, to succeed he must have a clear preponderance of evidence sustaining the allegations of his bill. *Smith v. Johnson*, 44 W. Va. 278, 29 S. E. Rep. 509. See also, *Wandling v. Straw*, 25 W. Va. 692.

It was held in *Raub v. Otterback*, 89 Va. 645, 16 S. E. Rep. 938, that the testimony of one of the defendants was properly admitted, to the effect that he never knew either of the attorneys who appeared in the original chancery proceedings in which the decree was rendered, that he never employed them, and that he never heard of the suit until recently,

where, unless counsel did actually appear for him with his authority, the court never acquired jurisdiction.

If it appears by the record that an attorney appeared for the defendant in a court of general jurisdiction, such appearance gives the court jurisdiction of the person of the defendant; and if the attorney so appeared without his authority, that fact cannot be shown as a defence at law in any action or proceeding upon the judgment, where the same may properly be used as evidence of the right thereby established. *Wandling v. Straw*, 25 W. Va. 692.

2. DEFENCES AVAILABLE AT LAW OR IN EQUITY.

Usury.—It is well settled in Virginia that a court of equity will interfere with a judgment at law, to relieve against usury. *Greer v. Hale*, 95 Va. 533, 28 S. E. Rep. 873.

But where relief is sought in equity, against a judgment at law, on the ground of usury, the bill must put the usury directly in issue. *Brown v. Toell*, 5 Rand. 543. See also, *Bloss v. Hull*, 27 W. Va. 503.

"The rule is established that a party having a good legal defence shall not, after a judgment at law, come into a court of equity upon the legal matter without alleging and proving good excuse for not using it at law; and moreover a court of equity will not grant relief merely because injustice has been done." *Allen v. Hamilton*, 9 Gratt. 267; *Slack v. Wood*, 9 Gratt. 40; *Ensign Mfg. Co. v. McGinnis*, 30 W. Va. 532, 4 S. E. Rep. 782; *Collins v. Jones*, 6 Leigh 530, 29 Am. Dec. 216; *Morgan v. Carson*, 7 Leigh 238.

Equity will relieve against a judgment at law, based on a decision that a bond bears more than legal interest, and for that reason is deemed usurious in a court of law, and will decree just compensation, if the transaction be fair. *Braxton v. Willing*, 4 Call 288.

Effect of Statutes.—And the change in the statute, declaring that usurious contracts shall be deemed for an illegal consideration, instead of void, as formerly, furnishes no warrant for departing from the long-established rule that a court of equity will go behind a judgment, to relieve against usury. *Greer v. Hale*, 95 Va. 533, 28 S. E. Rep. 873; *Bank v. Fugate*, 93 Va. 821, 23 S. E. Rep. 884; *Young v. Scott*, 4 Rand. 415.

Evidence Doubtful—Laches.—But a court of equity will refuse to grant relief on the ground that the judgment is for usury, where the evidence is doubtful and there has been a long delay. *Terry v. Dickinson*, 75 Va. 475.

Refusal of New Trial.—After a verdict for the plaintiff in an action sounding in damages, and a refusal by the court of law to grant a new trial, a court of equity ought cautiously to interpose. *Meredith v. Johns*, 1 H. & M. 584.

Refusal to Continue.—If defendant at law be ruled into a trial in the absence of some of the witnesses, to whose materiality he has made affidavit, he may except to the opinion of the court, and proceed to obtain relief in superior court of common law, but not in chancery. *Syme v. Montague*, 4 H. & M. 180.

Discharge of Bond.—In a suit in equity to obtain relief against a judgment obtained on a bond, if the bond has been discharged, that fact cannot avail the complainant, as he should have set it up as a defence in the action on the bond. *Barnett v. Barnett*, 83 Va. 504, 2 S. E. Rep. 733.

Failure of Consideration.—Under sec. 5, 6, ch. 126, Code of W. Va., equity has jurisdiction on the three

grounds, of failure of consideration, fraud in the procurement of the note, and breach of warranty of title to personal property, and it expressly gives the right to make defence at law, or omit that and go into equity, as the debtor prefers, without giving any excuse for not defending at law. *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. Rep. 575; *Bias v. Vickers*, 27 W. Va. 456. See *Dorsey v. Shepherd*, 9 W. Va. 57.

For a party entitled to plead in an action at law the defences specified in Code W. Va., ch. 126, sec. 5, need not plead them in the action, but may avail himself of them in equity without any excuse for not using them at law. *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. Rep. 575; *Bias v. Vickers*, 27 W. Va. 456.

Need Not Allege Excuse.—Where failure of consideration is a defence relied upon against a bond, for the payment of money, such defence is an equitable one, and the party entitled to make it is not bound to make it, in the court of law—it is at his option whether he will make such defence in the court of law or equity, and if judgment had been obtained on the bond in a court of law, it is not necessary to entitle him to make his defence in equity against the judgment, that he should aver in his bill any excuse, for not making such defence in the action at law. Code W. Va., ch. 126, sec. 6; *Ludington v. Tiffany*, 6 W. Va. 11.

Is Bound by His Election.—Though where statute gives the right to a defendant to defend at law, or obtain relief in equity, and he avails himself of his right to make his defence at law and a judgment is given against him, he cannot afterwards obtain relief in equity. *Knott v. Seamands*, 25 W. Va. 99; *Sanders v. Branson*, 22 Gratt. 364; *Penn v. Reynolds*, 23 Gratt. 518; 1 *Barton's Ch. Pr.* (3d Ed.) 41; *Bias v. Vickers*, 27 W. Va. 456.

After a party has been fully heard in a court of law, in a case in which the rule is the same in equity as at law, he shall not be permitted to go into a court of equity on the same controverted points. *Morris v. Ross*, 2 H. & M. 408.

Fraud, Accident, Surprise, Mistake.—Courts of equity have always granted relief, when it is shown that the reason why the defence was not made at law, was founded in fraud, accident, surprise, mistake, or some adventitious circumstance beyond the control of the party. *Holland v. Trotter*, 22 Gratt. 141; *Mason v. Nelson*, 11 Leigh 237; *Mosby v. Haskins*, 4 H. & M. 427; *Dey v. Martin*, 78 Va. 1; *Knapp v. Snyder*, 15 W. Va. 434; *Moore v. Lipscombe*, 82 Va. 546; *Erwin v. Vint*, 6 Munf. 267; *Price v. Fuqua*, 4 Munf. 68; *Callaway v. Alexander*, 8 Leigh 114; *Anderson v. Woodford*, 8 Leigh 319; *Halcomb v. Innis*, 4 Call 364; *McFarland v. Dilly*, 5 W. Va. 185; *Thomas v. Jones*, 98 Va. 323, 36 S. E. Rep. 332.

"Courts of equity relieve against judgments at law upon the ground that the party injuriously affected thereby has a defence of which he could not have availed himself in a court of law, or of which he might have availed himself, but was prevented by fraud or accident, unmixed with any fault or neglect on his part. * * * The cases fully establish, that after a trial at law, a party to entitle himself to have a new trial granted by a court of equity, must show that he has been guilty of no laches; that he has done everything that could reasonably be required of him to obtain relief at law. Without such excuse, which is to be judged of according to the circumstances, he cannot get relief in equity." *Per STAPLES, J.*

Green v. Massie, 21 Gratt. 358; Ayres v. Morehead, 77 Va. 586.

Moreover, it is immaterial that an act was done in good faith and without fraudulent intent, for if by it an advantage has been obtained which it is against good conscience to enjoy, a court of equity will relieve against it. Thomas v. Jones, 98 Va. 823, 36 S. E. Rep. 382, citing Holland v. Trotter, 22 Gratt. 141.

Conditioned upon Payment of Costs.—A complainant whose remedy was complete at common law, but who by accident was prevented from making it there, may be relieved against the judgment, but ought to pay the costs in chancery. Degraffenreid v. Donald, 2 H. & M. 10.

Prevented from Suffering Nonsuit.—But where a plaintiff suffers a verdict and judgment to go against him at law, he cannot apply to a court of equity to grant him a new trial, on the ground of his having been surprised at the trial at law, by unexpected evidence, unless he was prevented by fraud or accident from suffering nonsuit. Oswald v. Tyler, 4 Rand. 19; Barrett v. Floyd, 3 Call 581.

Gaming Contracts.—In an action at law on a promise founded on a gaming consideration, if the defendant is surprised at the trial, and there is a verdict and judgment against him, he may come into equity for relief, though he made no effort to obtain a new trial in the common-law court. White v. Washington, 5 Gratt. 645.

Mutual Mistake of Law.—But a court of equity will not relieve against a judgment a party who was prevented from making his defence at law by a mistake of law, although it was a mutual mistake by both parties to the suit. Richmond, etc., Co. v. Shippen, 2 P. & H. 327.

Mistake of Clerk.

Contra.—A judgment, however, against a sheriff, under a mistaken opinion of the clerk as to the law, that the bail piece was insufficient, the counsel having agreed that it might be filed, was relieved against in equity. Smith v. Wallace, 1 Wash. 254.

Mistake by Jury.—So also, a judgment at law may be enjoined on the ground of mistake by the jury, ascertained by after-discovered evidence. Rust v. Ware, 6 Gratt. 50.

Mistake, Miscalculation.—Relief against a judgment at law rendered by a mistake and miscalculation of the jury will be granted by a court of equity, where the evidence of such mistake and miscalculation would, if discovered in time, have furnished a good ground for a new trial. And when the case is one that requires the settlement of accounts, the court of appeals will not direct a new trial at law, but will order a reference to a commissioner, and will itself give the proper relief. Rust v. Ware, 6 Gratt. 50.

Assurances, Promises.—But where the defendant at law has been prevented from making his defence, by the assurances or promises of the plaintiff's counsel, a court of equity will grant relief. Holland v. Trotter, 22 Gratt. 136; Dey v. Martin, 78 Va. 1; Moore v. Lipscombe, 82 Va. 546.

Reliance on Statements of Others.—Where a defendant who had an adequate remedy at law, has been prevented from resorting to it, by a fraudulent representation or promise of the plaintiff, he ought to be relieved in equity. Poindexter v. Waddy, 6 Munf. 418; Knapp v. Snyder, 15 W. Va. 434. See also, Lee v. Baird, 4 H. & M. 453.

A party against whom a judgment has been entered on a bond cannot obtain relief in equity against such a judgment, on the ground that he

was acting as the agent of the judgment plaintiff in the sale of territory in which to sell a patented article, and that such bond was only "a sham," by which to induce others to purchase patent rights, and was never to be enforced against him, this being an attempt to perpetrate a palpable fraud upon innocent strangers, which cannot be countenanced or upheld in equity. In such case, the parties being *in pari delicto*, the complainant is not entitled to relief. Barnett v. Barnett, 83 Va. 504, 2 S. E. Rep. 733.

Acts and Representations.—The courts of equity do not interfere with judgment at law, unless the failure of the complainant to successfully defend at law was because of the acts or the representations of the opposite party, or his agents, or was the result of fraud, accident, or surprise, or some other adventitious circumstances beyond the control of the complainant. Rosenberger v. Bowen, 84 Va. 660, 5 S. E. Rep. 697.

Relief will always be granted where failure to defend at law resulted from the acts or misrepresentations of the opposite party, or his agents, or from fraud, accident, surprise, or some other adventitious circumstances beyond the control of the party complaining. Moore v. Lipscombe, 82 Va. 546; Dey v. Martin, 78 Va. 1; Holland v. Trotter, 22 Gratt. 144.

For example, in the case of Moore v. Lipscombe, *supra*, the defendant brought assumpsit against the complainant, and filed a copy of the account, which was served with the summons on the complainant. At the next term there was a judgment by default, on account of the complainant's absence from the state, and failure to make defence, he relying on the statement of the defendant's attorney, that he might rest assured that there would be no trial at that term as he was incapable of attending the court, by reason of an accident. The complainant obtained an injunction to the judgment, and on the hearing an issue was directed to ascertain the amount, if any, due the defendant from the complainant. On appeal it was held that the case was proper for equitable relief, and the direction of the issue was the proper course. Moore v. Lipscombe, 82 Va. 546; Wynne v. Newman, 75 Va. 815.

Sufficiency of Allegations.—Where a bill shows a case for the interference of a court of equity, on the ground that the action at law was not defended because the plaintiff had promised to take no judgment against the party, and assured him that it was unnecessary to employ counsel, and the bill further shows that a plea was put in by counsel for the defendant, without any allegation that such appearance was unauthorized, the bill is fatally defective. Knapp v. Snyder, 15 W. Va. 434.

Injustice Merely.—It is well settled that to entitle a party to relief in equity against a judgment at law, it is not sufficient to show merely that injustice has been done, but the party applying must show that he has been guilty of no *laches*, and that he has done everything that could be reasonably required of him to render his defence effectual at law. Otherwise relief will be denied, for "it is more important that there should be an end of litigation, than that justice be done in every case." Dey v. Martin, 78 Va. 1; Wallace v. Richmond, 26 Gratt. 67; Slack v. Wood, 9 Gratt. 40; Bateman v. Willoe, 1 Sch. & Tef. 201.

Although it may be manifest that great injustice has been done a defendant at law, by the verdict and judgment against him there, yet if this injustice has not been produced by any fraud or surprise on

the part of the plaintiff, but is the result either of the defendant's own negligence, or of his counsel's ignorance or bad management, a court of equity can give him no relief. *Tapp v. Rankin*, 9 Leigh 478.

"The grounds on which a court of equity will interfere to grant relief against a judgment at law in the nature of a new trial, are confessedly somewhat narrow and restricted. It is not sufficient to show that injustice has been done, but it must appear also that it was not occasioned by the inattention of the party complaining." *LEE, J. Slack v. Wood*, 9 Gratt. 40. See *Shields v. McClung*, 6 W. Va. 79; *Sperry v. Gibson*, 8 W. Va. 525.

Insufficient Allegations.—Where a bill in chancery, for setting aside and enjoining a judgment, presents no substantial grounds for equitable interference, it is properly dismissed, as no errors committed by the court can be considered prejudicial to the plaintiff. *Rollins v. National Casket Co.*, 40 W. Va. 590, 21 S. E. Rep. 722.

Insanity.—It is a sufficient ground for a perpetual injunction to a judgment against the defendant in an action of slander, that, at the time of speaking the defamatory words and of the recovery of judgment, he was insane, or partially deranged, on the subject in relation to which the words were spoken. *Horner v. Marshall*, 5 Munf. 466.

Laches—Eighteen Years.—Where a bill to set aside a judgment on the ground of usury, simply says that the debt is usurious, without stating the usurious interest taken, and the defendant denies the usury and the charge of usury is not sustained by competent evidence, the court will not, after a long delay (eighteen years), set aside the judgment and grant a new trial. *Terry v. Dickinson*, 75 Va. 475.

So also, one who was defendant in an action to subject property to the payment of a judgment against him may not, after the lapse of twenty-five years after the decree of sale and confirmation, where the land has increased in value and the condition of the parties has changed, reopen the case and relitigate the matters which were fully adjudicated by a court of competent jurisdiction. *Culbertson v. Stevens*, 82 Va. 406, 4 S. E. Rep. 607.

Six Years' Delay—Fraud.—So where a bill to obtain relief against a judgment on a bond, which it was alleged was procured by fraud, was not filed until six years after the perpetration of the fraud, relief was refused on the ground of unreasonable delay; the rule being that where a party has the right to rescind a contract on the ground of fraud, he must rescind at once on discovering the fraud, or as soon thereafter as circumstances will permit; for he is not bound to rescind, and any unreasonable delay, especially if it be injurious to the other party, will be regarded as a waiver of his right. *Barnett v. Barnett*, 83 Va. 504, 2 S. E. Rep. 738.

Delay by Appealing.—If, by mistake of the sheriff, a writ is served on the wrong person, but such person makes no defence at law, and suffers judgment to go against him by default, execution being issued, gives a forthcoming bond, and afterwards delays the plaintiff by appealing from the judgment on that bond, he is not entitled to relief in equity. *Chisholm v. Anthony*, 2 H. & M. 13.

C. LEGAL DEFENCES.

Allegations.—Where a bill avers that the written agreement between the maker and the payee of the note, in relation to the contract in pursuance of which the note is made, has been lost at the time the judgment was recovered on the note, and without which agreement the maker could not make his

defence at law, such bill avers a good ground for the jurisdiction of the court of equity. *Vathir v. Zane*, 6 Gratt. 246.

"It is insisted, that as the appellant has obtained a judgment at law, and the appellee comes into equity for relief, he is as much bound to negative facts, which would entitle the plaintiff at law to recover, as to affirm those which it is necessary for himself to prove. This would be against all the rules of pleading in chancery, and would be imposing on the plaintiff an impracticable duty. He may not be cognizant of the facts upon which the plaintiff at law relies, to entitle himself to recover, notwithstanding the matter relied upon by the party seeking relief in equity might, if standing alone, make out a proper case for the interposition of that court. The appellee had a right to rest his case upon the averment of such fraud as vitiates the contract; and of the fact that the security so fraudulently procured, had come to the possession of the holder by assignment. If the circumstances under which the holder acquired the paper, are such as still entitle him to recover from the maker, they must be shown in his answer; and not being responsive to any allegation in the bill, must be proved." *Vathir v. Zane*, 6 Gratt. 246.

Relief against Judgment on Gaming Contract—Less Diligence Required.—"The case of a gaming promise or security is an exception to the general rule on the subject, that rule being derived from the obligation of the party in most cases, to avail himself of his opportunity to defend himself at law; whereas, in case of a gaming promise or security he is under no such obligation. And as he may at first waive all defence at law, and seek relief in equity, so when he has been prevented by surprise from making his defence available at law, he is not bound to pursue it further in that forum; but may resort to a court of equity, which had from the beginning a complete and more searching jurisdiction of the controversy, and which treats all judgments founded on a gaming consideration where there has been no defence at law, or where there has not been, from adventitious circumstances, a full and fair trial of the question at law, as mere securities." *White v. Washington*, 5 Gratt. 645; *Goolsby v. St. John*, 25 Gratt. 154.

Statute of Limitations.—A suit in equity to enjoin the enforcement of a judgment in ejectment, brought immediately after its rendition, cannot be defeated by the plea of the statute of limitations, though the deed to such agent was made more than eighteen years before the institution of the suit. *Franks v. Morris*, 9 W. Va. 664.

Setting Out Proceedings at Law.—Where the plaintiff in a suit exhibits with and makes part of his bill the record of an action at law, the facts disclosed by such record thereby become averments of his bill to be considered in connection with the other averments. *Blas v. Vickers*, 27 W. Va. 456.

Adequate Remedy at Law.—"The simple allegation that the judgment upon which the writ of possession issued was erroneous, constitutes no ground for the interference of a court of equity. It is not by injunction that the errors of a county court are to be reviewed and corrected. The law provides another remedy for that purpose—namely by writ of error or appeal." *Rosenberger v. Bowen*, 84 Va. 600, 5 S. E. Rep. 697.

Set-Off.—Where a party has been summoned to answer an action at law for the recovery of money, and allows judgment by default to go against him,

although at the time of such recovery he had judgments against the plaintiff which he might have pleaded as a set-off, he cannot, on the ground that he mistook the time at which the case was to be tried, combined with the fact of the insolvency of the plaintiff, come into equity to obtain the benefit of such set-off, for there is a plain, complete, and adequate remedy at law, namely by motion, whereby he can have the judgments set off against the judgment of the plaintiff. *Zinn v. Dawson* (W. Va.), 34 S. E. Rep. 784, citing *Shield v. McClung*, 6 W. Va. 79; *Knapp v. Snyder*, 15 W. Va. 484; *Alford v. Moore*, 15 W. Va. 597; *Meem v. Rucker*, 10 Gratt. 506; *Hudson v. Kline*, 9 Gratt. 379; *Slack v. Wood*, 9 Gratt. 43; *Faulkner v. Harwood*, 6 Rand. 125; *Perkins v. Clements*, 1 P. & H. 141.

But a party is not compelled to plead a set-off in such an action, and if a judgment is obtained against him, and he holds judgments against the plaintiff, he may, on motion in a court of law after notice, have his judgment set off against the plaintiff's judgment. *Zinn v. Dawson* (W. Va.), 34 S. E. Rep. 784. See also, *Black v. Smith*, 13 W. Va. 780.

Where a jury have found a verdict for the plaintiff in an action of debt on a bond, an account of a transaction which, although partly subsequent to the date of the bond, is old and stale, ought not to be allowed, for the purpose of obtaining a discount against it. *Randolph v. Randolph*, 1 H. & M. 180.

Insolvency as Affecting Right of Set-Off.—The mere insolvency of a judgment creditor will not, of itself, justify an injunction against the enforcement of a judgment at law, in order to let in a set-off which might have been pleaded at law at the time such judgment was recovered. *Zinn v. Dawson* (W. Va.), 34 S. E. Rep. 784; *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. Rep. 16; *Faulconer v. Stinson*, 44 W. Va. 546, 29 S. E. Rep. 1011; *Finke v. Fleming*, 25 Gratt. 707; *George v. Strange*, 10 Gratt. 499; *Barton's Ch. Prac.* (2d Ed.) 22.

"Equity will not enjoin a judgment to let in a defence pleadable in the action, where the party has had the opportunity to do so, unless prevented by fraud, accident, surprise, or some adventitious circumstance beyond the party's control. *Shields v. McClung*, 6 W. Va. 79; *Harner v. Price*, 17 W. Va. 523, 548. And, as set-offs may be pleaded in defence, or made the subject of another action, equity generally will not enjoin a judgment to let them in. But it will do so where the party owning them is insolvent. *Beard v. Beard*, 25 W. Va. 486; *McClellan v. Kinnaird*, 6 Gratt. 352; *Marshall v. Cooper*, 48 Md. 46; *Levy v. Steinback*, 43 Md. 212; *Lindsay v. Jackson*, 2 Paige 581; 2 High, Imp. sec. 243." *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. Rep. 575.

Right of Sureties.—But the insolvency of one of the parties is a ground upon which a bill may sometimes be maintained by a surety for a set-off, when it clearly appears, that in consequence of the principal's insolvency the complainants can have no adequate remedy at law. *Mattingly v. Sutton*, 19 W. Va. 19. See also, *Hupp v. Hupp*, 6 Gratt. 810; *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. Rep. 602; *Shores v. Wares*, 1 Rob. 1.

Excuse for Failure to Plead Offsets.—Upon an issue made up on the plea nonassumpsit, there is a judgment for the plaintiff, whereupon the defendant applies for an injunction to the judgment, on the ground that he had offsets which he had intended to plead, but that owing to the sickness of his family at the time when the court sat, and for some time before, he was not able to attend the court or pre-

pare for trial, and that his counsel to whom he had communicated his defence was also absent. But the court held that there was no cause for an injunction and new trial, as it appeared that the offsets were neither pleaded nor filed, and though one of the defendant's counsel was present, no application for a continuance was made, nor was any affidavit filed upon which such an application could have been based. *Griffith v. Thompson*, 4 Gratt. 147.

Rule as to Admission of Offsets.—Where an injunction to a judgment is granted, and an account between the parties directed, the commissioners ought not to give the plaintiff at law credit for claims not exhibited to the jury, nor mentioned in the answer, and which are prior in date to the commencement of the suit. *Lipscomb v. Winston*, 1 H. & M. 453.

1. MATTERS OF EXCUSE—FAILURE TO DEFEND.—It was held in *Wallace v. Richmond*, 26 Gratt. 67, that where a party's counsel examines the docket but not the papers and fails to see that the suit he is employed to defend is pending against his client, whereby an office judgment is rendered against this client, equity will not relieve against such judgment, because this was negligence on his attorney's part, not unmixed with any fault or negligence in himself.

"It is well settled that it is no ground for equitable interference that a party has not effectually availed himself of a defence at law. There are cases in which equity will relieve after verdict, although a defence might have been made at law; but only where there has been no fault or negligence on the part of the defendant or his agents. * * * It must appear that the omission of the defendant to avail himself of the defence at law was unmixed with any negligence in himself or his agents. This rule is absolutely inflexible, and cannot be violated, even when the judgment is manifestly wrong in law or fact; or when the effect of allowing it to stand will be to compel the payment of a debt which the defendant does not owe, or which he owes to a third person." *Richmond Enquirer Co. v. Robinson*, 24 Gratt. 548; *Ayres v. Morehead*, 77 Va. 586.

Failure of Sureties of Sheriff to Defend.—Where a high sheriff is sued for the failure of his deputy to make a return of an execution, and a judgment is recovered, a court of chancery will not relieve the sureties against it, where they might have shown facts in their defence on the trial at law, and show no reason for not having defended themselves at law. *Bierne v. Mann*, 5 Leigh 364.

Failure of Clerk to Defend.—So if a clerk, on a motion against him for the penalty incurred by failing to pay the taxes on law process, fails to make his defence in such action, without a competent excuse, he cannot obtain relief in equity on the same ground. *Auditor v. Nicholas*, 2 Munf. 81.

Office Judgment.—If judgment be obtained, at the rules in the clerk's office, against the administrator; and he, at the next quarterly court, instructs his attorney to set it aside, and plead payment; and the attorney directs the clerk to set aside the judgment, and enter the plea; but he omits it; a court of equity will direct the plea to be received, the verdict upon the issues to be certified to that court, and on receipt of the certificate, will proceed to a final decree upon it. *Mayo v. Bentley*, 4 Call 528.

Must Show Cause for Failure to Defend.—Where, in a proceeding by one person against another to recover money which he alleged he paid as the surety for the latter, it was determined that both were

principals, and judgment was rendered in favor of the plaintiff for a moiety of the sum paid, the defendant having made no defence, cannot come into equity and obtain any relief, although he shows that he was the surety, and the plaintiff in the action at law the principal, unless he alleges and proves sufficient reasons for his failure to defend at law. *Turner v. Davis*, 7 Leigh 227.

Fraud Must Be Alleged and Proved.—"A party who had a defence at law, but failed to make it, and seeks relief in equity against a judgment, whether confessed or rendered on a contest, should allege and prove facts that constitute a fraud perpetrated by the adverse party in procuring the judgment or preventing the defence; or facts that indicate that though the complainant used proper diligence, or such diligence would not have availed, he was, by accident, mistake or surprise, prevented from discovering important facts, or from adducing material evidence and making adequate defence." *Morehead v. De Ford*, 6 W. Va. 316.

Negligence.—It is well settled that where a party, through his own, or his agent's or attorney's negligence, failed to avail himself of a defence which he might have made at law, he will not be relieved in equity. *Ayres v. Morehead*, 77 Va. 586.

"The rule is now well settled, that after a trial at law, if there appears to have been no fraud or surprise upon the part of the plaintiff, equity cannot relieve the defendant from the consequences of mere negligence, notwithstanding it may be manifest that great injustice has been done him at law. If it appears that by the use of proper diligence he could have defended himself successfully, however hard his case, equity must not interfere; and this upon sound principles of general policy, which no court is at liberty to disregard." *Tapp v. Rankin*, 9 Leigh 480.

Absence of Witnesses.—If a defendant has been grossly negligent in his preparations for his trial of the cause, a court of equity will not relieve against the verdict on account of the absence of the witnesses, and especially if the judge who tried the cause, and knew what passed at the trial, twice refused it, upon the same representation. *Hoomes v. Kuhn*, 4 Call 274.

Merely Writing to Attorney Insufficient.—Merely writing to an attorney asking him to take care of a case is such negligence as equity will not relieve against. *Hill v. Bowyer*, 18 Gratt. 364; *Stanard v. Rogers*, 4 H. & M. 438.

Neglect.—It is a fundamental principle in equity, that if a party suffer a judgment to pass against him, through neglect, he cannot have relief in equity, for a matter of which he might have availed himself at law. *Faulkner v. Harwood*, 6 Rand. 125.

Negligent Omission of Declaration.—Where a party brings replevin against the landlord for goods that the latter has distrained, but his action is dismissed for want of a declaration, imputable to his own neglect, whereupon the landlord brings suit on the replevin bond and recovers judgment, the defendant is not entitled to relief in equity on the ground that the goods distrained were in fact his property. *Donnally v. Ginatt*, 5 Leigh 350.

"It is a general rule that where a party may defend himself at law, equity will not interfere; and where he might have done so but has failed to do it, he shall not have relief by bill in equity unless he was prevented by fraud or accident, or the act of the opposite party unmixed with negligence on his part." MAXWELL, J. *Sperry v. Gibson*,

8 W. Va. 522. See *Richmond, etc., R. Co. v. Shippen*, 2 P. & H. 327.

Sickness of Party.—A court of chancery may relieve against a verdict and judgment obtained by the plaintiff, where the defendant is taken sick on his way to the trial, and thereby prevented from making certain affidavits necessary to his case. *Hord v. Dishman*, 5 Call 279.

Sickness of Family.—But it was held in *Griffith v. Thompson*, 4 Gratt. 147, that the sickness of the defendant's family at the time when the court sat, whereby he was prevented from pleading offsets, was not a sufficient ground for relief against the judgment.

Physical Incapacity.—A bill alleging that the plaintiff has received an accident which has so impaired his mental and physical faculties, as to incapacitate him from attending court, and making his defence, makes a proper case for equitable relief. *Alford v. Moore*, 15 W. Va. 597.

Ignorance.—But an injunction to a judgment at law will not be sustained where the defendant at law has failed to make his defence at law, from ignorance of the nature of proceeding against him, and a misapprehension of the steps it was necessary to take in order to subject him. *Meem v. Rucker*, 10 Gratt. 506; *George v. Strange*, 10 Gratt. 490.

No Knowledge That Suit Exists.—On the other hand a plaintiff will be relieved against a judgment at law where it appears that he had no knowledge of the existence of the suit at law, until after judgment was obtained. *Mosby v. Haskins*, 4 H. & M. 427.

Surprise.—During the term of court, the counsel representing the parties plaintiff and defendant in a case, in the presence of the regular judge, are talking over the business remaining unfinished, the defendant in the case being present, who understands from the conversation that his case would not be taken up before the next Tuesday for trial, which conversation was on Friday; and under this impression the defendant, with his witnesses, left the court. On Saturday a special judge was elected, who went upon the bench on Monday morning, and tried the case, in the absence of the defendant and his witnesses, and in ignorance of the misunderstanding, although an attorney for the defendant was in town, and had notice that a jury was being called in the case, and refused to go to the courthouse, on account of some feeling existing between himself and the special judge, and on account of his being too unwell to attend to business, and sent another attorney to state the matters to the court in reference to the understanding. The trial is proceeded with, and a judgment is rendered against the defendant, although he claims to have had a good defence. The trial of the cause, under the circumstances, works such a surprise upon the defendant that a motion to vacate the judgment, set aside the verdict, and award a new trial, should have prevailed. *Simpkins v. White*, 43 W. Va. 200, 27 S. E. Rep. 241.

An action was brought in 1875 in the county court. Two years thereafter, it was transferred to the circuit court. No order except continuances was made in it after such transfer. The judge of the circuit court could not preside at the trial, and in 1887 the plaintiff, in the absence of the defendant, and his counsel, caused a special judge to be elected, and, without the knowledge of the defendant, the case was tried and a verdict and judgment rendered for the plaintiff. The defendant, being notified of such judgment, moved the court to set the same aside

because of the facts above stated, and it was held that, upon his affidavit, alleging surprise, and the full payment of the debt sued on, the circuit court properly set aside the judgment, and awarded the defendant a new trial. *Bennett v. Jackson*, 34 W. Va. 62, 11 S. E. Rep. 734.

Bill of Exceptions Lost or Unsigned.—Where a case is tried before a justice, and a bill of exceptions essential to enable a party to obtain a writ of *certiorari* is lost, if signed, or, if not signed, the justice sickened and died without signing it, and there appears probable ground for a writ of *certiorari*, it is a proper case for equitable relief against the judgment, and for retrial. *Grafton & G. R. Co. v. Davisson*, 45 W. Va. 12, 29 S. E. Rep. 1028.

Fraud.—A bill which alleges fraud as a defence to the original cause of action must show that the fraud is attributable to the judgment creditor. *Griffith v. Reynolds*, 4 Gratt. 46.

"A party, without showing more will not be permitted to contradict the solemn records of a court, on the ground that the statements therein are false; that they show, that proof was heard, when in fact no proof was heard, and charge that there was consequently fraud in both the party and the court in so entering the judgment. If a party could be heard in a court of chancery to make such charges and by the officers of the court to prove them, there would be no stability in judgments, and the most solemn acts of courts of justice, to which the people must look for the protection of their rights, would be liable to be swept away by mere oral testimony. Such assaults upon the solemn acts of courts of record never have been and never can be successfully made." Per JOHNSON, *J. Braden v. Reitzenberger*, 18 W. Va. 286.

Province of Chancellor.—Where an application is made for relief against a judgment, the province of the chancellor is to test the conscience of the parties and not the legality of the judgment, nor to correct the errors, which may have been committed by the court. A different rule would render the jurisdiction of chancery general by converting it into a court, to which an appeal might be had in every instance. *Braden v. Reitzenberger*, 18 W. Va. 286.

2. NEWLY-DISCOVERED EVIDENCE.—Chancery will not relieve against a judgment at law, on the ground of newly-discovered evidence, where there is no suggestion of fraud, accident, mistake, or of any other circumstances preventing the party from having made the defence at law. *Norris v. Hume*, 2 Leigh 334.

Courts of equity, as well as courts of law, sometimes grant new trials on the ground of after-discovered evidence, but always with great reluctance and never except under special circumstances, which may be summed up thus: 1. The evidence must have been discovered since the trial.

2. It must be evidence that could not have been discovered before the trial by the plaintiff or defendant, as the case may be, by the exercise of reasonable diligence.

3. It must be material in its objects, and such as ought, on another trial, to produce an opposite result on the merits.

4. It must not be merely cumulative, corroborative, or collateral. *Wynne v. Newman*, 75 Va. 811; *St. John v. Alderson*, 32 Gratt. 140, and *note*; *Harnsbarger v. Kinney*, 13 Gratt. 511.

Cumulative Evidence.—A judgment at law will not be relieved against in equity on the ground of after-

discovered evidence, where it appears that such evidence is merely cumulative or merely goes to impeach the testimony of a witness on a former trial. *Brown v. Speyers*, 20 Gratt. 308, and *note*; *Harnsbarger v. Kinney*, 13 Gratt. 511; *Bloss v. Hull*, 27 W. Va. 508.

What Is Cumulative Evidence.—And evidence newly discovered is said to be cumulative, in its relation to the evidence on the trial, when it is of the same kind and character. If it is dissimilar in kind, it is not cumulative, in a legal sense, though it tends to prove the same proposition. *Wynne v. Newman*, 75 Va. 811; *St. John v. Alderson*, 32 Gratt. 140, and *note*.

Nor will a judgment at law be relieved against in equity on the ground of after-discovered evidence when such evidence relates to a fact in issue on the trial at law, and in support of which testimony was offered on the former trial, unless it is of such conclusive character, that, if it had been offered, it should have produced a different result. *Bloss v. Hull*, 27 W. Va. 508.

Diligence at First Trial.—Equity will not relieve a party against a judgment at law, on the ground of after-discovered evidence, or of a defence, of which he was ignorant, until judgment was rendered, unless he shows, that by the exercise of due diligence he could not discover such evidence or defence, or that he was prevented from employing the same by fraud, accident or the act of the opposite party, unmixed with laches or negligence on his part. *Bloss v. Hull*, 27 W. Va. 508; *Ludington v. Handley*, 7 W. Va. 269; *Shields v. McClung*, 6 W. Va. 79; *Knapp v. Snyder*, 15 W. Va. 434; *Hevener v. McClung*, 22 W. Va. 81; *Enquirer Co. v. Robinson*, 24 Gratt. 548; *Arthur v. Chavis*, 6 Rand. 141; *DeLima v. Glassell*, 4 H. & M. 369.

Illustration.—Though a bill charges that the judgment was recovered without appearance or defence for money which the plaintiff in the judgment alleged he had paid as surety, though he had not in fact paid one cent of the money, but the same had been paid by another surety, against whom there was a joint judgment with the plaintiff at law; and that of this fact the plaintiff in the bill had no knowledge until after the judgment, and therefore could not have defended himself, still this does not entitle the complainant to relief against the judgment, because it does not appear that he has done everything that could reasonably be required of him to render his defence effectual at law, for by the exercise of due and reasonable diligence, and by making proper inquiries in the proper quarters, he might have been readily led to discover whether the surety had in fact paid any of the money claimed to have been paid by him for the complainant, and of this information when obtained he could have fully availed himself in his defence in a court of law. *Slack v. Wood*, 9 Gratt. 40.

But where a bill of injunction to a judgment shows matter sufficient to have defeated a recovery at law, but to which, defence was not made because not discovered until after judgment, and until it was too late to move for a new trial, it is error to dissolve the injunction, provided a sufficient reason is shown in the bill why the matter of defence was not discovered in time to be set up in the action at law. *Ferrell v. Allen*, 5 W. Va. 48; *Harvey v. Seashol*, 4 W. Va. 122; *Armstrong v. Hickman*, 6 Munf. 287; *Mason v. Nelson*, 11 Leigh 227.

Evidence Obtainable by Bill of Discovery.—If a dis-

covery is necessary to enable a defendant to prove payments or set-offs, which he might have pleaded at law, he should file his bill of discovery in aid of his defence at law, or should file interrogatories to the plaintiff under the statutes, otherwise no relief against the judgment will be given. *George v. Strange*, 10 Gratt. 490.

See "Bills of Discovery."

Courts of equity relieve against judgments at law, upon the ground that the party injuriously affected thereby has a defence of which he could not have availed himself in a court of law, or of which he might have availed himself, but was prevented by fraud or accident, unmixed with any fault or neglect on his part. If the facts upon which the application for relief is based, are unknown to the party at the time of trial in the law court, it is his duty to bring them to the consideration of the court, or furnish some reasonable and satisfactory excuse for its failure to do so. Hence, if a discovery from the plaintiff is necessary to enable the defendant to make his defence at law, he must file his bill for the discovery before the judgment has been rendered against him. And he cannot go into equity for discovery and relief against the judgment, after it has been rendered. *Green v. Massie*, 21 Gratt. 356.

D. VOID JUDGMENTS—ADEQUATE REMEDY AT LAW.—A judgment pronounced by a justice, without service of process upon or notice to the defendant is void. But as such a judgment may be set aside, even when rendered upon the verdict of a jury, by the circuit court, upon a writ of *certiorari*, the defendant in the judgment cannot obtain relief against it in a court of equity. *Kanawha & O. Ry. Co. v. Ryan*, 31 W. Va. 364, 6 S. E. Rep. 924.

But in *Goolsby v. St. John*, 25 Gratt. 146, a bill was filed to enjoin execution on a judgment which had been rendered without service of process, or notice of the action. On demurrer to the bill, the court held that, the defendant in the judgment, having had notice of the judgment within the time limited for a motion to quash it, had a remedy at law by such motion and therefore is not entitled to relief in equity.

In *Kanawha & O. Ry. Co. v. Ryan*, 31 W. Va. 364, 6 S. E. Rep. 924, it was said by SNYDER, J., in referring to High on Injunctions, sec. 230, in which it is said that equity will not relieve against a void judgment where there is an adequate remedy at law: "This it seems to me, correctly states the rule of law on this subject, and especially is it the rule in Virginia and in this state to deny and withhold relief in equity where there is a plain and adequate remedy at law. In *Hudson v. Kline*, 9 Gratt. 379, the court says: 'It has been a favorite policy in this state, especially of late, not to afford relief in equity except in cases of concurrent jurisdiction. In all other cases he must avail himself of his legal remedy. If, without his default, he be deprived of all remedy at law, equity may relieve him; but if any legal remedy remains to him (that is, adequate remedy), though he may have lost, by misfortune, and without fault of his adversary, other concurrent legal remedies, he must resort to his remaining legal remedies.'" See also, 3 *Graham & Waterman on New Trials*, p. 1478 *et seq.*

Perpetual Injunction against Execution.—Where the judgment sought to be enjoined is absolutely void, the cause may be remanded to be proceeded in at law, and a perpetual injunction be granted against the collection of the execution on the judg-

ment. *Finney v. Clark*, 86 Va. 354, 10 S. E. Rep. 560. See *infra*, this note "Collateral Impeachment."

E. BILL FOR INJUNCTION.

Uncertain Credit.—Where an injunction has been awarded to stay the collection of a judgment, and it appears from the answer of the defendant that there is a considerable sum in his hands, which he has agreed to apply as a credit in such judgment, and it is uncertain what is the amount which he ought, under an agreement into which he has entered, to credit on such judgment, the court ought not to dissolve the injunction till it has ascertained, by sending the cause to a commissioner, if necessary, the amount of the credit which should be so given on such judgment. *Heatherly v. Farmers' Bank*, 31 W. Va. 70, 5 S. E. Rep. 754.

Discharge in Bankruptcy.—Where a judgment debtor has obtained his discharge as a bankrupt subsequent to the judgment, he may enjoin the suing out or levy of any execution upon such judgment. *Peatross v. M'Laughlin*, 6 Gratt. 64.

Where the debtor in an execution objects that a previous execution has been levied by the sheriff upon sufficient property to satisfy the judgment, and that he has improperly misapplied the proceeds of the sale of the property, or if he insists that payment has been made to the sheriff which has not been credited on the execution, if he has an opportunity to apply to the court of law from which the execution issued for redress, he has no right to come into equity for relief. *Beckley v. Palmer*, 11 Gratt. 625; *Crawford v. Thurmond*, 3 Leigh 85, and *Morrison v. Speer*, 10 Gratt. 228, distinguished in *Beckley v. Palmer*.

1. SATISFACTION BEFORE EXECUTION LEVIED.—It was held in *Crawford v. Thurmond*, 3 Leigh 85, that where a judgment is recovered against a debtor, but before the execution is delivered to the sheriff, the debtor makes satisfaction to the creditor of the full amount of the debt, and receives a receipt therefor, a court of equity has jurisdiction to give him relief by way of injunction to inhibit further proceedings on the execution, though he might have made a motion to quash the execution at law.

But where a party claims that he has not been credited for all the money paid by him to the sheriff, on an execution, he may have any injustice done to him in that respect corrected in the court from whence the execution issued, and it is not a case for an injunction to the judgment and relief in equity. *Morrison v. Speer*, 10 Gratt. 228.

Whether a bill in equity for an injunction is the proper remedy to prevent a judgment creditor from proceeding to collect anew a judgment which has been in fact satisfied, has been disputed. Some of the cases hold that such an application is meritorious and should be allowed. But the better-considered doctrine upon this subject, and that most in harmony with the general principles underlying the preventive jurisdiction of equity, is that an injunction should not be granted for the purpose of staying or preventing a sale under an execution on the ground of payment, in whole or in part, and that in all such cases the person aggrieved should be left to pursue his remedy at law. Thus, in a case where, by virtue of an agreement between a judgment debtor and a judgment creditor, the judgment ought to be entered as satisfied, but in lieu the creditor has an execution issued and levied upon the goods of the debtor, the latter cannot obtain relief by injunction in a court of equity, for the reason that he has an adequate remedy at law. *Howell v.*

Thomason, 84 W. Va. 794, 12 S. E. Rep. 1088; Hall v. Taylor, 18 W. Va. 544.

Writ of Possession.—Thus, an injunction will not be granted to restrain the execution of a writ of possession, based on an alleged error in the judgment upon which the execution issued, and also upon a judgment in the complainant's favor for possession of a tract of land of which the land in question is a part, the final decision of which is pending on appeal. *Rosenberger v. Bowen*, 84 Va. 600, 5 S. E. Rep. 697.

Subsequent Reversal.—But where execution has been levied and returned satisfied, on a judgment which is erroneous and afterwards reversed or corrected, restitution cannot be awarded, unless it appears that the money has been paid to the plaintiff. *Eubank v. Ralls*, 4 Leigh 808.

Statutory Provision.—See Code of West Virginia, sec. 17, p. 870, which provides that "A motion to quash an execution may, after reasonable notice to the adverse party, be heard and decided by the court whose clerk issued the execution, or, if in a circuit court by the judge thereof in vacation; and such judge or court may, without such notice, make an order staying proceedings on the execution until such motion can be heard and determined," etc. This provision is ample to protect an execution debtor from the levy of an execution upon a satisfied judgment, and is fully as complete and far less expensive and cumbersome than the resort to a court of chancery. *Howell v. Thomason*, 84 W. Va. 794, 12 S. E. Rep. 1088.

Audite Querula Obsolete.—A motion to quash an execution issued on a satisfied judgment is the proper proceeding in place of an *audite querula*, which is now an obsolete remedy, and on such a motion the court may order questions of fact to be tried by a jury. *Smock v. Dade*, 5 Rand. 639.

F. EQUITY ACTS ONLY IN PERSONAM.—Chancery cannot reverse or set aside a judgment of a law court for error or other cause, and order the law court to grant a new trial; but it can act on the person of the owner of the judgment by injunction against the enforcement of the judgment, and direct a trial by jury, and, upon verdict, either perpetuate or dissolve, in whole or in part, the injunction. *Graham v. Bank*, 45 W. Va. 701, 32 S. E. Rep. 245; *Wynne v. Newman*, 75 Va. 811.

In strictness, there is no such thing as an injunction to a judgment, because the court of chancery does not act upon the law court, and neither reverses, rescinds nor amends the judgment. It acts upon the party only, restrains him from enforcing the judgment by execution, and punishes him as for contempt for any violation of its mandate. *Beckley v. Palmer*, 11 Gratt. 625.

"The court of chancery acts *in personam*, and not upon the court of law, which must decide all cases coming before it according to the legal rights of the parties." *Nichols v. Campbell*, 10 Gratt. 560.

"The tribunal of the court of equity, does not act immediately upon that of the court of law, nor in any manner disrespectful to it; it only acts upon the party, and for good reasons existing in relation to him, restrains him from proceeding further." *Ashby v. Kiger*, Gilmer 153.

"That the injunction operates upon the party only, and not upon the court, would seem to be a truism requiring no argument to support it." *Epes v. Dudley*, 4 Leigh 145.

Jurisdiction.—The several superior courts of chancery have power to grant injunctions to the judg-

ments of all courts of common law within their respective districts, and not otherwise; the place where the court of law is holden, and not the residence of the parties, furnishing the rule of jurisdiction in such cases. *Cocke v. Pollok*, 1 H. & M. 499.

Anomalous Condition of Affairs.—"The record exhibits the singular case of two chancellors in different districts disclaiming jurisdiction of a case brought before them by a bill of injunction to a judgment rendered in the district court of Charlottesville. The chancellor of the Richmond district, it is alleged in the bill, refused to grant the injunction, although the defendants all resided within his jurisdiction, because the court, whose judgment was sought to be enjoined, was not within his jurisdiction. The chancellor of the Staunton district granted the injunction, but dismissed the bill afterwards, because, although the court which rendered the judgment sought to be enjoined, was within his district, yet none of the defendants resided therein." *TUCKER, J. Cocke v. Pollok*, 1 H. & M. 499. Thus, it will be seen from this opinion of JUDGE TUCKER, the embarrassments and difficulties which arise under the statute limiting the jurisdiction of chancery to grant injunctions to judgments, the condition of affairs, as presented by him, being truly anomalous.

County Court Judge.—Under Va. Code 1873, ch. 175, sec. 6, the judge of the county court may award an injunction upon a bill addressed to the judge of the circuit court. "Whether the judgment or proceeding enjoined be of a superior or inferior court of his county or district, or the party against whose act or proceeding the injunction be asked, resides in or out of the same; provided such act or proceeding is apprehended, or is to be done, or is doing, in his county or district." *Rosenberger v. Bowen*, 84 Va. 600, 5 S. E. Rep. 697.

The circuit court of Richmond city alone has jurisdiction to enjoin or affect any judgment in behalf of the commonwealth of Virginia. Code of Va. 1873, ch. 165, sec. 1; *Com. v. Latham*, 85 Va. 632, 8 S. E. Rep. 488.

"I have said that the general principle of our laws was that the locality of the law court determines the equitable jurisdiction. There is nothing in the act of January, 1802, singly considered, which abandons this principle; and, on the contrary, the act of February, 1802, seems strongly to support it. In most cases, the restraint upon the clerk of the law court is amply sufficient for the complainant; for without the act of the clerk no execution can go upon the judgment; and, this being the case, the defendants, wherever residing, will find their interest in coming in, submitting to the jurisdiction, and moving to dissolve the injunction. If, before the clerk of the law court receives notice that an injunction is awarded, he has, in fact, divested himself of his power, by actually issuing the execution into another district, beyond the limits of the chancery court, I am not at present prepared to say whether the process of the court may not pursue the execution, on the general principle that, where a jurisdiction exists, every necessary power shall be implied, to carry it into complete effect." *Cocke v. Pollok*, 1 H. & M. 499.

Venue.—The 41st section of the circuit superior court of law, Supp. to Rev. Code, ch. 109, giving jurisdiction to each of the judges of the circuit superior courts, to award injunctions to judgments rendered or proceedings apprehended out of his own circuit, but directing that, in such case, the

order for the process of injunction shall be directed to the clerk of the court of that county wherein the judgment is rendered or the apprehended proceeding is to be had, gives the judge jurisdiction only to award the injunction, not to hear and determine the cause. *Randolph v. Tucker*, 10 Leigh 655.

The court of one county may, on its equity side relieve against a judgment at law, rendered in another county court, by way of original jurisdiction. And though it cannot award a new trial at the bar of that other court, yet it may direct an issue to be tried at its own bar. And if the relief be afforded without the trial of an issue, where that is proper, the high court of chancery may, upon an appeal, after reversal, retain the cause, and direct an issue to be tried. *Ambler v. Wyld*, 2 Wash. 36.

G. EXTENT OF RELIEF.

Decree Repayment of Amount Collected.—A court of equity, having dissolved an injunction against the assignee of a bond, because the payments, for which credits are claimed by the complainant, were made to the obligee after notice of the assignment, ought further to decree, that the obligee (being a defendant to the bill) do repay the sum so received by him, so soon as the complainant shall have paid the amount of the judgment to the assignee. *Roberts v. Jordans*, 3 Munf. 488.

"This bandying of suitors for justice, from court to court, may answer some purposes which, however, I am sure the gentlemen had not in view, but will not produce speedy and substantial justice, the legitimate ends of all courts, and which requires that the decree, in the present instance should be reversed and a perpetual injunction awarded. And I agree with the judge near me, that such be the decree of the court, with this addition, that it shall provide for the repayment of the money, if paid under the dissolution of the former injunction." *Branch v. Burnley*, 1 Call 147. A similar order for repayment was made in *Stanard v. Brownlow*, 8 Munf. 220.

Cannot Enter Personal Decree.—Where upon a bill filed to enjoin a void judgment, the plaintiff is denied all relief for the reason that he has an adequate remedy at law, it is error to enter a personal decree against the plaintiff, for the amount of the judgment enjoined, upon the dissolution of the injunction. In such case, the only power possessed by the court is to dissolve the injunction, and dismiss the bill, with costs. *Kanawha & O. Ry. Co. v. Ryan*, 31 W. Va. 364, 6 S. E. Rep. 924; *Howell v. Thomason*, 34 W. Va. 794, 12 S. E. Rep. 1088.

Relief against Portion of Judgment.—Where a plaintiff agrees to sell to a defendant a certain tract of land for a stated price, and put him in possession of the crops growing thereon, also of a stated value, but violates his agreement as to the crops, whereby the defendant loses them, and afterwards, the plaintiff recovers judgment for the full contract price, but the defendant refuses to pay for the crops, he may have judgment perpetually enjoined to that amount. *Booth v. Kesler*, 6 Gratt. 350; *Sanders v. Branson*, 22 Gratt. 369. In the latter case the court said: "The circuit court, after refusing to relieve against the whole claim, had a right, both on the case stated in the bill and the prayer for general relief, to give such relief as was equitable and just." See also, *Mason v. Nelson*, 11 Leigh 227.

Where a party for himself and others sells a part of a tract of land to another and receives his bonds for the purchase money, and the others refuse to

confirm the contract, but sell their interest in the whole to the purchaser, the latter may enjoin a judgment recovered by the first vendor on the purchase money bonds, and be relieved in so far as he has been injured by such vendor's failure to procure the others to execute the contract. *Jaynes v. Brock*, 10 Gratt. 211.

"The rule has been long established, that a court of chancery will not entertain a bill for the purpose of allowing a man to make a defence, which he might have made in the court of law; unless he shows some good reason why he did not avail himself of that defence in a court of law. This rule is founded on the principle, that there ought to be an end of litigation; and that, consequently, where a matter has been once fairly investigated and decided in one forum, it shall not again become the subject of controversy in another. It was intended as a shield for the party who had prevailed at law, but, if he does not choose to avail himself of its benefit, if he voluntarily goes into the merits of the case, and in his answer, admits facts, which, if they had appeared to the court of law, would have there produced a different result, neither the rule, nor the principle of the rule, is violated by pronouncing a decree, justified by his own admissions." *Vanlew v. Bohannan*, 4 Rand. 587.

Condition for Relief.—A person coming into a court of equity to impeach a judgment at law, must, on his part, do what equity requires. *Lipscomb v. Winston*, 1 H. & M. 453; *Payne v. Dudley*, 1 Wash. 196.

Judgment Stands as Security.—Where there has been a recovery at law, and the defendant seeks relief in equity, in the nature of a new trial, the judgment at law stands as a security for what the plaintiff may be justly entitled to. *Knifong v. Hendricks*, 2 Gratt. 212; *Bank v. Hupp*, 10 Gratt. 33; *Grafton & G. R. Co. v. Davisson*, 45 W. Va. 12, 29 S. E. Rep. 1028.

"A judgment at law, however obtained, no matter by what fraud, accident or surprise, is allowed to stand as a security for what is justly due, whether that be a part or the whole of the debt recovered." *Bank v. Vanmeter*, 4 Rand. 552, 555.

Accounts.—Where the subject of the action is accounts, a court of equity will not direct a new trial at law, but will refer the accounts to a commissioner, and itself give the proper relief, but will permit the judgment to stand as a security for the sum ascertained to be actually due. *Rust v. Ware*, 6 Gratt. 50. See also, *Jaynes v. Brock*, 10 Gratt. 214.

H. HEARING AND FINAL DECREE.—In *Finney v. Clark*, 86 Va. 354, 10 S. E. Rep. 569, a bill for injunction against a judgment is brought on the ground that it is void for want of legal service of process, the prayer of the bill being to restrain the collection of the execution, to vacate the judgment, and to give the complainant in the bill an opportunity to make his defence at law, but raises no issue as to the merits. The plaintiff in his answer raised such issue. It was held that as the only question before the court of chancery was the validity, it had no right, of its own motion, to assume jurisdiction in the merits of the cause, but the execution on the judgment should be perpetually enjoined, the judgment vacated, and the cause remanded to be proceeded in at law by an alias summons properly served.

Will Set Aside Judgment in Toto.—When the plaintiff at law recovers more than he is in conscience

entitled to, and there is no standard by which a court of equity can ascertain the amount of the excess unrighteously recovered, the court will set aside the verdict *in toto*. *M'Rae v. Woods*, 2 Wash. 80.

Trial of Legal Issues in Equity.—Under circumstances, inducing suspicions, that a bond (on which a judgment at law had been obtained against an executor) was counterfeit, or fraudulent, upon a bill filed by the executor, relief was given in equity, by directing an issue to try whether the bond in question was the deed of the testator or not; and, if so, what was the consideration on which it was founded, notwithstanding the trial at law was upon the plea of payment put in by counsel, and a new trial moved for by the complainant was refused by the court. *West v. Logwood*, 6 Munf. 491.

A court of equity, upon enjoining a judgment at law, may direct an issue to be tried at its own bar, and if relief be afforded without the trial of an issue, when that is proper, the high court of chancery may, upon an appeal, after reversal, retain the cause, and direct an issue to be tried. Counsel need not be alarmed about objections to the form of proceeding, since being an issue out of chancery, and to be certified there, all forms in the proceeding at law will be out of the question. *Ambler v. Wyld*, 2 Wash. 36; *Hadfield v. Jameson*, 2 Munf. 60.

"There are cases in which the court has required the defendant in chancery to submit to a new trial in the action at law, and restrained him from enforcing the judgment complained of. But the regular course would seem to be for the chancery court to order such issue or issues as may be proper, and to base its decree on the finding of the jury at the hearing, either dissolving or perpetuating the injunction, in whole or in part, according to circumstances. Such was the course pursued by this court in *Knifong v. Hendricks*, 2 Gratt. 213. In the present case, if a new trial was proper, the court should have ordered an issue, the same as in the action at law, to be tried as other issues out of chancery are tried, the verdict of the jury, if the trial was in the law court, to be certified in the chancery court, and in the meantime continue the injunction until the hearing of the cause; and if the finding was for the defendant and affirmed, dissolve the injunction; if for the plaintiff, perpetuate the injunction and decree for the complainant according to the verdict." *Wynne v. Newman*, 75 Va. 811. See also, *Moore v. Lipscombe*, 82 Va. 546.

After an injunction has been granted and a trial at law directed, the court may, if satisfied that the injunction ought to have been dissolved, set aside the order for a new trial, and dissolve the injunction, although no verdict has been certified. *Vass v. Magee*, 1 H. & M. 2.

It is error for a court of equity, on application to enjoin a judgment at law and grant a new trial, to perpetuate the injunction, set aside and cancel the judgment, direct a new trial of the cause which has been terminated, and finally dispose of the suit in equity. The court of equity in such case should have continued the injunction, directed proper issues, and upon the coming in of the verdict perpetuated the injunction, or dissolved it in whole or in part, according to the finding of the jury. *Knifong v. Hendricks*, 2 Gratt. 213; *Bank v. Hupp*, 10 Gratt. 33.

Issues Directed to Be Tried by Jury.—Where a bill is filed to enjoin a judgment on the ground that the debt on which it is founded is for money won at

cards, it being doubtful on the evidence, whether such was the consideration, or if it was, whether the plaintiff in the judgment, who was a transferee of the debt, had not been induced to take the transfer of the debt under the belief, induced by the concealment or misrepresentation of the debtor, that the consideration of the debt was good and lawful; the court should continue the injunction, and direct issues to be tried by a jury for the purpose of ascertaining these facts. *Nelson v. Armstrong*, 5 Gratt. 354. See also, *Hord v. Dishman*, 5 Call 283.

Must Confess Judgment.—The general rule is, that when a party comes into a court of equity, to be relieved against proceedings at law, he must confess judgment at law, and rely solely on the court of equity for relief. *Warwick v. Norvell*, 1 Leigh 96. See generally, monographic *note* on "Judgments by Confession," appended to *Richardson v. Jones*, 12 Gratt. 53.

"And even courts of equity themselves admit, that the plaintiff at law may proceed so far, as that he may be at liberty, *eo instante* that the injunction is dissolved, to take out execution." *Epes v. Dudley*, 4 Leigh 145.

If proceedings on a judgment at law be enjoined by a court of chancery, and the injunction be afterwards dissolved; and on appeal, the order of dissolution is affirmed *in omnibus*; an execution may be sued out on the judgment at law, before the decree of affirmance is entered up in the court of chancery. *Epes v. Dudley*, 4 Leigh 145.

Moreover, the judgment creditor may take any other steps, pending the injunction, so as to place himself in a condition to sue out execution as soon as the injunction may be dissolved. Thus, a party plaintiff, whose judgment has been enjoined, may, upon the death of the defendant pending the injunction, revive it against his personal representative, otherwise he will not be in a situation, upon the dissolution of the injunction, to issue execution, but must then be delayed till he can sue out his *scire facias* and obtain the order of revival. *Richardson v. Prince George County*, 11 Gratt. 190.

"There is no hardship in confining a party to one jurisdiction. It is a general principle of equity, that a man shall not be permitted to sue, both in law and equity, for the same thing; this principle has given rise to the practice of requiring a release of errors at law on obtaining injunctions to judgments. It is bottomed on a principle, that a man may waive any particular right or benefit, and on the evident justice of preventing a party from being vexed and harassed in various courts for the same cause, but that he shall stand or fall by the election he has made." *ROANE, J. Branch v. Burnley*, 1 Call 147.

Release of Errors.—When a chancellor fails on granting an injunction to require a release of errors, the court of appeals will still respect the principle. *Ashby v. Kiger*, Gilmer 153. See "Judgments by Confession" appended to *Richardson v. Jones*, 12 Gratt. 53.

If a release of errors be pleaded to a supersedeas, and found for the defendant in error, the judgment should be, not that the judgment of the court below be affirmed, but that the plaintiff be barred of his writ of supersedeas. *Hite v. Wilson*, 2 H. & M. 268.

XIII. JUDGMENTS BY DEFAULT.

A. IN WHAT ACTIONS APPLICABLE.

Criminal Cases.—At common law no judgment by default could be rendered in a misdemeanor case. *State v. Slack*, 28 W. Va. 372.

The term judgment by default applies strictly and technically to actions at common law only. *Davis v. Com.*, 16 Gratt. 134.

Effect of Statute.—But sec. 5, of ch. 184, W. Va. Code, includes judgments for fines in misdemeanor cases, as well as judgments in civil cases, where such judgments are entered by default. *State v. Slack*, 28 W. Va. 372.

Under Code W. Va. 1891, ch. 158, sec. 20, no judgment by default for imprisonment can be rendered for any misdemeanor either under chapters 82 or 151 or for any other statutory misdemeanor, but there may be a judgment for a fine by default. A defendant may appear by counsel in any misdemeanor case, though it be punishable by imprisonment, but in no case can there be judgment of imprisonment without having the defendant present at its rendition. *State v. Campbell*, 42 W. Va. 246, 24 S. E. Rep. 875.

1. JUDGMENTS BY DEFAULT UNDER STATUTES.—All judgments, where there has been no appearance by the defendant, are judgments by default within the meaning of sec. 5, ch. 184 of W. Va. Code of 1868, and Va. Code, sec. 3451. *State v. Slack*, 28 W. Va. 372; *Adamson v. Pearce*, 20 W. Va. 59; *Bank v. McElfresh, etc., Co.* (W. Va.), 37 S. E. Rep. 541; *Smith v. Knight*, 14 W. Va. 749. But see *Holliday v. Myers*, 11 W. Va. 278; *Carlton v. Ruffner*, 12 W. Va. 298; *Brown v. Chapman*, 90 Va. 174, 17 S. E. Rep. 855; *Davis v. Com.*, 16 Gratt. 134; *Baker v. Mfg. Co.*, 6 W. Va. 196; *Meadows v. Justice*, 6 W. Va. 198; *Dickinson v. Lewis*, 7 W. Va. 673; *Forest v. Stephens*, 21 W. Va. 316; *Midkiff v. Lusher*, 27 W. Va. 439; *Higginbotham v. Haselden*, 3 W. Va. 269.

Judgment after Withdrawal of Plea.—But a judgment rendered against the defendant after withdrawal of his plea is neither a judgment by default nor by confession. *Holliday v. Myers*, 11 W. Va. 276; *Carlton v. Ruffner*, 12 W. Va. 297.

It is a judgment rendered upon proof of the cause made to the court without issue joined between the parties then before the court. *Carlton v. Ruffner*, 12 W. Va. 297.

A judgment, however, stating that the defendants were solemnly called and not appearing, on motion, etc., is a judgment by default; though it is stated at the foot of the judgment that on the motion of the defendants the execution on this judgment is suspended for sixty days, upon the execution of a suspending bond. *Goolsby v. Strother*, 21 Gratt. 107, and *note*.

Office Judgment.—An office judgment by default confirmed in an action of debt, although the service of process be insufficient, is a judgment by default within the meaning of the statute. *Goolsby v. St. John*, 25 Gratt. 146.

Proceeding by Motion.—"The case of a motion comes within the reason of the statute, and I think the term judgment by default was intended to apply to all judgments where there was a default of appearance." *Davis v. Com.*, 16 Gratt. 134. See also, *Preston v. Auditor*, 1 Call 471; *Cunningham v. Mitchell*, 4 Rand. 189.

Proceeding by Notice.—A proceeding by notice, although not a technical judgment by default at common law, falls within the equity, and was intended to be embraced within the scope of Code of W. Va., ch. 184, sec. 3, 5, 6. *Smith v. Knight*, 14 W. Va. 749.

Contract Sounding in Damages.—Under Va. Code 1887, sec. 3211, providing that a person "entitled to recover money by or on any contract may, on

motion, * * * obtain judgment therefor," one cannot obtain a judgment for a breach of contract on motion in an action sounding in damages. *Wilson v. Dawson*, 96 Va. 687, 32 S. E. Rep. 461.

But whether the judgment be technically or strictly by default, or merely *quasi* by default, the effect and the law, and the reason of the law are precisely the same, for all judgments where there has been no appearance by the defendant, are judgments by default within the meaning of the statute, Va. Code, ch. 181, sec. 5, p. 681. *Goolsby v. St. John*, 25 Gratt. 146; *Davis v. Com.*, 16 Gratt. 134; *Staunton Perpetual B. & L. Co. v. Haden*, 92 Va. 201, 28 S. E. Rep. 285.

B. PARTIES TO DEFAULT.

1. IN WHOSE FAVOR.

a. Deceased Plaintiff.—A judgment rendered by default in a suit instituted in the name of a dead person is not void but merely erroneous or voidable, and cannot be collaterally attacked, where the defendant is duly served but fails to appear and defend. *Watt v. Brookover*, 35 W. Va. 323, 13 S. E. Rep. 1007; *McMillan v. Hickman*, 35 W. Va. 705, 14 S. E. Rep. 227. See also, *Evans v. Spurgin*, 6 Gratt. 107.

2. AGAINST WHOM.

a. Parties Not Named in Writ or Declaration.—In a suit against a mercantile company, if the names of the partners be omitted in the writ and declaration, and the writ be served on a person not named in either, a judgment against the company for that person's failing to appear, cannot be sustained. *Scott v. Dunlop*, 2 Munf. 349.

b. Infants.—It is error to take judgment against an infant by default, who is not stated on the record to have appeared by his guardian to defend the suit, or that the guardian appointed by the court ever acted, or had notice of such appointment. *Fox v. Cosby*, 2 Call 1.

And an office judgment against an infant, who in the writ, is named as defendant "by J. K. his guardian," cannot be supported, but must be reversed *in toto*, if there be nothing in the record to show that J. K. was guardian by testament, or *ex provisione legis*, or guardian *ad litem*, appointed by the court. *Brown v. M'Rea*, 4 Munf. 439.

c. Deceased Defendant.—Where judgment by default is rendered against a defendant after his death, upon due service of process, such judgment is *not* void, but voidable, and cannot be collaterally attacked. *King v. Burdett*, 28 W. Va. 601.

d. Executors.—A judgment by default, against an executor, is *prima facie* admission of assets. *Mason v. Peter*, 1 Munf. 487.

Disability Accruing Pending the Suit.—The subsequent disability of the defendant does not render void a judgment by default where the court has once fairly acquired jurisdiction of the cause and parties. See *Neale v. Utz*, 75 Va. 480, holding that the judgment could not be collaterally assailed. See also, *Turnbull v. Thompson*, 27 Gratt. 306.

Joint Judgments.—Where, in a joint action of debt against two, a judgment by default goes against one, and the other pleads to the action, and there is a trial, then there should be one and the same joint judgment against both. *Peasley v. Boatwright*, 2 Leigh 196. See *infra*, this note, II, D., "Joinder of Parties."

Plea of Nil Debet by One.—Where an action is brought against the makers and endorsers of a negotiable note, and one of the makers files a plea of *nil debet*, upon which the cause is discontinued as to him, and a judgment by default goes against the

others for nonappearance, such judgment is valid against them. Code of Va. 1860, ch. 177, sec. 19; *Muse v. Farmers' Bank*, 27 Gratt. 252.

3. JOINT PARTIES.

Joint Codefendants—Irregular Service of a Portion.

—A joint judgment by default against several defendants, a portion of whom are not served with process, or if served, the service is irregular, is erroneous, and may be reversed on motion under W. Va. Code, ch. 134, sec. 5, though it has been satisfied by another defendant. *Ferguson v. Millender*, 22 W. Va. 30, 9 S. E. Rep. 38; *Laidley v. Bright*, 17 W. Va. 799; *Carlton v. Ruffner*, 12 W. Va. 299; *Vandiver v. Roberts*, 4 W. Va. 498; *Midkiff v. Lusher*, 27 W. Va. 428.

If the writ be issued against, and served upon, one person only, who alone appears and pleads, if the declaration be against him and another, and judgment be entered against "the defendants," such judgment is to be understood as against both, and therefore erroneous as to the one who never pleaded. And such erroneous judgment may be reversed (as to the person against whom it is improperly entered), upon appeal taken by the other defendant. *Graham v. Graham*, 4 Munf. 205.

Partners.—In order for a joint judgment to be rendered against all the partners of a firm, process must be served on all, otherwise such joint judgment will be reversed *in toto*, under Code of W. Va., ch. 134, sec. 5, on motion. *Ferguson v. Millender*, 22 W. Va. 30, 9 S. E. Rep. 38.

It was held in *Bowles v. Huston*, 30 Gratt. 206, that a judgment in New York under the Code of Procedure of that state against the members of a dissolved partnership, one of whom was not served with process and did not appear in person or by attorney in the suit, is not such a judgment as is contemplated by the constitution and act of congress, as to such person.

4. JURISDICTION OF PERSON.—A personal judgment or decree cannot be rendered against a defendant who is not served with process, and who does not appear. *McGavock v. Clark*, 93 Va. 810, 22 S. E. Rep. 834; *Wilson v. Bank of Mount Pleasant*, 6 Leigh 574, opinion of TUCKER, P.; *Gray v. Stuart*, 33 Gratt. 351; *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447, citing, besides the above cases, *Lamar v. Hale*, 79 Va. 147; *Wade v. Hancock*, 76 Va. 620; *Houston v. McCluney*, 8 W. Va. 135; *Capehart v. Cunningham*, 12 W. Va. 750.

Invalid Service.—An invalid service is the same as no service whatever; and the law is well settled that a judgment rendered without an appearance by or service upon the defendant is void for want of jurisdiction in the court to pronounce the judgment. *Kanawha & O. Ry. Co. v. Ryan*, 31 W. Va. 364, 6 S. E. Rep. 924; *Blanton v. Carroll*, 86 Va. 539, 10 S. E. Rep. 329.

Judgment on Void Process.—A judgment on a writ of *scire facias*, returnable on its face not within ninety days, can only be treated as a judgment rendered without service of process, because rendered on a void process, and is therefore void, because the imperative command of the statute (Code of Va. 1871, ch. 166, sec. 2), is that process from any court whether original, mesne, or final, except a summons for a witness, *shall be returnable* within ninety days, etc., and hence a writ not returnable within such prescribed time is in violation of the mandatory provision of the statute, and any judgment rendered thereon, is necessarily void. *Lavell v. McCurdy*, 77 Va. 763; *Warren v. Saunders*, 27 Gratt. 259.

a. Appearance and Defence as Waiver.—But judgments or decrees *in personam* may be rendered, by state courts, against nonresident defendants, who are summoned merely by publication, where they appear and defend on the merits, for thereby they submit themselves to the jurisdiction of the court. *Grubb v. Starkey*, 90 Va. 831, 20 S. E. Rep. 784; *Pennoyer v. Neff*, 95 U. S. 714, distinguished.

Though where a defendant appears in term to have an irregular process quashed, it is not an appearance to the action which dispenses with further and proper process. *Wynn v. Wyatt*, 11 Leigh 584.

Appearance Bail Discharged.—If the defendant, in debt on a bond, appears and pleads, without giving special bail, and the court, without ruling him to give such bail, sets aside the office judgment against him, his appearance bail is thereby discharged. *Grays v. Hines*, 4 Munf. 437.

Foreign Judgments.—If the plaintiff recovers judgment against the defendant, in a suit by attachment, without the defendant's appearance, the judgment will have no effect in another state, as a personal judgment against the debtor. But if the defendant appears and defends himself in person or by attorney, then the judgment will have the same force and effect everywhere, as a judgment recovered in an ordinary suit. In such a case the record may show upon its face that the debtor did or did not appear, and if it does, the judgment will have effect accordingly. If the record does not show whether he did or did not appear, the presumption is in favor of the validity of the judgment. *Fisher v. March*, 26 Gratt. 765.

Effect in Foreign State.—But in such a case, if the record does not state that the debtor did or did not appear, or even if it states that he did appear, in a suit upon this judgment in another state, the defendant may, by his pleading and evidence, aver and prove the contrary. *Fisher v. March*, 26 Gratt. 765.

Construction of Statutes.—It was held in *Gilchrist v. W. Va., O. & O. L. Co.*, 31 W. Va. 115, that by the construction, which the New York courts put upon the New York statutes authorizing proceedings against foreign corporations, no judgment *in personam* can be rendered in that state against a foreign corporation, unless it has appeared to the action.

"It lies at the very foundation of justice, that every person who is to be affected by an adjudication should have an opportunity of being heard in defence, both in repelling the allegations of fact and upon matters of law; and no sentence of any court is entitled to the least respect in any other court or elsewhere when it has been pronounced *ex parte* and without opportunity of defence." *Fairfax v. Alexandria*, 28 Gratt. 16; *Underwood v. McVeigh*, 23 Gratt. 409, and *note*; *Connolly v. Connolly*, 32 Gratt. 657.

b. Constructive Service.

Strict Construction of and Strict Compliance with Statute.—"The procedure by constructive service of process in lieu of personal service, is a departure from the common law, and must be strictly followed. And, unless it appears from the record that the return was duly made, the judgment by default is void, and hence, if any prescribed interval of time is required to elapse between the date of service of the process and the return day, or before the judgment by default, it must appear by the record that such required interval did intervene accordingly."

or else the judgment by default is void, not voidable only." 4 Min. Inst. (3d Ed.) 647; *Staunton Perpetual B. & L. Co. v. Haden*, 92 Va. 201, 23 S. E. Rep. 285.

For instances of the strict construction that has been put upon these statutes, see *Lewis v. Botkin*, 4 W. Va. 533, 538; *Hoffman v. Shields*, 4 W. Va. 490; *Capehart v. Cunningham*, 12 W. Va. 750.

Judgment against Nonresident.—A personal judgment by default cannot be rendered against a non-resident defendant, on publication merely; such a judgment is void. "Even if there be attachment of effects of nonresidents, a personal judgment on publication, without service of process or appearance, is a nullity, except as to effects attached. *O'Brien v. Stephens*, 11 Gratt. 610; *Black, Judgm. sec. 231*; *Cooper v. Reynolds*, 10 Wall. (U. S.) 818; *Coleman v. Waters*, 13 W. Va. 278; *Gilchrist v. Oil, etc., Co.*, 21 W. Va. 115." *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447.

Corporations.—A judgment by default against a corporation, rendered on return of a summons which shows that the requirements of the statute have not been complied with, is a void judgment, and may be assailed collaterally by third parties, and, in the language of Freeman, in his excellent work on Judgments, at sec. 117, "It neither binds nor bars anyone. All acts performed under it, and all claims flowing out of it, are void." *Staunton Perpetual B. & L. Co. v. Haden*, 92 Va. 201, 23 S. E. Rep. 285; Va. Code 1887, sec. 3225, 3226.

No Legal Service of Process—Judgment Void.—Where a judgment by default is obtained against a defendant without legal service of process, the judgment, based on such service of process, is void. *Staunton Perpetual B. & L. Co. v. Haden*, 92 Va. 201, 23 S. E. Rep. 285; *Finney v. Clark*, 86 Va. 354, 10 S. E. Rep. 509.

Waiver of Defective Service.—Thus, where a judgment was obtained by default without legal service of process, the request of the attorney for the defendant that an item for attorney's fees, which was improperly included in the judgment, be omitted therefrom, is not a waiver of defective service, because the judgment, being void, could not be ratified. *Staunton Perpetual B. & L. Co. v. Haden*, 92 Va. 201, 23 S. E. Rep. 285.

Summons Erroneously Directed.—Where, contrary to law, the summons is directed to the sheriff of another county than the one in which the suit is brought, the judgment by default is erroneous, but not void. *Brown v. Chapman*, 90 Va. 174, 17 S. E. Rep. 855.

Thus, where in debt against four obligors, one of whom is the high sheriff, the process goes into the hands of his deputy, who serves it upon him as well as the other three, to which he makes no objection; and there is a judgment by default against all of them, the process is properly served and the judgment is valid. *Turnbull v. Thompson*, 27 Gratt. 306.

Writ Not Signed by Clerk.—A judgment by default rendered upon a writ, a copy of which was not signed by the clerk, is erroneous, but not void. *Laldley v. Bright*, 17 W. Va. 779; *Ambler v. Leach*, 15 W. Va. 677.

Date of Writ Blank.—Moreover, a judgment by default, rendered upon a writ, the date of which is blank, is valid and binding as a judgment, unless set aside by motion to the court or by writ of error. *Ambler v. Leach*, 15 W. Va. 677.

Express Waiver.—Where, upon a motion to reverse a judgment by default for defective service of process on a sheriff by his deputy, the defendant, who

was sheriff, says he wishes to take no advantage of such return, if defective, this is a waiver or retraxit of the motion, and a release of error as to him, though he is a plaintiff in the motion to reverse; and, as he alone is prejudiced by the alleged defect, it is no ground for reversal as to any of the defendants. *Anderson v. Doolittle*, 38 W. Va. 632, 18 S. E. Rep. 726.

Appearance a Waiver.—The object of the service of process is to bring the party into court. A judgment by default, with process badly executed, would not be legal. By appearance to the action in any case for any other purpose than to take advantage of the defective execution or the nonexecution of process, a defendant places himself precisely in the situation in which he would be if process were executed upon him, and he thereby waives all objection to the defective execution or the non-execution of process upon him. *Bank v. Bank*, 3 W. Va. 386.

When a defendant has not been served with process in the action, and has not appeared to the action, it is error for the clerk to enter office judgment against him for failing to appear and plead, and to award a writ of inquiry of damages; and it is also error under those circumstances for the court to have the damages assessed by the jury, and to enter judgment against the defendant for the damages found by the jury. A defendant in such a case has the right under the statute to move the court, after proper notice, to reverse the judgment and correct the proceedings, and upon the court's refusal to do so, then to bring the matter before the appellate court by writ of error. *Capehart v. Cunningham*, 12 W. Va. 750; *Houston v. McCluney*, 8 W. Va. 135.

Irregularity—Plea to Action as Waiver.—A *capias ad respondendum*, in debt on bond, returnable to August rules, being returned executed, and the defendant not appearing, the clerk enters the common order; at September rules the defendant appears and puts in special bail, but does not plead; the plaintiff insists that the clerk shall enter a confirmation of the common order, so as to put the case on the office judgment lists of the next term, which the clerk refuses to do; at the next term, the court orders the case to be put on the office judgment, and then the defendant puts in a plea to the action; and at the ensuing term, there is a trial, verdict, and judgment for the defendant. The court held, without deciding whether it was regular or not to order the case to be put on the office judgment list, that the defendant's pleading to the action, was a waiver of objection to the regularity of the order. *Powell v. Watson*, 8 Leigh 4.

C. WHEN DEFAULT MAY BE TAKEN.

Scire Facias against Bail.—Upon a *scire facias* against special bail, he obtained a bail piece, arrested his principal, surrendered him to the jailer and took the jailer's receipt for his body, and gave notice thereof to the attorney of the plaintiffs, they not residing in the county. Notwithstanding all this, there was an office judgment upon *scire facias* against the bail, and he not appearing to defend the case at the next term, the office judgment was confirmed. It was held that equity will not relieve the bail. *Allen v. Hamilton*, 9 Gratt. 255.

Time for Hearing.—Va. Code 1873, ch. 106, § 6, applies to judgments by default, and, perhaps to decrees or bills taken for confessed and not where the defendants appear and answer; and the thirty days necessary to elapse in order to ripen the cause for hearing on its merits, are thirty days from the

service, not the return, of the process. *Robinson v. Mays*, 76 Va. 708.

1. ENTRY.

When Judgment to Be Entered.—It is error in a court of law to enter a judgment against a defendant, on the day after a conditional judgment has been confirmed at the rules. The defendant has until the next term after the conditional judgment is confirmed in the office, to set it aside, under the act of the assembly. *Green v. Skipwith*, 1 Rand. 460.

In the case of a judgment by default, final judgment must not be entered against a defendant within one month after he was served with process, for according to the true construction of our statutes, where less than one month has elapsed between the service of process and the end of the succeeding term, the conditional judgment will become final at the term next succeeding the expiration of one month after the service of process. Va. Code 1878, ch. 106, sec. 6; *Dillard v. Thornton*, 29 Gratt. 392, and *note*; *Robinson v. Mays*, 76 Va. 708.

Entry before Return of Writ.—A judgment entered in the clerk's office, before the execution and the return of the writ is erroneous, and cannot be supported by the writs being returned executed to the term when the judgment is made final. *Higginbotham v. Garland*, 2 Munf. 491; *Winchester v. Bank*, 2 Munf. 339.

Entry against Defendant and Bail.—It seems that, where a judgment is entered in the clerk's office against the defendant and bail, a copy of the bail ought to be inserted in the record. *Shelton v. Pollock*, 1 H. & M. 422.

Entry of Judgment Containing Indorsement of Credit.—A judgment by default, for want of appearance, founded on an instrument of writing for the payment of money, on which an endorsement of credit is made by the plaintiff himself, ought to be entered subject to such credit; or if the plaintiff refuses to take the judgment in that way, a writ of enquiry should be awarded. *Rees v. Conococheague Bank*, 5 Rand. 326.

Appearance Bail.—If an office judgment be set aside and the suit defended by the appearance bail, and he afterwards waives his plea, judgment is to be entered against the defendant as well as the bail. *Vanmeter v. Fulkimore*, 1 H. & M. 329, and *note*; *Wallace v. Baker*, 2 Munf. 334; *Lee v. Carter*, 3 Munf. 121.

Common Order Entered Prematurely.—It is error sufficient to reverse an office judgment that the common order was entered before the plaintiff filed his declaration. *Waugh v. Carter*, 2 Munf. 333.

Affidavit.—The proper construction of sec. 46, ch. 125 of the W. Va. Code, is that if the affidavit required by that section is filed during the first term of the court after the office judgment at rules, or at any time during the following vacation of the court, final judgment may be entered during that term in court on or before the fifteenth day thereof, or during that vacation by the clerk. But if the affidavit be not made during that term, or during the following vacation, then the clerk has no authority to enter up final judgment, but the plaintiff must prove his case before the court, before judgment is given him. *Farmers' Bank v. Montgomery*, 11 W. Va. 109; *Hunter v. Snyder*, 11 W. Va. 198.

Declaration Defective.—It seems that where an office judgment is reversed on the ground that the declaration is radically defective, the appellate court, if the writ be correct, will not enter judgment for the defendant, but will send the cause

back to be proceeded in from the writ. *Hill v. Harvey*, 2 Munf. 525.

Cause Properly on Office Judgment Docket.—If the common order and the common order confirmed have been regularly entered at rules, the cause is properly on the office judgment docket at the next term of the court; though no endorsement of the proceedings may have been made upon the papers in the cause. *Wall v. Atwell*, 21 Gratt. 401.

When to Be Placed on Docket.—A *capias ad respondendum* was issued, returnable to the rules, on the first Monday in April, and on that day common order was entered; the first Monday in May was the next rule day, on which day the common order was confirmed in the office. On the same day the court sat. *Held*, it was not regular to place that case on the office judgment docket of that term, because 1 Rev. Code 1819, ch. 128, sec. 76, p. 506-7, directs that the docket shall be made out before every term. *White v. Archer*, 2 Va. Cas. 201.

Irregularity in Proceeding in Office.—But if the proceedings in the office have been so irregular that the cause is not properly on the office judgment docket, the court should remand it to the rules for proper proceedings. *Wall v. Atwell*, 21 Gratt. 401.

D. ON DEFENDANT'S FAILURE TO PLEAD.

Rule to Plead.—The defendant in ejectment may, upon notice to the plaintiff appear at the next term of the court, and move the court to set aside the judgment by default, and allow him to plead thereon, where the plaintiff has not served the defendant with notice of a rule to plead, as the statute required. *Smithson v. Briggs*, 33 Gratt. 180.

But the defendant may be ruled to trial in the county court, at the first term after the office judgment. *Mandeville v. Mandeville*, 3 Call 225.

Interrogatories.—It is proper to permit the answers to interrogatories of one defendant to be read to the jury on the trial of the cause although the judgment has been had against him in the clerk's office, and has become final by the rising of the succeeding term of court, no issuable appeal having been filed. *Lazzell v. Mapel*, 1 W. Va. 43.

Failure or Refusal to Plead.—Under Va. Code 1887, § 3211, providing for the judgment in fifteen days' notice in an action by a person entitled to recover money, the defendant is not entitled to a jury trial, on failure or refusal to plead. *Preston v. Salem Imp. Co.*, 91 Va. 583, 23 S. E. Rep. 486.

Submission of Issue to Jury.—Where the defendant has not appeared and made defence to a motion, upon notice, against him and his sureties, and judgment is rendered against him by the court at the instance of the plaintiff; and the record of the judgment erroneously states: "This day came the parties by their attorneys, and neither party requiring a jury, all matters of law and fact are submitted to the court," it is not error for the court, upon the motion of the defendant at the same term to set aside the judgment. And the court may do so *ex mero motu*. *Smith v. Knight*, 14 W. Va. 749; *Ballard v. Whitlock*, 18 Gratt. 235.

Craving of Oyer.—If, in an action of debt on bond, the bond or deed sued on is not filed with the declaration, and the defendant appears at rules and craves oyer of it, which the plaintiff does not give, and the defendant will not plead without oyer, the clerk may properly take the rules without regard to the craving of oyer, so that the case may be ready to be disposed of at the next term of the court. *Smith v. Lloyd*, 16 Gratt. 295.

No Plea in Cause.—If there be an office judgment

against the defendant, in an action on the case, and a writ of inquiry, and, afterwards, without any plea in the cause, the jury be sworn as if there were an issue, and a verdict be found for the defendant, the verdict will be set aside, and a new trial directed. *M'Millon v. Dobbins*, 9 Leigh 422.

Expiration of Time to Plead.—Parties who are proceeded against by order of publication have one month after the order is completed to appear and plead; and it is error to confirm a conditional judgment at rules before the expiration of that time. *Higginbotham v. Haselden*, 8 W. Va. 266.

E. PLEADING OF DEFENDANT UNDISPOSED OF.

While Demurrer on File—Pending Motion.—"When an answer or other pleading of a defendant raising an issue of law or fact is properly on file in the case, no judgment by default can be entered against him. To authorize a default, the answer or other pleading must be disposed of by motion, demurrer, or in some other manner. For the same reasons, a default cannot be entered while a motion is pending." 1 Black, Judgm. sec. 86. Approved in *Johnston v. Bank*, 41 W. Va. 550, 28 S. E. Rep. 517.

F. STATUTE OF JEOfAILS.—In general, the statute of jeofails is not applicable in case of a judgment by default for want of appearance; but if the party has once appeared, though he makes default, afterwards, and then there is judgment against him by such default, the statute of jeofails is applicable. *Bargamin v. Poitiaux*, 4 Leigh 412.

Does Not Cure Errors or Defects in Proceedings.—In cases of judgments by default, the statute of jeofails does not apply to cure errors and defects in the proceedings. *Wainwright v. Harper*, 3 Leigh 870; *Hatcher v. Lewis*, 4 Rand. 152; *Payne v. Britton*, 6 Rand. 104, opinion of JUDGE GREEN.

G. WRIT OF INQUIRY.—It is error to enter a judgment on the office without awarding an inquiry of damages. *Shelton v. Welsh*, 7 Leigh 175.

Common-Law Rule.—According to the common law, as recognized and settled in West Virginia, there can be no final judgment by default in any action at law sounding in damages, in the absence of a writ of enquiry, either in the circuit court or before a justice, when the value in controversy or the damages claimed exceed twenty dollars, and the right of either party, if he demands it, to have such writ executed by a jury, is guaranteed by the West Virginia constitution. This right does not depend upon the condition of the pleadings, or the conduct of the adverse party. It is a right which may be invoked by either party, whatever may be the wishes or the actions of the opposite party. *Hickman v. B. & O. R. Co.*, 30 W. Va. 296, 4 S. E. Rep. 654.

When Writ of Inquiry to Be Executed.—A writ of inquiry cannot be executed in the general court, or a district court, at the term next succeeding the rule day on which the office judgment was confirmed; because the defendant has the whole term to set aside the writ of inquiry, and plead to issue. *Craghill v. Page*, 2 H. & M. 446. See Va. Code 1887, sec. 3288.

Power of Court to Correct.—But where the clerk improperly enters an order for a writ of inquiry in an action for damages, at rules, the court may correct the mistake, or disregard it, and enter judgment as though no such order had been entered. *Anderson v. Doolittle*, 38 W. Va. 629, 18 S. E. Rep. 724.

Insurance Policy—Provision as to Adjustment.—It

was held in *Commercial Union Assurance Co. v. Everhart*, 88 Va. 952, 14 S. E. Rep. 836, that a policy of fire insurance, containing a provision that, if there be other insurance on the property, the loss, if any, shall be adjusted among the several insurers, is not a "writing for the payment of money," within Va. Code, sec. 3285, dispensing with an inquiry of damages in an action on such writing in case of judgment by default.

Appearance Bail Not Taken.—If judgment be entered against the defendant and sheriff, in a case in which the sheriff was not required to take appearance bail, the court ought to set it aside as to the sheriff, when this is disclosed before executing the writ of inquiry. *Williams v. Campbell*, 1 Wash. 153.

Confirmation without Writ of Inquiry.—Where a joint action is brought against the drawers and endorsers of a negotiable note, an office judgment cannot be confirmed against all or either of the defendants, without a writ of inquiry. *Hatcher v. Lewis*, 4 Rand. 152.

Declaration in Debt for Money Lent.—A judgment at rules in the clerk's office cannot lawfully be made final, on a declaration in debt, for money lent, and not alleged to be founded on any specialty, bill or note in writing, until a writ of inquiry has been awarded and executed. *Hunt v. M'Rea*, 6 Munf. 454; *Shelton v. Welsh*, 7 Leigh 175.

Intervention of Jury—Ejectment.—An office judgment in an action of ejectment, does not become final without the intervention of the court or a jury, but there ought, in every such case, to be an order for an inquiry of damages. *The James River & Kanawha Co. v. Lee*, 16 Gratt. 424, and *note*; *Smithson v. Briggs*, 33 Gratt. 180; *Hickman v. B. & O. R. Co.*, 30 W. Va. 296, 4 S. E. Rep. 654.

Negotiable Notes.—As a negotiable note is not as to the indorser, a note for the payment of money within the meaning of the act of 1804, judgment consequently cannot be rendered in such case, without the intervention of a jury, and on reversing a judgment by default in such action, the defendant will be allowed to object to the merits in the court below. *Metcalf v. Battalle*, Gilmer 191.

H. APPLICATION FOR RELIEF.

Form of Notice to Reverse.—A notice to reverse or correct a judgment by default, need not be in writing. All that is requisite is, that there should be reasonable notice. *Dillard v. Thornton*, 20 Gratt. 392.

Default on Forfeited Forthcoming Bond.—When a judgment and award of execution upon a forfeited forthcoming bond, has been entered by default, upon a day prior to that to which notice is given, the court in which the judgment and award of execution is rendered has jurisdiction on the motion of the plaintiff to set aside the judgment and quash the execution, upon reasonable notice to the defendants. *Ballard v. Whitlock*, 18 Gratt. 235.

Specified Grounds of Motion Stated.—But a party, who asks the court to reverse the judgment by default on notice and motion under the statute must specify in his notice a particular ground of objection, or he cannot rely upon such grounds before the circuit judge or in the appellate court. *Laidley v. Bright*, 17 W. Va. 779; *Coffman v. Sangston*, 31 Gratt. 263.

Errors Apparent on the Record.—In *Laidley v. Bright*, 17 W. Va. 801, it was said obiter that the appellate court might look into the errors in the proceedings apparent on the face of the record although not specifically pointed out in the notice as

the basis of the motion. But this point was not essential to the decision.

Petitions for Rehearing.—The statutory remedy by motion, is, however, cumulative, and has not superseded or abolished petitions for rehearing, which may still be had according to the course of equity, in the same manner as before the enactment of the statute allowing these motions to be made. *Kendrick v. Whitney*, 28 Gratt. 646.

1. CAUSES FOR SETTING ASIDE JUDGMENT BY DEFAULT.—After judgment by default has been entered up in court, or an order of inquiry of damages has been executed, under section 46, ch. 125 of the W. Va. Code, it cannot be set aside, and a defence to the action be allowed, under section 47 of the Code, without good cause being shown therefor; and such good cause can only appear by showing fraud, accident, mistake, surprise, or some other adventitious circumstance beyond the control of the party, and free from culpable neglect on his part. *Post v. Carr*, 43 W. Va. 72, 24 S. E. Rep. 583.

Lack of Jurisdiction.—A judgment by default, rendered without jurisdiction, under ch. 123, Code of W. Va., amended by ch. 46, Act 1897, is void, and may be vacated on motion. *Rorer v. People's Bldg. Loan & Savings Ass'n (W. Va.)*, 34 S. E. Rep. 758; *Green*, Judgm. sec. 98.

Failure of Attorney to Defend.—But it seems that the mere failure of an attorney to defend is not good cause for setting aside a judgment by default. *Post v. Carr*, 42 W. Va. 72, 24 S. E. Rep. 583; *Hubbard v. Yocum*, 30 W. Va. 755, 5 S. E. Rep. 867; *Hill v. Bowyer*, 18 Gratt. 364.

Judgment by Default on Defective Return.—On the other hand, where a return of a sheriff on process is fatally defective, and there has been on such return a judgment entered by default, the defendant, under Code W. Va. sec. 5 of ch. 134, may on motion have such judgment set aside for such error, and if the motion is overruled, the judgment will be reversed on writ of error. *Midkiff v. Lusher*, 27 W. Va. 439.

Endorsement on Writ of Nature of Action.—If a writ be issued without an endorsement of the true nature of the action, the court may, upon inspection of the writ, dismiss the suit, if the motion be made during the term next after an office judgment has been entered, but not afterwards. *Williams v. Campbell*, 1 Wash. 158.

Illness—Prevalence of Smallpox.—Where it appears that the defendant in an action is dangerously ill, and unable to attend court, and the attorney he relies on is deterred from going to the courthouse on account of the prevalence of smallpox in the town where the courthouse is situated, whereby judgment goes against the defendant by default, such judgment should be set aside on motion, upon the presentation of sufficient affidavits proving the excuses offered for the defendant's and attorney's nonattendance. *Johnston v. Bank*, 41 W. Va. 550, 23 S. E. Rep. 517.

Mistake of Character of Suit.—In *Mosby v. Haskins*, 4 H. & M. 427, a judgment by default was opened where the party had made the mistake of supposing that the summons served upon him was process in a pending chancery suit instead of primal process in an action at law, the court further said: "Could there have been a more complete surprise, than in the first instance to have met with an execution instead of a *capias*. There certainly could not to my mind; and hence a good ground for relief in equity."

Order of Judge Forbidding an Appearance.—Where in a proceeding to confiscate property of a person charged to be in rebellion, the counsel for such person does not enter an appearance for him, because in three cases against the same party, before the same judge, he was informed by the judge from the bench, that it was the rule of his court not to allow an appearance and defence by rebels and traitors, the counsel is not in default for failing to enter an appearance; and the decree of confiscation entered thereon is void and of no effect. *Fairfax v. Alexandria*, 28 Gratt. 16.

Costs of Protest Not Demanded in Writ.—Where the judgment is by default, the error of claiming in the declaration costs of protest, when those costs are not demanded in the writ, may be taken advantage of. *Hatcher v. Lewis*, 4 Rand. 152. See also, *Wainwright v. Harper*, 3 Leigh 270.

Reversal of Joint Judgment by Default.—Thus, where a joint judgment is rendered against two by default and for a defective return as to one it is reversed, it must be reversed as to both of the defendants. *Midkiff v. Lusher*, 27 W. Va. 439; *Vandiver v. Roberts*, 4 W. Va. 493; *Hoffman v. Bircher*, 22 W. Va. 557.

Reversal on Motion under Statute.—But where a joint judgment is rendered against two or more defendants by default, it is error to reverse it on motion, under sec. 5, ch. 134 of the W. Va. Code, as to one defendant only, and not as to all. *Bank v. McElfresh, etc., Co. (W. Va.)*, 37 S. E. Rep. 541.

Waiver.—Where a judgment by default is set aside to allow the defendant to appear and plead, the latter cannot claim that he was not regularly brought into court. *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. Rep. 487; *Harvey v. Skipwith*, 16 Gratt. 414; Va. Code, sec. 3260.

Filing of Affidavit—Partnership.—Upon the hearing of a motion to correct a judgment for being rendered against parties, who had not been served with process, and who had not appeared to the action, it is not error for the court to refuse to permit other parties, who were included in the judgment, but who had been duly served with process in the action, to file a plea or an affidavit denying the partnership. *Carlton v. Ruffner*, 12 W. Va. 297.

Parties to Motion.—It is not necessary to make those defendants, upon whom process has been duly served, and against whom judgment has been rendered, parties to a motion made to correct a judgment by defendants, who have not been served with process, and who have not appeared to the action, but against whom the judgment had also been rendered. *Carlton v. Ruffner*, 12 W. Va. 297.

Joint Codefendants—Portion Not Served.—Where a joint judgment by default is rendered against several defendants, and it appears that the writ, a copy of which was served on some of the defendants, was not signed by the clerk, or where the notice is otherwise improperly executed as against one party, such judgment should be reversed, and the cause remanded, to be properly proceeded with below. *Laidley v. Bright*, 17 W. Va. 779; *Vandiver v. Roberts*, 4 W. Va. 493.

No Service of Process—How Corrected.—Where judgment is given against persons, upon whom process has not been served, and who have not appeared to the action, the proper way to correct the error is upon motion before the court that rendered the judgment. *Carlton v. Ruffner*, 12 W. Va. 299; *Gunn v. Turner*, 21 Gratt. 382.

But upon the hearing of a motion made by defend-

ants, against whom the court has rendered judgment, before process has been served on them, and who had not appeared, it is error for the court to remand the cause to rules as to another defendant, upon whom process had been duly served, and office judgment was confirmed, but who had not appeared to the action, and against whom the court had failed to enter judgment. *Carlton v. Ruffner*, 12 W. Va. 297.

Allowance of Credits—Reformation.—Where certain plaintiffs give notice, that they will move the court to reform an office judgment, by allowing certain credits, and one of the credits claimed is endorsed on the bond, and the plaintiff endorses the other at the time of the motion, the court will refuse to reform the judgment. *Gunn v. Turner*, 21 Gratt. 382.

Limitation of Motion.—The motion to correct an error in a judgment or decree rendered by default under ch. 1177, sec. 5, Va. Code 1873, or sec. 5, ch. 184, W. Va. Code, is barred after the lapse of five years from the date of such judgment or decree. *Kendrick v. Whitney*, 28 Gratt. 646; *Dick v. Robinson*, 19 W. Va. 159. See *Wrenn v. Thompson*, 4 Munf. 377.

2. WHEN MOTION TO SET ASIDE ACTED ON.—Where a motion to set aside a judgment by default and allow the defendant to plead, is made by the defendant during the term at which the judgment is entered, and good cause is shown why that judgment should be set aside and the defendant allowed to plead, the court should act on the motion during the term, and not continue the motion until the next term. *Johnston v. Bank*, 41 W. Va. 550, 23 S. E. Rep. 517.

Where, in an action of debt, the common order is confirmed at rules irregularly, the defendant having pleaded to a part of the plaintiff's demand, this irregularity cannot afterwards be corrected at rules. *Southall v. Bank*, 12 Gratt. 312.

When Become Final.—If the term of the circuit court lasts more than fifteen days, all office judgments in which no writ of enquiry is ordered become final judgments on the fifteenth day; and cannot afterwards be set aside by the court. *Enders v. Burch*, 15 Gratt. 64, and *note*; *Hunter v. Snyder*, 11 W. Va. 204; *Alderson v. Gwinn*, 3 W. Va. 229; *Lazzell v. Mapel*, 1 W. Va. 43.

No Plea to Issue.—Where there has been a conditional judgment at rules, in an action of debt, and the case is on the docket for hearing, the judgment becomes final on the last day of the next term of court or on the fifteenth day thereof, whichever happens first, if there is no pleading to issue. And the filing of an affidavit, requiring the plaintiff to take the suitors' test oath, where there is no such pleading, is not sufficient to prevent a judgment by operation of law. *Alderson v. Gwinn*, 3 W. Va. 229.

Several Defendants—Plea to Action by One.—Where one of several defendants appears and files a plea to an action of debt, which sets up no defence as to any one but himself, and no plea is entered for or by the codefendants, the office judgment is not set aside as to any of the parties but the one who moves so to do, and judgment becomes final against all others on the last day of the term at which the case is docketed. *Creig v. Hedrick*, 5 W. Va. 140.

Where a summons in debt is served on a defendant on the 8d of February, and the judgment by default becomes final on the 3d of March it is a valid judgment, because, under the statute the day of service of the process may be counted, and thirty days have elapsed between the service of process and the judgment. *Turnbull v. Thompson*, 27 Gratt. 303.

During Term.—A decree by default for the plaintiff, in an action to cancel a conveyance as fraudulent, is not such a final decree as to prevent the court, for sufficient cause shown, from setting it aside during the term. *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. Rep. 804.

Setting Aside at Subsequent Term.—Where a conditional judgment is entered in the office, in debt on a decree for money without awarding a writ of inquiry of damages, the court, at a subsequent term, may set aside the judgment as irregularly entered. *Shelton v. Welsh*, 7 Leigh 175. The court in this case distinguished and explained *Halley v. Baird*, 1 H. & M. 25; *Freeland v. Field*, 6 Call 12; *Digges v. Dunn*, 1 Munf. 56; *Eubank v. Ralls*, 4 Leigh 308. In the first case, i. e., *Halley v. Baird*, the court decided, in conformity with the common law, and *Freeland v. Field*, that a judgment entered in the order book and signed by the judge in open court, could not be amended at a subsequent term, these facts were emphatically stated, and seemed to have been considered as vitally important.

Subsequent Term.—Moreover, a final decree by default may be set aside at a subsequent term, for good cause shown, in a case where relief cannot be given by a bill of review, or bill to impeach the decree for fraud in obtaining it. *Erwin v. Vint*, 6 Munf. 267.

Member of Assembly—Privilege.—Where a suit has been brought against a member of the General Assembly, and the process has been served upon him, and an office judgment has been entered up against him at the rules, whilst his privilege existed, and confirmed, he may, at the next term of the court, though his privilege has then ceased, upon motion, have all proceedings subsequent to the issue of the process set aside, and the cause remanded to the rules. *McPherson v. Nesmith*, 3 Gratt. 237.

3. ADMISSION OF PLEAS.—After an office judgment, the court has discretionary power to admit any plea which appears necessary for defendant's defence, though not issuable and should refuse it only where delay seems to be intended. *Downman v. Downman*, 1 Wash. 26.

General Demurrer.—But a general demurrer is an issuable plea, which ought to be received for the purpose of setting aside an office judgment. *Syme v. Griffin*, 4 H. & M. 277.

Puis Darrein Continuance.—After an office judgment, and before the end of the next quarterly term the plea *puis darrein* continuance may be pleaded. *Hunt v. Wilkinson*, 2 Call 50, 1 Am. Dec. 534.

Plea in Abatement.—But a plea in abatement ought not to be received to set aside an office judgment, unless it be of matter which arose *puis darrein continuance*. *Bradley v. Welch*, 1 Munf. 284; *Hunt v. Wilkinson*, 2 Call 49.

A plea in abatement not being an issuable plea, cannot be filed to set aside an office judgment, and must be filed at rules, before office judgment is entered, except where cause, making the filing of a plea in abatement necessary, occurs after the office judgment is entered at rules, in which case it may be filed at the first opportunity afterwards. *Hinton v. Ballard*, 3 W. Va. 582, citing *Wyche v. Macklin*, 2 Rand. 426; *Hunt v. Wilkinson*, 2 Call 49, 2 Tuck. Com. 254. See monographic *note* on "Plea in Abatement" appended to *Warren v. Saunders*, 27 Gratt. 259.

Judgment on Docket.—An office judgment cannot be set aside when it stands as an office judgment on

the docket of the court, by a plea in abatement. *Wall v. Atwell*, 21 Gratt. 401.

Statute of Limitations.—The defendant cannot plead the act of limitations upon setting aside the office judgment, after the next succeeding term, unless good cause is shown. *Backhouse v. Jones*, 5 Call 462.

Defective Plea.—A defective plea, to an action upon an injunction bond, ought not to be received by the court, to set aside an office judgment. *Gray v. Campbell*, 3 Munf. 251.

Plea to Part of Demand.—If the plea filed by the defendant at rules, does not go to the plaintiff's whole demand, he may sign judgment for so much as is not covered by the plea. *Southall v. Bank*, 12 Gratt. 312.

Discretion of Court in Receiving Pleas.—Where a plea is offered on setting aside an office judgment, the court may exercise a sound discretion about receiving them; should receive none (if objected to) that do not go to the merits of the action. *Wyche v. Macklin*, 2 Rand. 426; *Downman v. Downman*, 1 Wash. 26.

I. RELIEF BY PROCEEDING IN EQUITY.—An injunction will not be granted against a judgment by default upon summons directed to the sheriff of another county than the one where the action is brought, although the summons was issued contrary to law, as the judgment, though erroneous, is not void, and the defendant has a complete remedy at law by motion under Va. Code 1887, sec. 8451. *Brown v. Chapman*, 90 Va. 174, 17 S. E. Rep. 855.

Grounds for Interference in Equity.—A party cannot get relief in equity, against a judgment by default, upon grounds which might have been successfully taken in a law court, unless some reason founded in fraud, accident, surprise, or some adventitious circumstances beyond the control of the party be shown, why the defence was not made in that court. *Alford v. Moore*, 15 W. Va. 597; *Knapp v. Snyder*, 15 W. Va. 434; *Braden v. Reitzenberger*, 18 W. Va. 286. See *infra*, this note, "Equitable Relief against Judgments."

Suit in Equity to Enforce Judgment.—In a suit in equity brought for the purpose of enforcing a judgment lien, which judgment was obtained against the defendant by default, the defendant will not be allowed in said chancery suit to make any defence against the judgment which might have been successfully made in a court of law, unless he shows some reason founded on fraud, accident, surprise, or some adventitious circumstance beyond his control, why the defence at law was not made. *McNeel v. Auldridge*, 24 W. Va. 748, 12 S. E. Rep. 851.

Scope of Relief.—Where for want of service of process judgment is void, collection of execution should be enjoined, the judgment vacated, and the cause remanded to be proceeded in at law by an alias summons properly served. *Finney v. Clark*, 86 Va. 854, 10 S. E. Rep. 569.

Relief of Bail.—Bail cannot be relieved in equity against a judgment at law by default, without assigning some good cause why he did not defend himself at law. *Brown v. Toell*, 5 Rand. 543.

1. APPEAL FROM DEFAULT.

Preliminary Application to Correct.—If a party takes an appeal from a judgment by default before applying to the court in which the decree was rendered, or to the judge thereof to correct the errors of which he complains, his appeal must be dismissed, as improperly taken. *Baker v. Western M. & M. Co.*, 6 W.

Va. 196; *Peerce v. Adamson*, 20 W. Va. 57; *Com. v. Levy*, 28 Gratt. 21; *Gunn v. Turner*, 21 Gratt. 383.

It was held in *Peerce v. Adamson*, 20 W. Va. 57, that section 85 of art. 8 of the W. Va. Constitution does not authorize the setting aside of judgments therein specified and the granting of new trials therein. The judgments must stand until, by "due process of law," it is ascertained that they were rendered because of acts done according to the usages of civilized warfare in the prosecution of the war and when so ascertained such judgments are nullities.

Supersedeas to Order.—Where a court sets aside an office judgment and the execution which has issued upon it after the fifteenth day of the term, and permits the defendant to plead, the plaintiff may have a supersedeas from the order; and though that part of the order setting aside the judgment is interlocutory, and the appellate court will reverse the whole order. *Enders v. Burch*, 15 Gratt. 64, and *note*; *Hunter v. Snyder*, 11 W. Va. 204.

Review of Judgments by Default.—In reviewing a judgment by default on a forthcoming bond, the appellate court will compare it with the execution on which it was taken. *Glascock v. Dawson*, 1 Munf. 605.

By Va. Code 1887, § 8451, "the court in which there is a judgment by default, or decree on a bill taken for confessed, or the judge of the said court in the vacation thereof, may, on motion, reverse such a judgment or decree for any error for which an appellate court might reverse it, as if the following section had not been enacted, and give such judgment or decree as ought to be given." See *Brown v. Chapman*, 90 Va. 174, 17 S. E. Rep. 855.

Justice's Judgment—Trial De Novo upon Appeal.—The judgment of a justice rendered upon the verdict of six jurors in an action for damages, in which no defence was made by the defendant, cannot be tried *de novo* by the circuit court upon appeal. *Hickman v. B. & O. R. Co.*, 30 W. Va. 296, 4 S. E. Rep. 654; *Vandervort v. Fouse*, 30 W. Va. 326, 4 S. E. Rep. 660; *Barlow v. Daniels*, 25 W. Va. 512.

a. Record on Appeal.

Summons and Return Part of Record.—In all cases of a judgment by default, for want of appearance, the writ with the endorsement is a necessary part of the record, that it may be seen whether there was a proper foundation for the judgment. *Nadenbush v. Lane*, 4 Rand. 413; *Wainwright v. Harper*, 3 Leigh 270; *Amiss v. McGinnis*, 12 W. Va. 374.

Facts Proven—Evidence.—It is not necessary to make the facts proven, nor the evidence, a part of the record, in case of a judgment by default, and if any part of the evidence is referred to in the preamble to the judgment, this, of itself, is insufficient to preclude the fact that other evidence might have been heard by the court, unless it affirmatively appears from the record that this was all the evidence heard by the court. *Anderson v. Doolittle*, 38 W. Va. 629, 18 S. E. Rep. 724.

Receipt for Executions.—A judgment by default against a sheriff, for fines collected upon executions in behalf of the commonwealth, may be sustained, although his receipt for the execution is not inserted in the record. *Segouine v. Auditor*, 4 Munf. 398.

Copy of Bail Bond.—A clerk's entering and confirming an office judgment, at rules, against a defendant, and another person, as "security for his appearance," is not sufficient to make such person liable as appearance bail; but a copy of the bail bond should be inserted in the transcript of the

record, for want of which, the judgment should be reversed. *Quarles v. Buford*, 3 Munf. 487.

Record as Evidence.—Notwithstanding the fact that the defendants, in a suit in chancery, are in default, yet the record or proceedings in another suit *inter alios*, is not competent evidence against them. *Frazier v. Frazier*, 2 Leigh 642.

XIV. OPERATION AND EFFECT.

A. RES JUDICATA.—A point once adjudicated by a court of competent jurisdiction, however erroneous the adjudication, may be relied on as an estoppel in any subsequent collateral suit in the same or any court at law or in equity, when either the party or his privies allege anything inconsistent with it, and that, too, whether the subsequent suit is upon the same or a different cause of action; nor is it necessary that precisely the same parties should have been plaintiffs or defendants in the same suit, provided that the same subject-matter in controversy between two or more parties to the two suits, respectively, have been in a former suit directly in issue and decided. The conclusiveness of the judgment or decree extends beyond what may appear on its face, to every allegation which has been made on one side, and denied on the other, and was in issue and determined in the course of the proceedings. If it appears by the record that the point in controversy was necessarily decided in the first suit, whether upon the law on demurrer, or upon the facts in issue, it cannot again be considered in any subsequent suit between any of the parties or their privies. *McCoy v. McCoy*, 20 W. Va. 794, 2 S. E. Rep. 809; *Poole v. Dilworth*, 26 W. Va. 583; *Corrothers v. Sargent*, 20 W. Va. 356; *Beckwith v. Thompson*, 18 W. Va. 103; *Coville v. Gilman*, 13 W. Va. 337; *Western M. & M. Co. v. Virginia, etc., Co.*, 10 W. Va. 250; *Tracey v. Shumate*, 23 W. Va. 509; *Tate v. Bank*, 96 Va. 766, 23 S. E. Rep. 476.

Qualification of Rule.—But the law of *res judicata* is subject to this qualification: no party can be estopped by any judgment or decree if the record of the first suit shows that he had no opportunity to be heard in opposition to such judgment or decree. *McCoy v. McCoy*, 20 W. Va. 794, 2 S. E. Rep. 809; *Renick v. Ludington*, 20 W. Va. 511; *Renick v. Ludington*, 16 W. Va. 379; *Haymond v. Camden*, 23 W. Va. 182; *Stephens v. Brown*, 24 W. Va. 234; *Underwood v. McVeigh*, 23 Gratt. 409.

A judgment rendered by a court of competent jurisdiction in a former suit between the same parties, and involving the same subject-matter, is conclusive. *Currie v. Chowning*, 2 Va. Dec. 25, 21 S. E. Rep. 809, citing *Diehl v. Marchant*, 87 Va. 447, 12 S. E. Rep. 803.

Application to Foreign Judgments.—The rule as to *res adjudicata* applies not only to judgments and decrees of the same state, but to the judgments and decrees of the courts of any state in the Union, whenever questioned in any sister state, provided there was personal service or an appearance of the parties to the suit in the sister state. *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. Rep. 16; *Black v. Smith*, 13 W. Va. 780.

Suit Construing Deeds.—But, a suit construing certain deeds and the rights of the parties thereunder will not be considered *res judicata* of an action of ejectment founded on an alleged breach of the conditions of the deeds. *King v. Railway Co.*, 99 Va. 625, 39 S. E. Rep. 701.

Petition to Rehear—Bill of Review—Final Determination.—"The court, before allowing a petition to re-

hear, or a bill of review to be filed on the ground of after-discovered evidence, ought to be satisfied that the evidence relied on is new and could not, by ordinary diligence, have been discovered prior to the date of the decree complained of; but when the court is so satisfied, and allows a petition to rehear, or a bill of review to be filed, those questions are finally determined, and are not open when the petition to rehear, or a bill of review is heard on the merits. 1 Bart. Ch. Pr. 332." *Craufurd v. Smith*, 98 Va. 622, 23 S. E. Rep. 235, 25 S. E. Rep. 657.

Legality of an Authority to Issue Mandamus.—On a rule issued against a county commissioner to show cause why he should not be fined for contempt in disobeying a peremptory *mandamus* issued against him and others, directing them to settle and sign a bill of exceptions in the manner therein prescribed, he cannot question the legality of the writ, and the authority to issue it, as that matter, as to him, is *res judicata*. *State v. Cunningham*, 33 W. Va. 607, 11 S. E. Rep. 76.

Partition.—It was held in *Newberry v. Sheffey*, 86 Va. 286, 15 S. E. Rep. 548, where a purchaser of land at a sale for partition in a chancery suit was entitled to a credit on his bonds, for his wife's interest in the lands, and he fails to pay his bonds for the purchase money, and judgment was recovered therein against the sureties, execution issued, and a forthcoming bond taken, that in a motion on the forthcoming bond, the court properly refused to continue the case until such interest could be ascertained and credited on the judgment, because the right of the parties, so far as the proceeding at law was concerned, had been settled by the judgment. See also, *Cleek v. McGuffin*, 89 Va. 324, 15 S. E. Rep. 896; *Carter v. Washington*, 2 H. & M. 345.

Cloud upon Title.—Thus, where a purchaser of land applies for and obtains an injunction in a circuit court restraining the trustee from selling on account of an alleged cloud upon the title, and the supreme court has, on appeal, reversed the circuit court, and decides that the alleged cloud and defect do not constitute sufficient ground for an injunction and dismiss the bill, the plaintiff cannot bring a second, and precisely similar, suit against the same parties for the same purpose and cause of action; and on a plea of *res judicata* the plea will be sustained. *Kinports v. Rawson*, 36 W. Va. 237, 15 S. E. Rep. 66.

Plea of Res Judicata.—If a new suit is brought by the plaintiffs against the same defendant for the same cause of action, and the plea of *res judicata* is interposed by the defendant, it will bar the action. *Parsons v. Riley*, 33 W. Va. 464, 10 S. E. Rep. 806.

For to obtain the benefit of *res judicata* it must be pleaded. *Beall v. Walker*, 26 W. Va. 741; *The Western M. & M. Co. v. The Virginia, etc., Co.*, 10 W. Va. 250. See *Blern v. Ray* (W. Va.), 38 S. E. Rep. 521.

Thus a judgment between the same parties, upon the same point, which, if pleaded, would have been a perfect bar is, when used as evidence under the general issue, not conclusive on the jury, but only evidence to be weighed by them. *Cleaton v. Chambliss*, 6 Rand. 86.

If in assumpsit, the defendant plead the act of limitations, and the plaintiff would avoid the plea by a former suit having been brought in time, he must reply the former specially; he cannot give it in evidence under a general replication to the plea. *Bogle v. Conway*, 3 Call 1.

Evidence.—Under a declaration alleging that a certain judgment in a prior suit was rendered on May 30th, a copy of such judgment purporting to

have been rendered on May 31st, was admissible in evidence; the record showing that the verdict on which the judgment was based was rendered on May 30th. *Sayre v. Edwards*, 19 W. Va. 352.

Copy of Judgment.—A copy of a judgment of the general court, upon a case adjoined to it by a superior court, attested by the clerk of the general court, his attestation or handwriting being proved, is competent and sufficient evidence before the same superior court, to prove what it purports to be. *Gibson v. Com.*, 2 Va. Cas. 111.

1. PARTIES AND PRIVIES.

a. General Rule as Regards Parties.—It is a well-settled rule of evidence that a verdict and judgment in an action at law, cannot be received in evidence upon the trial of an action between others, not parties to the first, nor standing in privity with those who were, for the purpose of proving any fact upon which such verdict and judgment were founded and which being essential to their rendition, is to be regarded as established by them. *Stinchcomb v. Marsh*, 15 Gratt. 202; *Cady v. Gale*, 5 W. Va. 505; *Adams v. Alkire*, 20 W. Va. 490.

Unlawful Detainer.—It was held in *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. Rep. 354, in an action for damages occasioned by taking out a distress warrant against the plaintiff for rent due in March, 1891, that a judgment rendered in November, 1890, between the same parties, in an action of unlawful detainer, is no evidence as to whether rent was due at the date of the warrant.

Amended Bill—New Parties.—If an amended bill is filed making new parties and additional allegations, and after it is ready for hearing, on this amended bill, a decree is rendered reciting that the cause was heard on the papers formerly read, but not reciting, that it was heard on the amended bill, and the decree is such as might have been rendered on the original bill, nothing being decided with reference to the new allegations of the facts stated in the amended bill, the failure to recite in this decree, that the cause was heard also on the amended bill, cannot be regarded as a clerical error; and the new parties are not bound by this decree as *res adjudicata*. *Renick v. Ludington*, 20 W. Va. 511.

A plaintiff suing for slaves as administrator of his wife, is not barred by a decision against her, in her lifetime, in a suit to which she was not a party; the ground of that decision having been that, under the act of limitations, the opposite party had obtained a legal title to the slaves by five years' possession commencing during the coverture, during which also the right of the wife accrued, and the husband having never had possession in his character as husband. *Blakey v. Newby*, 6 Munf. 64.

Improperly Made Parties.—Proceedings by the commissioner of school lands, under chap. 184 of the W. Va. Acts of 1872-73, for the sale of foreign lands for the benefit of the school fund, was never designed to settle the title to land between opposing claimants; and if they are improperly made defendants in such a proceeding, the circuit court has no jurisdiction, in such a case, to adjudge which of such claimants has the better title to the land so as to bind any of such improper parties by such adjudication in any controversy which they might thereafter have, involving the question, who had the better title to the land. *McClure v. Manperture*, 20 W. Va. 633, 2 S. E. Rep. 761.

Thus the parties to two suits must be regarded as the same, when the complainants in both were certain taxpayers of a municipality suing on behalf of

themselves and all other taxpayers, and the defendants in both, though consisting of different persons, were, in each suit, representing and acting for the municipality without any private interest. *Gallaher v. Moundsville*, 24 W. Va. 730, 12 S. E. Rep. 859.

Description of Parties.—It was held in *Fidelity Ins., Trust & S. D. Co. v. S. V. R. Co.*, 33 W. Va. 761, 11 S. E. Rep. 58, that an attachment against a defendant which summons M, president of the S. V. R. Co., garnishee, to answer what property of the defendant he has in hand, and a judgment is rendered that the plaintiff recover of M, president of S. V. R. Co., garnishee of the defendant, a sum of money, are not an attachment and judgment against the S. V. R. Co., as garnishee, and do not bind property in the hands of the latter company belonging to the defendant; and the sale of the property under execution upon such judgment does not pass title thereto, or bar the defendant, from setting up its claim, to such property against the S. V. R. Co.

General Rule as Regards Privies.—"It is well settled that a judgment is conclusive not only upon those who are actually parties to the litigation, but also upon all persons who are in privity with them. This is not only a doctrine of our own law, but also a principle of general jurisprudence, as appears from the rule of the Roman law that 'the plea *res adjudicata* is available against him who has succeeded to the rights of ownership of the person who suffered the judgment.'" 2 Black, Judgm. 549; *Smith v. Parkersburg Co-Op. Ass'n* (W. Va.), 37 S. E. Rep. 645; *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. Rep. 354; *Tate v. Bank*, 96 Va. 765, 32 S. E. Rep. 476.

"There is no doubt that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court, except on appeal, writ of error, or other proceeding provided for its revision."

* * * * The principle underlying and supporting all these decisions is that a judgment necessarily affirming or denying the fact is conclusive of its existence whenever it becomes a matter in issue between the same parties or between the parties or their privies with them. Therefore a judgment for the defendant in an action for obstructing a water course, if based upon the ground that there was no water course to be constructed, is, in subsequent actions, conclusive of the nonexistence of such water course; but, if the judgment had been for the plaintiff, it would necessarily have been conclusive in other actions of the existence of the water course and of its obstruction." *Freem. Judgm.* § 249; *C. & O. R. Co. v. Rison* (Va.), 37 S. E. Rep. 320.

Right of Free Ferriage.—A former adjudication by a court of competent jurisdiction in 1810, wherein the question of the right of the ancestor of the plaintiff in the suit, his heirs and tenants, to free ferriage across a stream, and the construction of the deed on which the right was based, was decided in his favor, is binding and conclusive in a subsequent suit involving substantially the same question, not only on the original parties to the deed in the former suit, but also on all those in privity with them. *Williams v. Tomlin*, 3 Va. Dec. 565, 28 S. E. Rep. 383; *Lemmon v. Herbert*, 92 Va. 653, 24 S. E. Rep. 249.

Exception to Rule.—"The general rule certainly is, that no person is bound by a judgment or decree

except those who were parties or standing in privity with others who were parties. But there are exceptions to the rule of equal authority with the rule itself. *Baylor v. Dejarnette*, 18 Gratt. 164. It would certainly be unreasonable and unjust that a party having a charge upon an estate affecting the whole fee should be delayed or embarrassed in enforcing his claim because of limitation by way of remainder to persons to whom it might be impossible or improper to make parties to the cause. To obviate this difficulty the doctrine of virtual representation has been introduced by which certain parties before the court are regarded as representing those coming after them with contingent interests." *Harrison v. Wallton*, 95 Va. 721, 30 S. E. Rep. 372.

Prison-Bonds Bond—Sheriff Not Party.—The sheriff, in a suit upon a prison-bonds bond, though not a party to the suit on the bond, is bound by the judgment, unless he can prove that it was obtained by collusion. *Hoe v. Tebbs*, 1 Munf. 501.

Remaindermen.—In *Baylor v. Dejarnette*, 18 Gratt. 162, the court said: "It is well settled that it is not necessary that remaindermen, after the first estate of inheritance, should be made parties: and where real estate is in controversy which is subject to an entail it is sufficient to make the first tenant in tail *in esse*, in whom an estate of inheritance is vested, a party with those claiming prior interests without making those parties, who may claim in reversion or remainder after such estate of inheritance. And a decree against such tenant in tail will bind those in reversion or remainder although by the failure of all the previous estates, the estates in remainder or reversion might afterwards become vested." See also, *Faulkner v. Davis*, 18 Gratt. 684, 688.

Where the circuit court construes a will as giving a life estate, which construction is not drawn in question on appeal, and which is approved by the appellate court, the question as to what estate passed by the will is *res judicata*; and the fact that the remaindermen are not parties to that suit is immaterial. *Hawthorne v. Beckwith*, 89 Va. 786, 17 S. E. Rep. 241.

Presence—A person, not a party to a judgment, is not bound by it, in law or equity, merely on the ground that he was present, and cross-examined the witnesses. *Turpin v. Thomas*, 2 H. & M. 139.

Decision as to Freedom—Privies.—A judgment deciding in favor of the freedom of persons held in slavery, has no effect against any party, except the defendant and those claiming under him, posterior to the judgment. *Kitty v. Fitzhugh*, 4 Rand. 600. But see *Bensimer v. Fell*, 80 W. Va. 15, 12 S. E. Rep. 1078.

In an action for freedom, a former verdict which found the mother of the plaintiff to be free, or a slave, is conclusive evidence, where the defendant in the second action claims under the defendant in the former suit. *Shelton v. Barbour*, 2 Wash. 64. But see *Talbert v. Jenny*, 6 Rand. 159.

Judgment in Forma Pauperis.—It seems that a judgment, in a suit *in forma pauperis* brought by negroes to recover their freedom, in which it is adjudged that they are slaves, is not necessarily conclusive of the status of the negroes, in a new controversy between them and the same defendants, and, under peculiar circumstances, may be no bar to the recovery of their freedom. *Erskine v. Henry*, 9 Leigh 188.

Where a suit *in forma pauperis*, is brought by

negroes to recover their freedom, and it is adjudged that the paupers are slaves, the judgment in the pauper suit is not conclusive evidence, and if the court holds them to be free, the plaintiffs cannot recover them. *Erskine v. Henry*, 9 Leigh 188.

Assignees.—Where the assignment of a chose in action is absolute in its terms, and judgment has been obtained thereon in the name of the assignor for the benefit of the assignee, which judgment has subsequently been declared void in a suit brought by the assignee to enforce the collection of the judgment out of the lands of the judgment debtor, the assignor of the debt is bound by the decree against his assignee, and is estopped from setting up the judgment as a lien on the lands of the judgment debtor, even though the assignment was merely a collateral security for a debt, or intended to carry only a partial interest. The assignor and assignee are at least privies in the transaction, and the question of the lien of the judgment is *res judicata*. *Cox v. Crockett*, 92 Va. 50, 23 S. E. Rep. 840. See monographic note on "Estoppel" appended to *Bower v. McCormick*, 23 Gratt. 310.

Where, in an action to enjoin a sale under a trust deed on the ground that it has been merged in a judgment on the bond secured by it, a resettlement is asked of the accounts of the defendant's testator or administrator *de bonis non* because of the recent discovery of a receipt showing assets unaccounted for, and it appears that all these parties were parties to a former suit against the deceased's administrators, in which it was charged that the deceased had not fully accounted for the assets, the judgment in the latter case is *res judicata*. *Gibson v. Green*, 89 Va. 524, 16 S. E. Rep. 661.

Determination on Appeal.—Where a question of law or fact is one definitely settled and determined by a decree of the supreme court, and the cause is remanded for further proceedings, a party to the suit cannot, by subsequent pleadings, call in question the conclusiveness of the questions determined by such decree. *Seabright v. Seabright*, 33 W. Va. 152, 10 S. E. Rep. 265.

A judgment which determines the issue of the legality of a dam, in an action in which such issue is raised by the pleading, is conclusive between the parties or their privies in a subsequent action, since the parties are estopped from denying such facts. *C. & O. R. Co. v. Rison*, 99 Va. 18, 37 S. E. Rep. 320.

Judgment Creditor—Pendency of Suit.—A judgment creditor is concluded by a decree in a cause in which he is a defendant, though he has, at the same time, a suit depending against the same parties to enforce his prior lien. *Jones v. Myrick*, 8 Gratt. 179.

Persons Claiming in Different Rights.—Where the same person has two separate and distinct rights or interests in the subject-matter of a suit and the allegations of the bill comprehend but one of said rights or interests, the fact that such person is made a party to such suit will not estop, conclude or prevent him from asserting or defending his rights or interests in regard to said subject-matter so far as they were not involved or comprehended in the allegations of the bill in such suit. As to the matters not so comprehended in the bill, he will not be regarded as a party to the suit. Thus, if a person is interested in the subject-matter of a suit in two capacities, the one as trustee in one deed of trust and the other as beneficiary in a different deed of trust, both deeds of trust being upon the same property, and he is made a party to a suit

brought to set aside the latter trust deed, in which no reference is made to him as trustee in the trust deed, he will not be regarded as a party to that suit in his capacity of trustee in the former trust deed. *McNult v. Trogon*, 29 W. Va. 469, 2 S. E. Rep. 328. See monographic note on "Estoppel" appended to *Bower v. McCormick*, 23 Gratt. 310.

Grantor and Grantee.—A grantee of land is not affected by a judgment against his grantor, after the conveyance, merely because of privity in estate. *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. Rep. 1078.

Trustee and Cestui Que Trust.—Rights of a *cestui que trust* cannot be cut off by a decree in equity rendered against his trustee in a suit in chancery to which the *cestui que trust* was not a party. *Collins v. Loftus*, 10 Leigh 5.

Joint Parties.—Though the statute in relation to joint obligations, gives an action against the personal representative of a deceased joint obligor, 1 Rev. Code, ch. 98, § 3, p. 359; Va. Code, ch. 144, § 13, p. 582, it does not affect the principle that the defect of the remedy against one joint obligor upon a ground not personal to himself, defeats it as to all of the obligors. *Brown v. Johnson*, 13 Gratt. 644. The court in this case further said: "If a verdict and judgment for the plaintiff against one of several who are jointly bound may be admitted in evidence in an action against another as a bar, it would seem to be a necessary corollary (if the deduction be not *a fortiori*) that a verdict and judgment against the plaintiff in the former action upon an issue going to the merits and ascertaining that the plaintiff never had any cause of action against that defendant, would be admissible as a bar to a subsequent action against another so jointly bound. For the joint obligation would clearly be at an end as to the former, and therefore, as we have seen, as to all the others."

"At common law a judgment recovered against one of two or more persons on their joint contract was a bar to an action against the others. The entire cause of action was merged in the judgment, and the joint liability of those not sued, or against whom the judgment was not rendered, was extinguished. And upon a joint and several contract the action had to be brought against all jointly, or against one of them singly, and could not be brought against any intermediate number. These rules, however, have been essentially changed by statutes enacted by the legislature." See Va. Code 1887, §§ 3395, 3396, 3312; *Cahoon v. McCulloch*, 92 Va. 177, 23 S. E. Rep. 225.

Covenant by One Joint Obligor.—A covenant by the obligor in a bond with one of three joint obligors, that if after judgment against all the parties the money is not paid by the other two, he will relieve him from the payment of it, is not a release, and will not bar an action on the bond against all the obligors. *Brown v. Johnson*, 13 Gratt. 644.

Judgment as between Joint Defendants.—Where in a suit charging two administrators with the joint *devastavit* of the intestate's estate, and they jointly except to the report wherein they were charged with the *devastavit*, and the court sustained the exception, one of these administrators cannot afterwards be heard to charge his coadministrators with the same *devastavit* whereby a debt due by the estate to the allegor was lost. The decree sustaining the exception is the law of the case, binding upon the parties and those claiming under them. *Kent v. Kent*, 82 Va. 205.

Record as Evidence.—The record of a judgment is

evidence in a subsequent suit between the same parties, to the effect that claims asserted in both suits which were disallowed or set off in the former suit are not done. *Johnson v. Jennings*, 10 Gratt. 1.

The record of the verdict and judgment, upon a writ of inquiry, in a suit by the mother of the plaintiff, against a third person, in which record the ground of the judgment does not appear, may be given in evidence to prove, that the mother had recovered her freedom; not that she was entitled to it. But the questions, upon what ground the judgment in that suit was rendered, and whether the decedent was born after the mother acquired her right to freedom or not, ought to be left open. *Pegram v. Isabell*, 2 H. & M. 193.

Parties to Record.—A record of one suit cannot be read as evidence in another, unless both the parties, or those under whom they claim, were parties to both suits, it being a rule that a document cannot be used against a party who could not avail himself of it, in case it was made in his favor, nor can it be read in evidence on the ground that the defendant and one of the plaintiffs in the latter suit were parties to the former, and that the same point was in controversy in both, when another plaintiff, and the person under whom both the plaintiffs jointly claim, were not made parties to the former suit. *Paynes v. Coles*, 1 Munf. 373; *Chapmans v. Chapman*, 1 Munf. 398. See also, *Waggoner v. Wolf*, 28 W. Va. 820.

C. REPRESENTATIVE PARTIES.

Judgment against Personal Representative Not Evidence against Heir.—The general doctrine, without qualification or exception, is well settled that there being no privity between the personal representative and the party to whom the real estate passes, a judgment against such personal representative is not even *prima facie* evidence against the heir or devisee. *Bank v. Good*, 21 W. Va. 455; *Laidley v. Kline*, 8 W. Va. 218; *Custer v. Custer*, 17 W. Va. 124; *Mason v. Peter*, 1 Munf. 437; *Saddler v. Kennedy*, 26 W. Va. 636; *Foster v. Crenshaw*, 3 Munf. 520; *Shields v. Anderson*, 3 Leigh 736; *Chamberlayne v. Temple*, 2 Rand. 306.

Not a Lien.—Such a judgment is not a lien on the real estate descended to the heir and does not prevent the statute of limitations from running in favor of the heir wherever real estate descended is sought to be subjected for the debt on which such judgment was obtained. *Saddler v. Kennedy*, 26 W. Va. 636.

Judgment against Executor Binds Legatees.—But a judgment against an executor is conclusive, both as to the validity and amount of the demand, on both executors and legatees. *Hooper v. Hooper*, 33 W. Va. 526, 9 S. E. Rep. 937; *Corrothers v. Sargent*, 20 W. Va. 351; *Sheldon v. Armstead*, 7 Gratt. 264; *Freem. Judm.*, § 163. See also, *Seabright v. Seabright*, 33 W. Va. 152, 10 S. E. Rep. 265, in which case it was held that where the question raised by a bill in equity is as to whether certain bonds and notes therein described are a part of the estate of a decedent, or have been disposed of by assignment and delivery, as a gift to two of his brothers, and the property has by a decree of the supreme court been determined to belong to the estate of the decedent, the decision is binding and conclusive upon all the distributees of the estate.

"With the settlement before auditors, the heir as such has no concern, nor can such settlement be evidence against him either *prima facie* or otherwise. Even a judgment against an executor is no evidence

against the heir, of the justice or the amount of the creditor's demand; it is *res inter alios acta*. *Mason v. Peter*, 1 Munf. 487. *A fortiori*, it would seem, that the *ex parte* report of auditors, appointed only to settle the disbursements of the personal assets, cannot be so. The account in this case, then, was no evidence before the commissioner of the court of chancery, except so far as the acknowledgment of the brothers made it so. But in that acknowledgment the sisters did not join, and it did not therefore bind them. Therefore, it could not avail the administrator; for he could have no decree for a sale of realty without establishing his demand in such mode as would bind all the heirs. It is like the case of a confession of judgment by one of two joint obligors, and a successful defence of the action by the other; in which case, the confession avails nothing, and the judgment is entered for both defendants. The demand is entire and if disapproved as to one, is disapproved as to all, the confession to the contrary notwithstanding." *Street v. Street*, 11 Leigh 498.

And a judgment or decree against an executor in favor of a creditor, payable out of assets, is conclusive evidence upon the executor and his sureties as to the existence and justness of the demand. *Crim v. England*, 46 W. Va. 480, 33 S. E. Rep. 810.

Lost Bond.—But a judgment upon an alleged lost bond, against the personal representative of the obligor, is not even *prima facie* against the heir or devisee of his estate. *Board v. Callihan*, 33 W. Va. 209, 10 S. E. Rep. 382. See also, *Daingerfield v. Smith*, 33 Va. 81, 1 S. E. Rep. 599.

Intestate's Bond.—A judgment, however, rendered against an administrator upon the bond of his intestate, is conclusive evidence of the validity of the debt as against the administrator. *Montague v. Turpin*, 8 Gratt. 453.

Return Nulla Bona.—A judgment against an executor or administrator as such, with an execution, and return *nulla bona*, are not sufficient to authorize an action on the administration bond, but a *devastavit* must first be established by a second suit. *Gordon v. Justices of Frederick County*, 1 Munf. 1. But see *Meade v. Brooking*, 3 Munf. 548.

Evidence of Debt.—But a judgment against the personal representative of a decedent is not even *prima facie* evidence of a debt against the heirs of such decedent. *McKay v. McKay*, 33 W. Va. 724, 11 S. E. Rep. 213; *Broderick v. Broderick*, 28 W. Va. 878.

In *Garnett v. Macon*, 6 Call 308, the court by CHIEF JUSTICE MARSHALL said: "The defendants insist that the decree against a personal representative of George Brooks is conclusive evidence against the devisee of the existence of the debt. The cases cited by counsel, in support of this proposition, do not decide the very point. Not one of them brings directly into question, the conclusiveness of a judgment against the executor, in a suit against the heir or devisee. They undoubtedly show, that the executor completely represents the testator, as the legal owner of his personal property, for the payment of his debts in the first instance, and is, consequently, the proper person to contest the claims of his creditors. Yet, there are strong reasons for denying the conclusiveness of a judgment against an executor in an action against the heir. He is not a party to the suit,—cannot controvert the testimony,—adduce evidence in opposition to the claim,—or appeal from the judgment. In case of a deficiency of assets, the executor may feel no

interest in defending the suit, and may not choose to incur the trouble or expense attendant on a laborious investigation of the claim. It would seem unreasonable that the heir, who does not claim under the executor, should be estopped by a judgment against him. In this case, the creditor is bound to proceed against the executor and to exhaust the personal estate, before the lands become liable to his claim. The heir, or devisee, may indeed, in a court of chancery, be united with the executor in the same action, but the decree against him, would be dependent on the insufficiency of the personal estate. Since, then, the proceeding against the executor, is, in substance, the foundation of the proceeding against the heir, or devisee, the argument for considering it as *prima facie* evidence, may be irresistible, but I cannot consider it as an estoppel. The judgment not being against a person representing the land, ought, I think, on the general principle, which applies to giving records in evidence, to be re-examinable when brought to bear upon the proprietor of the land."

Joint Executors.—"Between the executors of the same decedent in different jurisdictions, there is privity derived from, or through the will of the testator, and a judgment or decree is evidence against the other, and may be enforced against each (see *Hill v. Tucker*, 3 How. 458), and it is sufficient to ground a suit or action on or against either executor. An administrator with the will annexed is, in legal contemplation, executor of that will, and a decree against the domiciliary executor binds every executor of the same will in every jurisdiction." *Garland v. Garland*, 84 Va. 181, 4 S. E. Rep. 334.

Sureties of Executor—Virginia Rule.—A verdict and judgment against an executor or administrator are not conclusive evidence against his surety; nor are they conclusive even against the party against whom they are rendered, unless they are pleaded as an estoppel. *Craddock v. Turner*, 6 Leigh 116; *Hobson v. Yancey*, 2 Gratt. 73.

Judgment by Default—Heirs Not Parties.—A judgment by default against a personal representative in a suit to which the heirs or devisees of the decedent are not parties, is not evidence against such heirs or devisees in a suit or proceeding by the creditor to subject the real estate, descended or devised, to the payment of the debt, and the reason assigned is, that there is no privity between the representative and such heirs or devisees. *Brewis v. Lawson*, 76 Va. 41; *Watts v. Taylor*, 80 Va. 627; *Daingerfield v. Smith*, 33 Va. 81, 1 S. E. Rep. 599.

And CHIEF JUSTICE MARSHALL, in delivering the opinion of the supreme court in *Deneale v. Stump*, 8 Peters 531, said: "It is understood to be settled in Virginia, that no judgment against the executors can bind the heirs, or in any manner affect them. It could not be given in evidence against them." See also, *Robertson v. Wright*, 17 Gratt. 534, and *note*; *Hudgin v. Hudgin*, 6 Gratt. 320, 52 Am. Dec. 124; *Stockton v. Copeland*, 30 W. Va. 674, 5 S. E. Rep. 143.

Effect of Statute on Rule.—Va. Code 1872, ch. 127, § 2, does not alter the above-stated rule. *Brewis v. Lawson*, 76 Va. 36; *Watts v. Taylor*, 80 Va. 627.

"In all cases where the question is, whether a person be a debtor or not, a judgment against him or his legal representative seems to be *prima facie* evidence of the fact, liable to be controverted upon the ground of fraud, or upon any other just ground, by any one a stranger to the judgment except, in the case of a real and personal representative of the same person.

in which case either the one or the other might have been sued in the first instance." *Chamberlayne v. Temple*, 2 Rand. 206.

Former Report of an Account.—Where in a creditor's suit against an administrator, to which the distributees are not parties, a master stated and reported an account of the sums collected by the administrator, which report was confirmed, and later the distributee filed a bill against the administrator and his sureties for an account of sums previously collected by him and for payment of the whole, it was held that the former report did not preclude an account of the last, especially where the sums collected, and the dates when, and persons from whom they were collected, are specified in the bill. *Hurt v. West*, 87 Va. 78, 12 S. E. Rep. 141.

When Judgment against Ancestor Binds Heir.—A judgment against the ancestor in his lifetime, only binds the heir, when it cannot be paid out of the personal estate of the ancestor. *Rogers v. Denham*, 2 Gratt. 200.

Injunction and Sale of Trust Property.—Where in a bill filed to enjoin the sale of trust property, a resettlement is prayed of the accounts of the defendant's testator as administrator *de bonis non*, on the ground of the recent discovery of a receipt showing assets unaccounted for, and it appears that all the parties to the bill were parties to a former suit against the decedent's administrators, in which, it was charged that the decedent had not fully accounted for the assets, the matters set up in the bill as to the assets are *res adjudicata*. *Gibson v. Green*, 80 Va. 524, 16 S. E. Rep. 661.

d. Joint Trespassers.—A party injured by cotrespassers may sue either one against whom the action may be brought. He is not bound to prosecute all, and neither the omission to sue all, nor if all are sued the dismissal of one of them from the suit, can be pleaded by the others in bar. *Bloss v. Plymale*, 3 W. Va. 203.

A plaintiff in action of trespass may sue all, or any, or either of the alleged trespassers, and he is entitled to full satisfaction, but to only one satisfaction; and if the damages have been in part satisfied by payment or compromise with some of the defendants, the plaintiff may still proceed against those who remain on the record. *Bloss v. Plymale*, 3 W. Va. 202.

A judgment against one joint trespasser is no bar to a suit against another for the same trespass; nothing short of full satisfaction, or that which the law must consider as such, can make such judgment a bar. *Griffe v. McClung*, 5 W. Va. 181; *Lovejoy v. Murray*, 3 Wall. (U. S.) 1.

(1) **Former Judgment.**

Former Judgment in Trespass Bars.—A judgment against one of several joint trespassers, whether satisfied or not, is a bar to any action against the cotrespassers. *Petticolas v. Richmond*, 95 Va. 456, 28 S. E. Rep. 566. See *Switzer v. McCulloch*, 76 Va. 777. In the latter case it was held the former judgment did not bar the parties because of a compromise after the judgment at law, which had the effect of remitting the parties to their original rights.

Assault and Battery.—In a joint action of assault and battery, a judgment against one of the defendants is a bar to the recovery of additional damages against the rest. *Ammonett v. Harris*, 1 H. & M. 498; *Wilkes v. Jackson*, 2 H. & M. 355; *Brown v. Johnson*, 13 Gratt. 651.

Continuing Trespass.—Where a plaintiff has already

recovered damages against the defendant for erecting a dam, thereby causing his land to overflow, in a second suit he can only recover for damages occasioned by the continuance of the dam subsequently. *Ellis v. Harris*, 32 Gratt. 684.

Right to Appeal.—A plaintiff cannot appeal from a judgment in favor of all the defendants, except one, in a joint action of trespass, until the suit has been abated, dismissed, or decided as to that one. *Wells v. Jackson*, 3 Munf. 458.

Judgment in Detinue.—A judgment against one person in an action of detinue for a slave, is, while unsatisfied, a bar to another action for the same slave, and by the same plaintiff, against another person. *Murrell v. Johnson*, 1 H. & M. 450.

After a judgment in detinue, a new action of detinue against the same defendant for the same thing, in which the former judgment is not declared upon, but is only relied on as evidence of title, cannot be maintained. *Withers v. Withers*, 6 Munf. 10.

After a judgment in detinue for slaves, the plaintiff cannot come into equity for profits accruing afterwards, pending an appeal; nor to recover their increase not included in such judgment; nor to compel the delivery of them by purchasers from the defendant. *Alderson v. Biggars*, 4 H. & M. 470.

Trover and Trespass for Same Injury.—If a plaintiff brings trover or detinue to recover a horse, and trespass for taking the same horse, a judgment for the defendant in an action of trover or detinue, is a good bar to the action of trespass. *Hite v. Long*, 6 Rand. 457.

Ejectment.—Where an action of ejectment is brought by an adverse claimant against a tenant to recover possession of the premises, and judgment is rendered for such plaintiff against the tenant by default, and a writ of possession is executed by which the plaintiff is placed in actual possession, the possession is thereby changed, and the landlord is thereby actually turned out; and in a second action of ejectment by the plaintiffs, who derived title from the plaintiff in the first suit, against such landlord, sued as defendant, the record of recovery in the former suit is competent evidence on behalf of the plaintiff in the latter suit as showing or tending to show, that the defendant's possession at that time was ended and changed by the execution of such writ of possession. *Clark v. Perdue*, 40 W. Va. 300, 21 S. E. Rep. 735.

Fictitious Plaintiffs.—But no verdict and judgment in ejectment can be relied on as a bar to a subsequent ejectment though for the same land, and, between the same defendants and lessors of the plaintiff, where the fictitious plaintiffs are not the same. *Pollard v. Baylors*, 6 Munf. 433.

Adverse Party.—A verdict at law against a party is no bar to a decree in his favor if he is brought into chancery by the adverse party; but it is otherwise, if he is the plaintiff in equity. *Jones v. Jones*, 4 H. & M. 447.

Opinion as to Safety Does Not Preclude Action for Damages.—Where a jury of inquest in a mill case are induced by the opinions expressed and facts stated by the father of the applicant, to report that no person will sustain damage from the dam allowed to be built; and the inquisition is confirmed by the court; this inquest and judgment is no bar to an action for damages sustained by the father against a vendee of the mill, which were not actually foreseen and estimated by the inquest. *Calhoun v. Palmer*, 8 Gratt. 88.

Judgment Procured by Fraud.—If it be alleged and proved that a judgment or decree was procured by fraud, it ceases to protect the wrongdoer, or to obstruct the injured party in the assertion of his rights. *Francis v. Cline*, 96 Va. 201, 31 S. E. Rep. 10; *N. & W. R. R. Co. v. Mills*, 91 Va. 641, 22 S. E. Rep. 556.

Judgment Setting Aside Homestead.—A judgment setting aside a homestead to a debtor is not a bar to a subsequent action by the party to the judgment to subject the homestead to his claim, after expiration of the exemption. *Hanby v. Henritze*, 85 Va. 177, 7 S. E. Rep. 204.

Ineffectual Suit to Enforce Lien of Judgment.—Although a judgment is an indivisible cause of action in the sense that it may not be divided or split up into several causes of action, nevertheless a suit brought to enforce the lien of a judgment and prosecuted in good faith, though ineffectually, is not a bar to a subsequent suit by the same plaintiff against the same debtor to enforce the satisfaction of the same judgment. In such cases it will be the duty of the equity court to see that the creditor does not exercise his right capriciously or oppressively, and make such orders or decrees with reference to the imposition of costs as will protect litigants against unnecessary and vexatious suits. In other words the vitality of a judgment is not exhausted by one action thereon, but the judgment creditor is entitled to pursue successive actions until satisfaction is obtained. *Kelly v. Hamblen*, 98 Va. 383, 36 S. E. Rep. 491.

Joint Assignment of Damages.—A judgment assigning damages jointly, on the breaches assigned in a declaration on an injunction bond payable to several obligees jointly, while it is not a formal ascertaining the damages according to the statute, it is substantially so, and should be held as in full satisfaction and discharge of all the breaches alleged in the declaration, and a bar to any other or further recovery for the same breaches. *Peerce v. Athey*, 4 W. Va. 22.

Plea of Former Judgment—How Tried.—A plea of former judgment on the same cause of action in bar of the plaintiff's suit, replied to by "No such judgment," should be tried by the court by an examination and inspection of the record, and it is improper to submit the same to a jury. *Davis v. Trump*, 43 W. Va. 191, 27 S. E. Rep. 397.

How Available.—The mode in which a party must avail himself of a former judgment for the same cause of action is by plea in bar, or in an action of assumpsit, by evidence on the general issue. *Cleaton v. Chambliss*, 6 Rand. 86.

Justice's Judgment.—Where the plaintiff already has an intelligible judgment, though defective in form and grammar, against the same parties in the same cause of action, he is precluded thereby from instituting another suit therefor before another justice, or in court. "He should have the defective judgment corrected, which the justice has the right to do on his motion, as to any clerical error committed by him, he being his own clerk." *Davis v. Trump*, 43 W. Va. 191, 27 S. E. Rep. 397.

2. ISSUES.

a. Must Be Directly in Issue.—A fact which has been directly tried and decided by a court of competent jurisdiction cannot be contested again between the same parties in the same or any other court. It is *res judicata*. But to make it *res judicata* it must have been directly and not collaterally in issue in the former suit, and then decided. *Parsons v. Riley*, 33 W. Va. 464, 10 S. E. Rep. 806; *The Western M. & M.*

Co. v. The Va., etc., Co., 10 W. Va. 250; *S. V. R. R. Co. v. Griffith*, 76 Va. 914; *Henry v. Davis*, 13 W. Va. 230.

If it appears that the issue presented in the latter suit was involved and determined in the former suit, the judgment or decree in such former suit is not only a bar to a second suit, between the same parties or their privies upon the same claim or demand, but also bars a suit between the same parties or their privies upon a different cause of action. Such a judgment or decree is conclusive upon the parties to it until reversed upon appeal, or until set aside or annulled by some proceeding instituted for that purpose. *Harrison v. Wallton*, 95 Va. 731, 30 S. E. Rep. 372.

It is settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question, in another suit between the same parties. *Corprew v. Corprew*, 84 Va. 599, 5 S. E. Rep. 798; *Withers v. Sims*, 80 Va. 658; *McComb v. Lobdell*, 32 Gratt. 185; *Tilson v. Davis*, 32 Gratt. 92, and *note*; *Foster v. City of Manchester*, 89 Va. 92, 15 S. E. Rep. 497; *Fishburne v. Ferguson*, 85 Va. 324, 7 S. E. Rep. 361; *Diehl v. Marchant*, 87 Va. 449, 12 S. E. Rep. 808.

But a former judgment cannot be pleaded in bar unless it was directly upon the same point, and between the same parties or privies. *Cleaton v. Chambliss*, 6 Rand. 86.

Certainty.—"It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example: if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible." *Russell v. Place*, 94 U. S. R. 214, 4 Otto 606, approved in *Chrisman v. Harman*, 29 Gratt. 494, and *note*, 26 Am Rep. 387; *Withers v. Sims*, 80 Va. 651, 658; *Legrand v. Rixey*, 83 Va. 862, 3 S. E. Rep. 864.

Record Must Be Set Out.—Where a decision of a former suit is pleaded as an estoppel, so much of the former record must be set out or made part of the pleading, as will show that the precise question has been adjudicated in the former suit. *The Western M. & M. Co. v. The Virginia, etc., Co.*, 10 W. Va. 250.

Opinion of Trial Judge.—When a decree in a former suit is pleaded as *res judicata*, and the decree does not show upon which of the several points in litigation it is based, but refers to the opinion of the trial judge, filed in the case to explain what was determined, such opinion becomes a part of the record and must be looked to, to determine what was the issue and what was adjudicated by the decree. *Legrand v. Rixey*, 83 Va. 862, 3 S. E. Rep. 864.

Extrinsic Evidence.—Where a judgment or decree is relied upon as an estoppel, and the pleadings and proceedings in the former suit leave it doubtful what was the precise issue or state of facts upon

which the judgment or decree was rendered, parol or extrinsic evidence may be received in a subsequent suit to show what was actually in issue and determined on the trial of a former suit. *Withers v. Sims*, 80 Va. 651; *Chrisman v. Harman*, 29 Gratt. 404; *Légrand v. Rixey*, 83 Va. 862, 3 S. E. Rep. 864.

Illustration.—If a decree be pronounced by a superior court of chancery, against an executor, in a suit brought against him and his securities, but without charging or exonerating them by such decree, and the executor removes out of the commonwealth, without satisfying the same, a second suit may be brought against him and them in the superior court of chancery of any other district in which the securities reside, to get satisfaction from them. *Crutcher v. Crutcher*, 4 Munf. 457.

Sureties.—In a suit by a surety to recover for amounts paid by him on behalf of his principal, the defence of *res judicata* will not be sustained when it appears that the claims brought forward in the present suit were not put in issue in the former litigation, nor were they there made the basis of any prayer for relief, nor mentioned in the decree of the court. *Tarter v. Wilson*, 95 Va. 19, 27 S. E. Rep. 818. See *Niday v. Harvey*, 9 Gratt. 454.

Conveyance.—For example it has been held, that a former adjudication, in the suit brought for the sole purpose of determining whether the language in a conveyance of real estate does not create a specific lien or charge on the land, will not estop the grantors in such a conveyance from setting up a personal claim against the grantees or their estates, when such question was in no wise involved in or adjudicated in the former suit. *Brown v. Squires*, 42 W. Va. 367, 26 S. E. Rep. 177.

Judicial Sale.—The order of a court of chancery directing a writ to issue to place the purchaser at a judicial sale in possession of lands, made after a full hearing, at which the issuing of the writ was resisted on the ground that the purchase had been made in the trust for the original judgment debtor, and under an agreement entitling him to remain in possession, and to a conveyance of the property on his complying with certain conditions, is conclusive against him in a subsequent suit in equity seeking to enforce the same agreement upon which he relied in resisting the application for a writ of possession. *Burner v. Hevener*, 34 W. Va. 774, 12 S. E. Rep. 861.

Condemnation Proceedings.—Where judgment is rendered for a city in street condemnation proceedings, the landowner cannot, in a prosecution for obstructing the street, defend on the ground that the proceeding was illegal. *Foster v. Manchester*, 89 Va. 92, 15 S. E. Rep. 497.

Partition.—A judgment in a partition suit decreeing that the defendant is entitled to the plaintiff's share of the property under a deed by the defendant to the plaintiff, the validity of which was not then in issue, is not *res judicata* against the plaintiff's right in a subsequent action to set aside the deed on the ground that it was made without consideration, and with the understanding that the defendant would reconvey the property to the plaintiff on request. *Eaves v. Vial*, 98 Va. 184, 34 S. E. Rep. 978.

Illegality of Contract—Authority of Agent.—In a suit upon a judgment, the questions whether it was an illegal contract on which the judgment was recovered, or whether the agent who made the contract was authorized to make it, are concluded by the judgment. *Fisher v. March*, 26 Gratt. 765.

Right of Widow in Personalty.—Where after the

death of the testator, one of the devisees brings suit to obtain a partition of real estate and a distribution of the personal estate, the court assigning the widow dower in one-third of the real estate and decreeing payment to her of one-third of the personal estate by the executor without words of qualification, it is not necessary to determine what estate in the personalty the widow took, she being entitled to the possession of it in any event, and such decree is not *res judicata* of the quantity of estate in personalty she took under the will. *Houser v. Ruffner*, 18 W. Va. 245.

Failure of Consideration.—Where, in the court in which the judgment was rendered, the question of the paramountcy of a defendant's homestead has been raised and decided adversely, the same question cannot be raised a second time in another suit brought to ascertain priorities of liens on the defendant's realty, and the defence of failure of consideration must be set up either in the suit wherein the judgment is rendered, or by a chancery suit brought by the defendant for that purpose. *Spotts v. Com.*, 85 Va. 531, 8 S. E. Rep. 375.

Forfeiture of Lease.—When it has been determined that a senior lease has been forfeited by a failure of the lessee to comply with the condition therein, the senior lessee cannot afterwards file a bill against the landlord and junior lessees praying for relief against such forfeiture, because the fact of forfeiture of the senior lease is *res judicata*, and cannot be brought into question and again litigated in a suit in equity. *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. Rep. 544.

Platters Not Submitted on First Motion.—Where the matters involved in a second motion were not submitted to the jury on the trial of the first motion, or if submitted could not have been legally adjudicated by them, no question of estoppel can arise. *Allebaugh v. Coakley*, 75 Va. 628.

No Decision Necessary to Decide Case.—Where a claim is made in the defendant's answer, but has no connection with the relief sought in the bill, and is not necessary to be decided in passing upon the case so made in the bill, then the decree does not conclude the question when it is afterwards set up by the defendant by a cross bill in the cause, though the court in its decree expressed an opinion in favor of the defendant. *Niday v. Harvey*, 9 Gratt. 454.

b. What Might Have Been Litigated.—It is well settled that an adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated, as incident thereto, and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue, in the former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata*. *Rogers v. Rogers*, 37 W. Va. 407, 16 S. E. Rep. 633; *Sayre v. Harpold*, 83 W. Va. 553, 11 S. E. Rep. 16.

When a judgment or decree has been rendered by a court of competent jurisdiction in a suit, it is a bar to any further action between the same parties upon the same matter of controversy. 1 *Barton's Law Prac.* (2d Ed.) 553, 554; 7 *Rob. Prac.* 172; *Findlay v. Trigg*, 83 Va. 543, 3 S. E. Rep. 142; *Simpson v. Dugger and Boisseau v. Same*, 88 Va. 963, 14 S. E. Rep. 760. The decree in the first cause is not only final as to matters

actually determined, but as to every matter which the parties might have litigated, within the scope of the pleadings, and which might have been decided *Diehl v. Marchant*, 87 Va. 447, 12 S. E. Rep. 808; *Withers v. Sims*, 80 Va. 660, 661; *Blackwell v. Bragg*, 78 Va. 529; *Fishburne v. Ferguson*, 85 Va. 321, 7 S. E. Rep. 361; *Davis v. Brown*, 94 U. S. 428; *Cromwell v. County of Sac*, 94 U. S. 357; *Wells, Res. Adj.* § 252; *Stearns v. Beckham*, 81 Gratt. 391; *Durant v. Essex Co.*, 7 Wall. 107; *Malloney v. Horan*, 49 N. Y. 116; *Freem. Judgm.* §§ 246, 254. In the case of *McCullough v. Dashiell*, 85 Va. 41, 6 S. E. Rep. 610, the learned judge, delivering the opinion of the court, says: "The doctrine of *res adjudicata* applies to all matters which existed at the time of the giving of the judgment or rendering the decree, and which the party had the opportunity of bringing before the court." *Beale v. Gordon*, 2 Va. Dec. 35, 21 S. E. Rep. 667.

A judgment upon the merits of the case is a bar or estoppel against a prosecution of a second action upon the same demand, and is a finality to the claim or demand in controversy and concludes parties and those in privity with them, not only as to every matter which was offered and received to sustain and defeat the claim, but also any other admissible matter which might have been used for that purpose; such demand or claim having passed into judgment cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. These principles apply with equal force as well to judgments of the inferior courts of record of the United States rendered in this state between parties subject to their jurisdiction, as to judgments of the circuit courts of the state. *Wandling v. Straw*, 35 W. Va. 692; *Parsons v. Riley*, 33 W. Va. 464, 10 S. E. Rep. 806.

Points Essential to Former Judgment.—The doctrine of *res judicata* embraces not only what was in point of fact adjudicated, but the judgment or decree is conclusive as to all questions in issue, whether formally litigated or not. It is not necessary that the issue should have been taken upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment. Every point which has been specifically decided, and, by necessary implication, every issue which must have been decided, in order to support the judgment or decree, is concluded. But where one of the parties to the second suit was not a party to the former suit, and the land sought to be subjected in the second suit was not the same as in the former, the plea of *res judicata* is not available. *Kelly v. Hamblen*, 98 Va. 383, 36 S. E. Rep. 491.

Matters Producible by Diligence.—The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties, to form an opinion and pronounce the judgment, but to every point which properly belonged to the subject-matter of litigation and which the parties exercising reasonable diligence, might have brought forward at the time. *State Iron Co. v. Rarig*, 93 Va. 595, 25 S. E. Rep. 894; *S. V. R. R. Co. v. Griffith*, 76 Va. 918; *Withers v. Sims*, 80 Va. 660; *McCullough v. Dashiell*, 85 Va. 41, 6 S. E. Rep. 610; *Fishburne v. Ferguson*, 85 Va. 321, 7 S. E. Rep. 361; *Osburn v. Throckmorton*, 90 Va. 316, 18 S. E. Rep. 285; *Beale v. Gordon*, 2 Va. Dec. 35, 21 S. E. Rep. 667; *Campbell v. Campbell*, 22 Gratt. 665; *Findlay v. Trigg*, 83 Va. 543, 3 S. E. Rep. 142; *Roller v. Pitman*, 98 Va. 613, 36 S. E. Rep. 987; *Bradley v. Zehmer*, 82 Va. 685; *Adams v. S. V. R. R. Co.*, 76 Va. 918; *Legrand v. Rixey*, 83 Va. 862, 3 S. E. Rep. 864.

A judgment or decree upon the merits of the case is a bar or estoppel against the prosecution of a second suit upon the same demand, not only as to every matter which was offered and received to sustain or defeat the claim, but also any other admissible matter which might have been used for that purpose. *Biern v. Ray* (W. Va.), 38 S. E. Rep. 530.

In order for the defence of *res judicata* to prevail, the judgment or decree in the former suit must have been rendered in a proceeding between the same parties or their privies and the matters in controversy must have been the same in the former suit as in the latter, and have been determined on the merits. The adjudication when so made, constitutes a bar not only to the points actually decided, but to every point which properly belonged to the particular matter in litigation, and which the parties might have brought forward at the time, for a party is required to present the whole of his case and not omit a part, which by the exercise of reasonable diligence, he might have brought forward at the time; all those matters which were offered and received, or which might have been offered to sustain the particular claim or demand litigated in the prior suit, and all those matters of defence, which were presented or might have been introduced under the issue to defeat the claim or demand, are concluded by the judgment or decree in the former suit. *Dillard v. Dillard*, 97 Va. 434, 34 S. E. Rep. 60; *State Iron Co. v. Rarig*, 93 Va. 595, 25 S. E. Rep. 894; *Miller v. Wills*, 95 Va. 354, 28 S. E. Rep. 337.

Matters Assumed True.—A proposition assumed or decided by the court to be true, and which must be so assumed or decided in order to establish another proposition, which expresses the conclusion of the court, is as effectually passed upon and settled in that court as the very matter directly decided. *Blake v. Ohio River R. Co.* (W. Va.), 35 S. E. Rep. 963.

Formal Presentation.—But in order that a matter may thenceforth be considered as *res judicata*, the claims of the respective parties concerning the matter must be formally presented to the court, and duly passed upon. *Tarter v. Wilson*, 95 Va. 19, 27 S. E. Rep. 818.

Illustrations.—For example, it has been held, when a report of sale which contains a statement of the commissions, charged by the commissioner, has been confirmed by the trial court, and the decree confirming the report is affirmed by the court of appeals, without raising any question as to the propriety of the commission charged, the question becomes *res judicata*, and the amount of the commission charged, is beyond the reach of judicial inquiry. *Roller v. Pitman*, 98 Va. 613, 36 S. E. Rep. 987.

Right of Wife to Join by Next Friend.—Where a wife, in a suit by the husband, was required to be made a party, but was not allowed to join by her next friend, and upon appeal, and after petition for rehearing, the decree in favor of the plaintiff was reversed, as the question of the wife's right to join by her next friend, might have been presented upon the first appeal, the adjudication is final, and binding upon her, and a bill brought by the wife alone, concerning the same subject-matter should be dismissed. *McCullough v. Dashiell*, 85 Va. 37, 6 S. E. Rep. 610.

Where the plaintiff is met, in a *scire facias* proceeding to revive a decree with the plea of *null tiel record* and statute of limitations, and upon these issues there is a final, general, judgment in favor of the defendants, this ends all right in the plaintiff to

enforce the decree against the defendant, either at law or in equity. *Raub v. Otterback*, 92 Va. 517, 23 S. E. Rep. 883.

Cross Actions.—If a physician sue for his services and judgment goes by default, for the nonappearance of the patient, defendant in that suit, recovery by the former does not estop the latter from bringing a cross action for malpractice; but if he appear, unless the record shows that it was not to defend, but solely to disclaim the waiver of his own right, he is estopped by the recovery, *Holt, J.*, dissenting. *Lawson v. Conaway*, 37 W. Va. 150, 16 S. E. Rep. 564.

But where a party files a bill attacking a trust deed as fraudulent and void, and it is so adjudged by the court, he cannot afterwards file a cross bill to have the deed equitably enforced for his benefit, which he might have set up in the original bill. If such a thing were allowed there would be no end of litigation, and judicial proceedings would be a farce. *Simpson v. Dugger*, 88 Va. 968, 14 S. E. Rep. 760.

"Whenever a former judgment is relied on as a bar, whether by pleading or in evidence, it is competent for the plaintiff to show that it did not relate to the same property or transaction in controversy, and the question of identity thus raised is a matter of fact to be decided upon the evidence, if the record is itself silent. And so if the cause is divisible or the pleadings involve two distinct propositions, it is competent to show that only one of them was submitted to and passed upon by the jury. 1 Greenl. Ev. § 532; *Southside Railroad Co. v. Daniel*, 20 Gratt. 344; *Kelly v. Board of Public Works*, 25 Gratt. 755; *Packet Co. v. Sickels*, 5 Wall. 580; *Chrisman v. Harman*, 29 Gratt. 494." *Allebaugh v. Coakley*, 75 Va. 620.

The contention that a judgment in a condemnation proceeding, which authorized the construction of a dam, established the fact that the dam was lawful, which will defeat an estoppel arising from a subsequent judgment finding it to be legal, cannot be sustained, where the former judgment only authorized its construction, and did not find that the dam actually constructed was lawful. *C. & O. R. Co. v. Rison*, 99 Va. 18, 37 S. E. Rep. 320.

In *Cleaton v. Chambliss*, 6 Rand. 86, the court by *CARR, J.*, said, in regard to unnegotiable bonds which were given but not paid, and judgment was obtained upon them, that: "Here the foundation of the action is the promise, there the foundation is the bond. The issue there, was upon *non est factum*; that was the point decided, the allegation taken and found; an allegation not put in issue, and which could not possibly be put in issue, in the case before us. If then, the judgment on the bonds had been pleaded, the plea could not have availed; for, if it had stated the record correctly, a demurrer would have lain; and if incorrectly, the replication of *nulla record* would have overthrown it."

Relief was given in equity, in a pauper's suit for freedom, by awarding a new trial at law and a decree rendered for the plaintiff (a verdict being certified) upon a bill stating, that in the previous proceedings, he had not been permitted to obtain testimony, and on proof now produced in his support of right, notwithstanding the defendant pleaded, in bar to such relief, a former verdict and judgment, by which the plaintiff was declared to be a slave, and a decree of another court of chancery dismissing a similar bill, exhibited on his behalf from which judgment and decree he had not appealed. *Isaac v. Johnson*, 5 Munf. 95.

If a judgment of reversal states that it "is not to bar or prejudice any future claim for the appellee, made on fuller proof to the auditor," and the new case does not differ from the former, the first judgment concludes the cause. *Innis v. Roane*, 4 Call 379.

Inference or Argument.—In order that a former decision shall operate as *res judicata*, it must be certain and clear that the precise question was definitely and finally determined; and it cannot be made out by inference or argument. *Winton v. Stewart* (W. Va.), 37 S. E. Rep. 603.

Illustration.—A suit in chancery and decree therein, can neither be pleaded in bar, nor given in evidence, in an action at law between the same parties, unless the very same matter of controversy was involved in both suits, and unless the court of chancery had competent jurisdiction to decide the matter. For example, where a plaintiff filed a bill in chancery against the defendant, charging fraud practiced by the defendant, in the sale of a slave, and praying that the contract might be rescinded, and that the defendant might be enjoined from taking measures to recover the purchase money of the plaintiff, and the bill was dismissed on a hearing, and then the plaintiff brought an action against the defendant to recover damages for breach of warranty of soundness of the slave, it was held that the proceedings and decree in the suit in chancery could neither be pleaded by C in bar of the action at law, nor was the record thereof admissible evidence on the trial of the action at law. *Pleasants v. Clements*, 3 Leigh 474.

c. Identity of Issues.—It is essential to estoppel by record that the identical question upon which it is invoked was in issue upon the former proceedings. The rule is thus stated in *Black. Judgm.* § 610: "There must be an identity of issues, and by this is meant that the issue raised in the second suit, upon which the evidential force of the former judgment is to be directed, must be identical with the issue, or one of the issues, raised and determined in the first action." *C. & O. R. Co. v. Rison*, 99 Va. 18, 37 S. E. Rep. 320. See also, *Sangster v. Com.*, 17 Gratt. 124; *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. Rep. 354; *Currie v. Chowning*, 2 Va. Dec. 25, 21 S. E. Rep. 809; *Weaver v. Vowles*, 2 Rob. 438.

Lands Not the Same in Both Suits.—Moreover a verdict, on which a judgment is rendered, is conclusive evidence in any subsequent suit between the same parties or their privies; the same point coming in question; though the lands or other things in controversy be not the same. *Preston v. Harvey*, 3 H. & M. 63; *Shelton v. Barbour*, 2 Wash. 64; *C. & O. R. Co. v. Rison*, 99 Va. 18, 37 S. E. Rep. 321.

Trust Deeds.—Where a trustee files a bill to enforce a trust deed, and a decree is entered accordingly, and he afterwards files a second bill to set aside the trust deed, on the ground that it is fraudulent, the decree in the first suit is not a bar to the second, because the question whether the deed was fraudulent was not put in issue in the first case, and therefore could not be decided. *Quarles v. Kerr*, 14 Gratt. 48.

Points Same—Objects Different.—Judgment upon a direct point in a former suit, on a writ of *quo warranto*, or an information in the nature of said writ, is conclusive upon the same point in a latter suit, though the objects of the two suits be different. Thus, where a plaintiff instituted a proceeding in the nature of *quo warranto* to try title to

an office, against one appointed by the legislature in his place, it was held that a judgment rendered in that proceeding for the defendant was a bar to the plaintiff's proceeding by mandamus to compel the board of supervisors to pay him salary as officer *de jure*; the writ of mandamus being prayed for on the same grounds set up in the *quo warranto* proceeding. *Shumate v. Fauquier County*, 84 Va. 574, 5 S. E. Rep. 570.

A judgment is conclusive if on a direct point, though the objects of the two suits are different. *Gallaher v. Moundsville*, 84 W. Va. 730, 12 S. E. Rep. 859; *Winston v. Starke*, 12 Gratt. 317.

Facts Necessarily in Issue.—A fact necessarily involved in an issue, on which there has been a judgment, is thereby conclusively settled in any suit thereafter between the same parties and their privies, but the facts in controversy on the trial of an issue, but not necessarily involved in the issue, though ever so important in its determination, are not settled by a judgment on the issue, but are open to controversy in any other suit between the same parties and their privies. *Beckwith v. Thompson*, 18 W. Va. 103; *Houser v. Ruffner*, 18 W. Va. 244; *Doonan v. Glynn*, 28 W. Va. 715. See *Coville v. Gilman*, 13 W. Va. 314.

Facts Necessary to Decision.—But a judgment is conclusive by way of estoppel as to facts without the existence and proof or admission of which the judgment could not have been rendered. *Blake v. Ohio River R. Co.* (W. Va.), 35 S. E. Rep. 953.

"Where every objection urged in the second suit was open to the party, within the legitimate scope of the pleadings, in the first suit, and might have been presented at that trial, the matter must be considered as having passed *in rem judicatam*, and the former judgment in such a case is conclusive between the parties. It is not necessary to the conclusiveness of the former judgment that the issue should have been taken upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment. * * * The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or the ground-work upon which it must have been founded. * * * It is not only final as to the matters actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided." *Diehl v. Marchant*, 87 Va. 447, 12 S. E. Rep. 803. See *Fishburne v. Ferguson*, 85 Va. 321, 7 S. E. Rep. 361; *Blackwell v. Bragg*, 78 Va. 529.

Test.—If it is doubtful whether a second suit is for the same cause of action as the first; it is a proper test to consider whether the same evidence would sustain both, and what was the particular point or matter determined in the former action. *Gallaher v. Moundsville*, 84 W. Va. 730, 12 S. E. Rep. 859.

d. Must Be on the Merits.—Dismissal of a suit on its merits at the hearing, whether on plea in bar or demurrer for want of equity or cause of action, is a bar to another suit for the same subject-matter between the same parties, unless the dismissal be "without prejudice," etc.; whereas if the bill is dismissed for defect of form or structure, not going to the merits, it is no bar to a future suit for the same subject-matter. *Payne v. Grant*, 81 Va. 164; *Hughes v. U. S.*, 4 Wall. (U. S.) 237; *Durant v. Essex Company*, 7 Wall. (U. S.) 107. See also, *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. Rep. 36; *Cornell v. Hartley*, 41 W. Va. 493, 23 S. E. Rep. 789, 1 Barton's Ch. Pr. (2d Ed.) 358; *Burner v. Hevener*, 34 W. Va.

774, 12 S. E. Rep. 861; *Wandling v. Straw*, 25 W. Va. 692; *Riley v. Jarvis*, 42 W. Va. 43, 26 S. E. Rep. 306.

"In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings or parties, or a misconception of form of proceedings, or want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit. *Hughes v. U. S.*, 4 Wall. 237." *Tate v. Bank*, 96 Va. 765, 32 S. E. Rep. 476. See *Fishburne v. Engledove*, 91 Va. 548, 23 S. E. Rep. 354.

A judgment for the defendant upon pleadings not going to the foundation of the action, is no bar to the plaintiff's bringing another action for the same cause. *Lane v. Harrison*, 6 Munf. 573.

Decree Dissolving Injunction.—A decree dissolving an injunction upon the merits, where no relief but an "injunction" is sought, is final, and *res judicata*. *Fluharty v. Mills* (W. Va.), 38 S. E. Rep. 521; *Gallaher v. City of Moundsville*, 84 W. Va. 730, 12 S. E. Rep. 859; *Burner v. Hevener*, 34 W. Va. 774, 12 S. E. Rep. 861.

Sufficiency.—The defence of *res judicata*, made by answer, is sufficient when supported by the production of the record of the former suit between the same parties, touching the same matter, showing a final decree therein on the merits. 1 Barton's Ch. Pr. (2d Ed.) § 114; *Miller v. Miller*, 92 Va. 196, 23 S. E. Rep. 232.

Bar to Recovery in Equity.—A verdict and judgment at law, against a plaintiff, is no bar to his recovery in equity for the same cause of action, where it does not appear that the merits of the controversy were fully and fairly tried and determined at law. *Hawkins v. Depriest*, 4 Munf. 469.

Petition to Rehear.—Where a petition to rehear is rejected on the ground that it is not accompanied by an affidavit, and because it does not state why the matters set up were not brought to the attention of the court before the decree was rendered, the matter does not become *res judicata*, and it is error to refuse leave to file a new petition, accompanied by an affidavit that the matter therein set up was unknown to the petitioners, and could not have been known by the use of reasonable diligence. *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. Rep. 431. See *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. Rep. 36.

Motion to Reverse Overruled.—Where a party makes a motion, under sec. 5, ch. 134 of the W. Va. Code, to reverse a judgment on the ground that one of several defendants, against whom a joint judgment is rendered, was not served with process, and did not appear, and such motion is overruled, the decision of the circuit court overruling that motion, makes such judgment valid and binding under the doctrine of *res judicata*, though it was void before, unless such decision be reversed. *Ferguson v. Millender*, 32 W. Va. 30, 9 S. E. Rep. 38.

It was held in *Pettus v. Atlantic Savings & Loan Ass'n*, 94 Va. 477, 26 S. E. Rep. 834, that an order of a hustings court, in the exercise of its special statutory jurisdiction, appointing a trustee to take the place of the trustee named in the deed, who has resigned the trust, determines nothing as to the rights of the parties under the deed, nor as to the character of the deed, and will not debar the grantor from asserting its true character.

Nul Tiel Record, Act of Limitations.—Where, to a

scire facias to revive a decree, the defendants plead *nullius in terra* and the statute of limitations, and on these pleas issue is joined, and there is a final general judgment in favor of the defendants, this ends all right in the plaintiff to enforce the decree against the defendants, either at law or in equity. *Raub v. Otterback*, 92 Va. 517, 23 S. E. Rep. 883.

Demurrer to Cross Bill.—Where a county files a cross bill admitting the validity of certain of its bonds, yet on the ground that the plaintiff has not complied with its contract with the county, the county asked the court to decree that it was not bound, except to *bona fide* holders of the bonds for value and without notice, the effect of a dismissal of the cross bill on demurrer, when it appears that the demurrer was sustained upon the grounds going to the merits of the question raised by the pleadings, is to adjudge that the county is bound; and such a decree is, as between the same parties, a final determination of the question. *W., O. & W. R. R. Co. v. Cazenove*, 83 Va. 744, 8 S. E. Rep. 433.

Judgments Must Be Final.—"It is well settled that the doctrine of *res judicata* applies only to final judgments, not to interlocutory judgments or orders, which the court which rendered has power to vacate or modify at any time." 2 Black, Judgm. § 509, cited with approval in *Rhelms v. Ins. Co.*, 39 W. Va. 672, 20 S. E. Rep. 670; *Quarles v. Kerr*, 14 Gratt. 48; *Yates v. Wilson*, 86 Va. 625, 10 S. E. Rep. 976.

A final adjudication of a court of competent jurisdiction upon the merits of the controversy, so long as it remains unreversed, is a bar to any new suit for the same cause of action between the same parties. *Burner v. Hevener*, 34 W. Va. 774, 12 S. E. Rep. 861.

Suit by Legatees.—It seems that a final decree, in a suit by legatees, for the division of a testator's estate, is a bar to a bill exhibited by the same persons, or their legal representatives, suggesting that the executor had kept back part of the property, but not averring that this was new matter since discovered, or that the decree was obtained by fraud. *Legrand v. Francisco*, 3 Munf. 88.

Partition—Rights of Children Not Adjudicated.—Where, in partition, the issue was whether the complainants were entitled to the shares of their deceased brothers and sisters, under the will of the complainant's grandfather, or whether such shares belong to their father, it was held that a decree that the complainants were entitled to such shares was binding on the father, who was a party to the suit, since it settled the question that he had no interest in the property, though it did not finally adjudicate the rights of the children as between themselves; and in the absence of fraud, such decree cannot be assailed by the creditors of the father, and the lands subjected to their claims. *Gardner v. Stratton*, 89 Va. 900, 17 S. E. Rep. 553.

3. COURTS IN GENERAL.—A judgment rendered by a court of competent jurisdiction is a bar to a subsequent action between the same parties upon the same matter directly in issue. There is no difference between a judgment in a court of common law and a decree of a court of equity; both stand on the same footing. And as we have seen, the doctrine of *res judicata* is equally applicable to those matters which have been, and those which might have been, adjudicated. *Adams v. S. V. R. R. Co.*, 76 Va. 913; *Blackwell v. Bragg*, 78 Va. 529; *Burner v. Hevener*, 34 W. Va. 774, 12 S. E. Rep. 861; *Tilson v. Davis*, 33 Gratt. 92; *Tracey v. Shumate*, 23 W. Va. 474; *Western M. & M. Co. v. The Virginia, etc., Co.*, 10 W.

Va. 250; *Parsons v. Riley*, 33 W. Va. 464, 10 S. E. Rep. 806.

No Difference between Decrees and Judgments.—It is well established law that a final decree in chancery is as conclusive as the judgment at law. A verdict and judgment in a court of record or a decree in a court of chancery puts an end to all points decided between the parties to the suit. There is and ought to be no difference between the verdict and judgment in the court of law and a decree in a court of equity. They both stand on the same footing and may be offered in evidence under the same limitations; it would be difficult to assign a reason why it should be otherwise. There is nothing anomalous or unusual in setting up a former adjudication as an estoppel to an action for equitable relief. The rule is a beneficiary one, and it is a matter in which it is said that the public has an interest as well as the parties, that there should be an end to litigation. *Tilson v. Davis*, 33 Gratt. 92; *Tracey v. Shumate*, 23 W. Va. 474; *Western M. & M. Co. v. The Virginia, etc., Co.*, 10 W. Va. 250; *Parsons v. Riley*, 33 W. Va. 464, 10 S. E. Rep. 806.

a. Probate Courts.—When a paper is propounded for probate to the proper court by a devisee, and there is a sentence of the court fairly obtained and pronounced on the merits, excluding the paper from the probate, such sentence of exclusion from probate is conclusively binding upon all claiming under the paper. *Schultz v. Schultz*, 10 Gratt. 358; *Connolly v. Connolly*, 32 Gratt. 657; *Ballow v. Hudson*, 13 Gratt. 672.

The sentence of a court of probate fairly obtained and pronounced upon the merits, by which a paper propounded as a will by the nominated executor is rejected, in a proceeding in which some of the next kin interested to defeat it, are parties defendants, is conclusively binding upon a legatee in the paper, though he was an infant at the time, and no party to the proceeding. And the paper cannot again be propounded by the legatee. It would be intolerable evil, if the controversy could be renewed, from time to time, at the pleasure of the same, or even of other parties. Obvious considerations of justice and sound policy require that in a proceeding of so much publicity and notoriety, intended to sanction or condemn perpetually an important muniment of title; affecting various interests, original and derivative, which time only can fully develop and determining prospectively, channels of succession, powers of representation, and classes of ownership; there should be, as far as practicable, uniformity, consistency and finality. Such a proceeding becomes to a great extent, a matter of public as well as private interest; and both the general good and individual security prohibit that it should be, so far as can be avoided, in any wise uncertain, vacillating or precarious. *Wills v. Spraggins*, 3 Gratt. 555.

Analogous to Judgments in Rem.—"When a will has been propounded by the party interested, and fairly rejected on the merits, it would defeat the policy of the law, and be productive of many mischiefs, if it could be again propounded by the same party or by others who might be interested, and the contest thus renewed from time to time. The sentence therefore against the will must be regarded as a sentence against all claiming under it. It stands upon a footing analogous to the cases known as judgments *in rem*, which being adjudications upon the subject-matter are regarded as final and conclusive not only in the courts in which they are

pronounced, but in all others in which the same question arises." *Schultz v. Schultz*, 10 Gratt. 358; *Connolly v. Connolly*, 32 Gratt. 657.

Pendency of Bill in County Court.—The pendency of a bill in equity, in a county court, after dissolution of an injunction, is no bar to the complainant's obtaining another injunction from the superior court of chancery. *Roberts v. Jordans*, 8 Munf. 488.

b. Appellate Courts.

Effect on Parties Not Appearing.—It is settled that if a party sues out a writ of error from a judgment against him, and the judgment is affirmed, the judgment of the appellate court affirming the judgment of the lower court has all the force of *res judicata*, and makes that judgment binding. It is binding as a judgment, even on parties who did not appeal, and were not served with appellate process, if a joint judgment. *Ferguson v. Millender*, 33 W. Va. 30, 9 S. E. Rep. 38; *Camden v. Werninger*, 7 W. Va. 528; *Armstrong v. Poole*, 30 W. Va. 666, 5 S. E. Rep. 257; *Campbell v. Campbell*, 22 Gratt. 649; *Board v. Parsons*, 24 W. Va. 551; *Henry v. Davis*, 13 W. Va. 230; *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223; *Newman v. Mollahan*, 10 W. Va. 488.

Where exceptions have been taken to an administrator's account, because, among other things, of payments made to unpreferred creditors, and the account is confirmed, and an appeal therefrom taken to the court of appeals, where the decision of the lower court is affirmed, a bill in equity against the administrator by a party to the former proceeding, charging *devastavit* on account of such payments, cannot be sustained, although the validity of the payments was not, in fact, questioned in the court of appeals. *Findlay v. Trigg*, 83 Va. 539, 3 S. E. Rep. 142.

Where a judgment of the circuit court has been affirmed by the supreme court, such judgment cannot be impeached or set aside by a court of equity, in a suit brought for that purpose, upon any ground of error upon the face of such judgment or upon the record of the case in which it is rendered. *Armstrong v. Poole*, 30 W. Va. 666, 5 S. E. Rep. 257.

Chancery Courts.—Moreover, a court of chancery cannot, upon the same facts, alter a decree of the court of appeals. *Price v. Campbell*, 5 Call 115; *White v. Atkinson*, 2 Call 376.

Decision as to Jurisdiction.—Where the court of appeals decides, whether rightfully or wrongfully, that it has jurisdiction of a cause, and orders the trial court to enter judgments therein, after the close of that term, the question of jurisdiction becomes *res judicata*, and cannot be raised in a subsequent action on the judgment. This rule is established by an unbroken line of decisions. *Stuart v. Peyton*, 97 Va. 796, 34 S. E. Rep. 696; *Griffin v. Cunningham*, 20 Gratt. 31; *Campbell v. Campbell*, 22 Gratt. 667; *Stuart v. Heiskell*, 86 Va. 191, 9 S. E. Rep. 984; *Roanoke St. Ry. Co. v. Hicks (Va.)*, 32 S. E. Rep. 790; *Reid v. Strider*, 7 Gratt. 76; *Bank v. Craig*, 6 Leigh 400; *Renick v. Ludington*, 20 W. Va. 537.

Commissioner's Report.—If, in a chancery cause, a commissioner reports that the lands of certain persons not parties to the cause are liable to be sold in the cause, and the court confirms this report and orders the sale of their lands, and they appeal from this decision, and the appellate court on their appeal hears the cause on its merits and affirms the decree, these appellants are bound by this decree as *res adjudicata*, as the appellate court in so deciding, must have held that it had jurisdiction not only of the cause but of the parties; and this judgment as well

as that on the merits of the case is binding on the parties. But if the appeal had been taken in such case not by these persons, but by some other party to the cause, neither the judgment in the court below nor its affirmance by the appellate court would have bound such persons as *res adjudicata*; for in such case there would be no implied judgment of the appellate court, that it had jurisdiction over such persons as parties to the cause. *Renick v. Ludington*, 20 W. Va. 511.

Questions Decided on Appeal.—It is a settled rule of the appellate court, that a question which has been decided on the first appeal in any cause, cannot be reviewed or reversed in any subsequent appeal in the same cause. *Stuart v. Preston*, 80 Va. 625; *Ins. Co. v. Clemmitt*, 77 Va. 366; *White v. Offield*, 90 Va. 336, 18 S. E. Rep. 436.

Thus, where in a suit to correct a mistake and for an accounting, the court below held that payment by the grantee in a deed of certain incumbrances on the land should be considered payments on the price, which decree was affirmed in that respect on appeal, on a second accounting, under the decree of the appellate court, the question, whether the payments of the incumbrances were payments on the price or to be treated as set-offs, is *res judicata*. *Stuart v. Heiskell*, 86 Va. 191, 9 S. E. Rep. 984.

Title to Lands.—Where in the original cause the title to lands was investigated by a commissioner whose report was confirmed by the circuit court and an appeal from its decision to the supreme court was dismissed, a contention that there is a defect in the title will not be considered. *Hudson v. Yost*, 88 Va. 347, 18 S. E. Rep. 436.

Final and Interlocutory Decrees.—A decree of the supreme court upon a question decided by the court below is final and irreversible; and upon a second appeal in the cause, a question decided upon the first appeal cannot be reversed, being *res judicata*, and such a decision is alike conclusive whether the decree appealed from is final or interlocutory. *Turner v. Staples*, 86 Va. 300, 9 S. E. Rep. 1123; *Miller v. Cook*, 77 Va. 806.

Points adjudicated by the supreme court on a former appeal must be regarded as *res judicata* during the further progress of the cause. *Wick v. Dawson (W. Va.)*, 37 S. E. Rep. 639.

Correction by Rehearing in Lower Court.—Where a decree has been affirmed by the supreme court on appeal, it becomes *res judicata*, and no error in it can be corrected by rehearing in the court below. *Lore v. Hash*, 89 Va. 277, 15 S. E. Rep. 549.

Effect of Taking Additional Evidence in Lower Court.—Moreover, the conclusiveness of a decision by the supreme court on appeal, by which the principles of a cause are settled, is not affected by the fact that additional evidence is taken after the case goes back to the trial court. *Turner v. Staples*, 86 Va. 300, 9 S. E. Rep. 1123.

Important Questions Omitted.—Although the opinion of the supreme court should indicate that important questions involved in the pleadings had been overlooked, which, had they been considered, might have changed the adjudication, nevertheless the decision, when it has been rendered and has become final, settles the rights of the parties in that particular case, and it may be pleaded as an estoppel. *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. Rep. 561.

Matters Not Actually Adjudicated.—Matters once determined on appeal in the supreme court cannot be reopened; and this is true whether those mat-

ters were actually adjudicated or not. If they could have been adjudicated in that suit they are equally settled. *Carter v. Hough*, 89 Va. 508, 16 S. E. Rep. 665; *Findlay v. Trigg*, 83 Va. 539, 3 S. E. Rep. 142; *Campbell v. Campbell*, 22 Gratt. 649.

Matters Contained in Record.—Whatever is contained in the record on an appeal is supposed to have been passed upon, and whatever is passed upon here, and whatever might have been passed upon in consideration of the record, is concluded and settled, and cannot be reopened by the court below. *Krise v. Ryan*, 90 Va. 711, 19 S. E. Rep. 783; *Campbell v. Campbell*, 22 Gratt. 649.

Construction of Records.—When the supreme court has placed a construction upon the legal character and effect of certified copies of entries or memorandums in certain public records, such construction is *res judicata* in the supreme court and all other courts of the state, on a second appeal. *Holleran v. Meisel*, 91 Va. 143, 21 S. E. Rep. 658; *Chahoon's Case*, 21 Gratt. 822, and *note*; *Campbell v. Campbell*, 23 Gratt. 649; *Turner v. Staples*, 86 Va. 300, 9 S. E. Rep. 1123; *Stuart v. Heiskell*, 86 Va. 191, 9 S. E. Rep. 984; *Norfolk, etc., R. Co. v. Mills*, 91 Va. 613, 22 S. E. Rep. 554.

Entry That Plaintiff Takes Nothing by His Motion.—If a judgment on a summary motion be reversed on the ground that the plaintiff's claim is not supported by the evidence, the appellate court should proceed to enter judgment, that the plaintiff take nothing by his motion; such judgment would be a bar to another motion for the same cause of action. But if such judgment be not entered, the judgment of reversal is too imperfect to be a legal bar. *Webb v. McNeil*, 3 Munf. 184.

4 RETRAXIT.—A retraxit is an open and voluntary renunciation by the plaintiff in open court of his suit, and the cause thereof. A dismissal by a plaintiff who no longer has any interest in the cause of action is not a retraxit, and cannot prejudice the rights of the real owner of the subject of litigation, who is neither a party to the action, nor a privy of the plaintiff. *Tate v. Bank*, 96 Va. 765, 33 S. E. Rep. 476; *Wohlford v. Compton*, 79 Va. 336.

Maker and Accommodation Endorser.—In an action against the maker and accommodation endorser of a negotiable note by one who held the note as collateral for a debt, the plaintiff having received satisfaction of his debts from his original debtor, dismissed the action at the defendant's costs, with the knowledge and acquiescence of the endorsers, the collateral notes being at the time transferred to the defendant in error who was not a party to the action on them, and had no notice or knowledge of the pendency of the action. *Held*, the dismissal was not a retraxit, precluding the defendant in error from subsequently recovering from an endorser who was a party, and acquiesced in the dismissal. *Tate v. Bank*, 96 Va. 765, 33 S. E. Rep. 476.

Dismissal of Suit Agreed.—The dismissal of a suit agreed is not a retraxit and cannot be pleaded in bar of a subsequent suit between the same parties, for the same cause of action. *MARSHALL, C. J.*, in *Hoffman v. Porter*, 2 Brock. R. 156, disapproved in *Hoover v. Mitchell*, 25 Gratt. 387.

Judgment for Costs.—Also, a dismissal of a suit by the plaintiff's order is no bar to his bringing another suit for the same cause of action, even though there was a judgment by the court for the defendant against the plaintiff for costs. *Coffman v. Russell*, 4 Munf. 207.

Discontinuance.—A discontinuance is not a retraxit. *Muse v. Bank*, 27 Gratt. 252.

Must Be Entered in Person.—A retraxit can only be entered by the plaintiff in person, and in open court. *Muse v. Farmers' Bank*, 27 Gratt. 252.

Damages by Statute.—The damages of five dollars, given by the act of the assembly, in cases of nonsuits, ought not to be awarded in the case of a retraxit. *Pinner v. Edwards*, 6 Rand. 675.

Retraxit in Criminal Cases.—A dismissal of a presentment is not a retraxit, nor is a retraxit known to the criminal law, where the prosecution is carried on by the commonwealth. This power of a retraxit is a dispensing power, and the law has not entrusted it to a prosecuting attorney. *Worham v. Com.*, 5 Rand. 669.

5. NONSUIT.—A nonsuit is not a final judgment, but the opposite. By suffering a nonsuit the plaintiff ends his present suit without prejudice to his right to bring another. *Mallory v. Taylor*, 90 Va. 348, 18 S. E. Rep. 438; 4 Min. Inst. (3d Ed.) 958; *Pinner v. Edwards*, 6 Rand. 675; *Railway Co. v. Long*, 26 W. Va. 699.

Must Go to the Merits.—A nonsuit, to be such at all, must go to the whole case, as there is no such thing as a partial nonsuit. *Railway Co. v. Long*, 26 W. Va. 692.

Nonsuit Ordered by Justice.—A nonsuit ordered by a justice must be regarded, after a trial on the merits, as a judgment for the defendant, and consequently a bar in any other litigation between the same parties (in regard to the same subject-matter), even though the order was made with the consent of the plaintiff. *Parsons v. Riley*, 33 W. Va. 464, 10 S. E. Rep. 806.

Voluntary Nonsuits.—The court may recommend a nonsuit, but cannot direct it to be entered, against the will of the plaintiff. *Ross v. Gill*, 1 Wash. 87.

Not Appealable.—But if the court directs the plaintiff to be nonsuited, and he submits to it (which he is not bound to do), he deserts his cause, and cannot by an exception, avail himself of any legal objection to the opinion of the court. *Thornton v. Jett*, 1 Wash. 138.

Omission of Joint Defendants.—If one of several joint contractors be omitted as defendant, and the omission is disclosed only by the evidence, the plaintiff will be nonsuited. *Prunty v. Mitchell*, 76 Va. 169.

Variance between Allegata and Probata.—If the evidence differs from the statement in the declaration, judgment of nonsuit will be given by the court of error. *Calvert v. Bowdoin*, 4 Call 217.

Damages in Case of Dismission.—The damages of five dollars, given by the act of the assembly ought to be awarded in all cases of dismissions and discontinuances, produced by a voluntary abandonment of the cause by the plaintiff, after the defendant's appearance, whether in the office, or in court, and such dismissions ought to be entered up as nonsuits. But the dismission of a suit for a failure to give security for costs, is not such a voluntary failure to prosecute, as authorizes the judgment of nonsuit. *Pinner v. Edwards*, 6 Rand. 675.

Reasons for Suffering Nonsuit.—The nonsuit is resorted to where the plaintiff finds himself unprepared with evidence to maintain his cause, either in consequence of his being ruled into a trial when not ready, or when surprised by the testimony of a witness, or some ruling of the court, or some similar reason. *Cahoon v. McCulloch*, 92 Va. 177, 23 S. E. Rep. 225.

Setting Aside a Nonsuit.—Where a nonsuit, in a

writ of right, has been suffered under a misapprehension on the part of the defendants and their counsel as to the legal effect of an instruction given at the trial, the court, in the exercise of a sound discretion, should, on the motion of the defendants, set aside the nonsuit; and if this is not done, the judgment, overruling the motion, will be reversed. *Walkers v. Boaz*, 2 Rob. 485.

Effect of Nonsuit.—The only effect of a judgment of nonsuit is to put an end to the pending suit, without precluding another for the same cause of action. *Cahoon v. McCulloch*, 92 Va. 177, 23 S. E. Rep. 225.

Contrast.—In 2 Tuck. Com., p. 251, it is said: "A retraxit differs from a nonsuit in that the one (the latter) is negative, and the other (the former) is positive. The nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon the payment of costs; but a retraxit is an open and voluntary renunciation of his suit in court, and by this he forever loses his action." Quoted in *Hoover v. Mitchell*, 25 Gratt. 387. See *Pinner v. Edwards*, 6 Rand. 675; *Railway Co. v. Long*, 26 W. Va. 609.

Non Pros. Species of Nonsuit.—The judgment of *non pros.* for the plaintiff's failure to file a verification does not bar another suit for the same cause, this judgment is a species of nonsuit. "Such a judgment is not regarded as one on the merits, but only as a nonsuit, and, while final in the particular case, is not conclusive upon the matter of action. It is treated as a nonsuit by 3 Bl. Com. 296; by 4 Min. Inst. (4th Ed.) 867; 2 Black, Judgm. § 702; 1 Freeman, Judgm. § 261. JUDGE SUMMERS regarded it as a nonsuit in *Pinner v. Edwards*, 6 Rand. 675. All authorities hold that a nonsuit does not bar a second suit for the same cause. The authorities just given say that a judgment on *non pros.* will not defeat a second suit." *Henry v. Ohio River R. Co.*, 40 W. Va. 234, 21 S. E. Rep. 863.

Where there is a plea of new matter, concluding with a verification, and the plaintiff fails to reply to it, there ought to be a judgment of *non prosequitur* against him, after a rule to reply, but such need not be served. *Henry v. Ohio River R. Co.*, 40 W. Va. 234, 21 S. E. Rep. 863.

6. DISMISSAL IN EQUITY.—A bill in equity dismissed generally, without any reservation to the plaintiff to sue thereafter, is conclusive between the parties, and those claiming under them, of all the issues made up in the cause, even though there was no jurisdiction in equity because of an adequate remedy at law. *Watson v. Watson*, 45 W. Va. 290, 81 S. E. Rep. 939; *Carberry v. Railroad Co.*, 44 W. Va. 260, 28 S. E. Rep. 694; *Taylor v. Yarbrough*, 13 Gratt. 183. See also, *Wandling v. Straw*, 25 W. Va. 692; *McCoy v. McCoy*, 29 W. Va. 794, 2 S. E. Rep. 809.

But the dismissal of a suit, not conclusive on the merits, by one court of equity, will not prevent another co-ordinate court of equity from taking jurisdiction. *Carter v. Campbell*, Gilmer 159.

Merits.—In order that a judgment may constitute a bar to another suit, the point in controversy must be the same in both cases, and in the first must have been determined on the merits. An order simply dismissing the suit is not a determination on its merits, and so is not a bar to the maintenance of a second suit for the same cause of action. *Wilcher v. Robertson*, 78 Va. 602. See also, *Saunders v. Marshall*, 4 H. & M. 455.

Order Dismissing Caveat.—For example, it has been held that an order dismissing a caveat, when not on

the merits, is not conclusive of the controversy. *Hunter v. Hall*, 1 Call 206.

Dismissal of Suit Agreed.—But an order dismissing a case agreed is a bar to another suit on the same cause of action. *Pethtel v. McCullough* (W. Va.), 30 S. E. Rep. 199; 2 Black, Judgm. § 706.

The judgment of a court of competent jurisdiction, dismissing a suit agreed, upon the ground that it has been agreed by the parties, is at least *prima facie* a final determination as to those parties of the matters litigated in that suit. It is virtually an acknowledgment by the plaintiff in open court, as in retraxit, that he has no cause of action, or rather, no further cause of action. It is not merely an abandonment of his suit, by the plaintiff, as in a nonsuit; it is the concurrent action of both parties. *Hoover v. Mitchell*, 25 Gratt. 387.

Embraces What Might Have Been Litigated.—The judgment of a court of competent jurisdiction, dismissing a suit agreed, upon the ground that it has been agreed by the parties, is a final determination as to those parties of the matters litigated in that suit, and this principle embraces not only what was actually determined, but also extends to every other matter which the parties might have litigated in the suit. *Wohlford v. Compton*, 79 Va. 333; *Wilcher v. Robertson*, 78 Va. 602; *Hoover v. Mitchell*, 25 Gratt. 387; *Siron v. Ruleman*, 32 Gratt. 233. These cases were cited with approval in *Pethtel v. McCullough* (W. Va.), 30 S. E. Rep. 199.

Fraudulent Deeds.—A decree, by a court of competent jurisdiction, dismissing a bill, upon the ground that the deed under which the complainant claimed was fraudulent, is a complete bar to another original bill to try the validity of the same deed; the proper remedy, if such decree be erroneous, being by appeal, writ of error, supersedeas, or bill of review, and not by original bill. *Holliday v. Coleman*, 2 Munf. 162.

Effect of Order of Dismissal.—It is provided by statute that "after the dismissal of an appeal, writ of error or supersedeas, no other appeal, writ of error or supersedeas shall be allowed to or from the same judgment, decree or order." This statute has been construed to apply as well to an order dismissing an appeal for failure to print the record as to a similar order made on any other ground. *Woodson v. Leyburn*, 83 Va. 843, 8 S. E. Rep. 873; *Barksdale v. Fitzgerald*, 76 Va. 892; *Beecher v. Lewis*, 84 Va. 630, 6 S. E. Rep. 367; *Cobbs v. Gilchrist*, 80 Va. 503.

It was held in *Alvey v. Cahoon*, 86 Va. 173, 9 S. E. Rep. 994, if one writ of error be dismissed for matter merely formal, the effect is, so far as any rehearing is concerned, the same as an affirmance in the appellate court.

Effect of Adding "Without Prejudice."—Where an action for damages for breach of the conditions of a written contract is brought before a justice, and upon a general denial by the defendant of the complaint the justice hears the case upon the evidence and arguments of counsel, and enters a judgment dismissing the plaintiff's suit for failure to prove the execution of the contract sued on, with costs, he cannot by adding the words "without prejudice to a new suit" authorize a new suit for the same cause of action. *Parsons v. Riley*, 33 W. Va. 464, 10 S. E. Rep. 806.

7. EVIDENCE.

Judgment of Justice Evidence of Probable Cause.—A judgment by justice, though reversed, is *prima facie* evidence of probable cause in an action for malicious prosecution and false imprisonment, and it

has been thought by some that such judgment is conclusive evidence of such probable cause. *Womack v. Circle*, 29 Gratt. 192.

Judgment as Evidence between Creditors.—But a judgment in favor of one creditor, declaring a conveyance by the debtor void, is not evidence in favor of or against another creditor. *Winston v. Starke*, 12 Gratt. 317.

Judgments against Sheriff—Sureties.—So, judgments obtained against a sheriff for breach of duty in an action against his sureties, are not evidence against such sureties. Nor are the admissions of the sheriff evidence against the sureties. *M'Dowell v. Burwell*, 4 Rand. 317.

On a notice and motion by the administratrix of a high sheriff against a deputy and a surety, for the default of the deputy in not paying over money collected on an execution, the judgment recovered by a creditor, showing that it is for such default of the deputy, is *prima facie* evidence against the deputy and his sureties, that the administratrix had been subjected to the liability for the default of the deputy, although the deputy was not notified of the action. *Cox v. Thomas*, 9 Gratt. 323.

Judgment as Evidence for Officer.—A judgment against an officer is evidence for him in an action against the deputy and his sureties to show that he had been subjected to the payment of money by reason of the default of the deputy. *Cox v. Thomas*, 9 Gratt. 323.

Judgment on Official Bond as Evidence of Defalcation.—Judgment against a public officer on his official bond is not only not conclusive evidence of a defalcation, but it is not even *prima facie* of such a fact. *Courtney v. Beale*, 84 Va. 692, 5 S. E. Rep. 708.

Mandamus.—Where application is made for a mandamus to enforce a judgment against a town, the judgment conclusively determines that the town is chargeable with the sum, for which the judgment was rendered. *Wells v. Town of Mason*, 23 W. Va. 46.

a. Chancery Cause as a Title Link.—The record in a chancery cause is legal evidence for the defendant as a link in his chain of title, though the plaintiff was not a party to the cause. *Baylor v. Dejarnette*, 13 Gratt. 152, and *note*; *Waggoner v. Wolf*, 28 W. Va. 85.

An order of court, appointing commissioners to assign the widow her dower, although made *ex parte*, and on motion, without regular proceedings in chancery, and the report of the commissioners, are proper evidence, to show that the slave was allotted to the widow for life only; especially, where the widow and her second husband were present and consented to the allotment. *Hunter v. Jones*, 6 Rand. 541.

But a record to which neither the demandant nor tenant was a party, is not even *prima facie* evidence against the tenant that the grantor in the deed to the demandant was heir at law of the grantee in the patent in which the demandant claimed title. *Duncan v. Helms*, 8 Gratt. 68.

In tracing the title to land in controversy, a decree in a suit between other parties, is not evidence, against the person claiming under neither of them, that one of those parties was in fact, as therein described, eldest son and heir of the former proprietor; it being incumbent upon the party, wishing to avail himself of such issue to prove it by evidence, *alunde*, but such decree may be received (as a link in the chain of evidence) to

prove the fact that it was rendered. *Lovell v. Arnold*, 2 Munf. 167.

B. LIEN OF JUDGMENT—ORIGIN AND HISTORY.

1. WRIT OF ELEGIT.—At common law, except for debts due the king, the lands of the debtor were not liable to the satisfaction of a judgment against him, and consequently no lien thereon was acquired by a judgment. This was in accordance with the policy of the feudal law introduced into England after the Conquest, which did not permit the feudatory to charge, or to be deprived of, his lands for his debts, lest thereby he should be disabled from performing his stipulated military service, and which, moreover, forbade the alienation of a feud without the lord's consent. The goods and chattels of the debtor, therefore, and the annual profits of his lands, as they arose, were the only funds allotted for the payment of his debts. This continued to be the law until the passage of the statute Westm. 2. 13 Edward I, by which, in the interest of trade and commerce, the writ of elegit was for the first time provided for. By that statute the judgment creditor was given his election to sue out a writ of *fi. fa.* against the goods and chattels of the defendant, or else a writ commanding the sheriff to deliver to him all the chattels of the defendant (except oxen and beasts of the plough), and a *moiety* of his lands, until the debt should be levied by a reasonable price or extent. When the creditor chose the latter alternative, his election was entered on the roll, and hence the writ was denominated an elegit, and the interest which the creditor acquired in the lands by virtue of the judgment and writ was known as an estate by elegit. This statute was substantially adopted in Virginia at an early day, and in consequence of this right to subject a *moiety* of the defendant's lands, the courts held that a *lien* was acquired by the judgment, which extended to all the defendant's lands within the state, and which was superior to the claims of subsequent purchasers, though for valuable consideration and without notice. *Hutcheson v. Grubbs*, 80 Va. 254; *Borst v. Nalle*, 28 Gratt. 423; *Renick v. Ludington*, 14 W. Va. 367.

Right to Take Out Elegit Not Suspended by Suing Out Writ of *Fi. Fa.*—"There is no statute in Virginia which, in express terms, makes a judgment a lien upon the lands of the debtor. As in England, the lien is the consequence of a right to take out an elegit. During the existence of this right the lien is universally acknowledged. Different opinions seem at different times to have been entertained of the effect of any suspension of the right. * * * A case was soon afterwards decided in the court of appeals of the state in which this question of the execution law of the state of Virginia is elaborately argued and deliberately decided. That decision is, that the right to take out an elegit is not suspended by suing out a writ of *fi. fa.*, and, consequently that the lien of the judgments continues pending the proceedings on that writ. This court, according to its uniform course, adopts that construction of the act which is made by the highest court of the state." Per MR. CHIEF JUSTICE MARSHALL in *U. S. v. Morrison*, 4 Peters 124; *Burton v. Smith*, 13 Peters 464.

Under Va. Code 1873, ch. 182, sec. 9, a judgment lien may be enforced in equity without a *fi. fa.* thereon, it being unnecessary for the judgment creditor, under that act, to exhaust his remedies at law before going into equity to subject the land of his

debtor, or his fraudulent alienees to satisfy his judgment. *Moore v. Bruce*, 85 Va. 189, 7 S. E. Rep. 195; *Price v. Thrash*, 30 Gratt. 515.

Fl. Fa. Need Not Be Returned "Nulla Bona."—Under the statute, Code 1873, ch. 182, § 9, it is not necessary that an execution of *fleri facias* should have been returned *nulla bona*, before the plaintiff in the judgment may sue in equity to subject the lands of his debtor to satisfy the judgment. *Barr v. White*, 30 Gratt. 581.

Right to Go into Equity—Remedy at Law.—It is not necessary since the revision of the law in 1849, that a judgment creditor shall exhaust his remedies at law before going into equity to subject the land of his debtor or his fraudulent alienees to his judgment. The remedy in equity against the real estate is not dependent upon the inadequacy of the legal remedy to satisfy the judgment out of the personal estate, or the insufficiency of such estate for that purpose, but it may always be resorted to whether there is or is not personal estate of the debtor, sufficient to satisfy the debtor. *Price v. Thrash*, 30 Gratt. 515; *Stovall v. Border Grange Bank*, 78 Va. 188.

Actual Issuance of Elegit Unnecessary.—The lien on land created by a judgment depends upon the right of the plaintiff to sue out an elegit, and it is not essential to the existence of the lien, that the elegit should have actually issued before the judgment creditor can come into equity for relief. *Scriba v. Deane*, 1 Brock. (U. S.) 166; *Taylor v. Spindle*, 3 Gratt. 44. But see *Eppes v. Randolph*, 2 Call 125.

Moreover, judgments do not bind lands after twelve months from the date, unless execution be taken out within that time, or an entry of elegit be made on the record. *Eppes v. Randolph*, 2 Call 125.

Elegit Abolished.—The lien resulting from the writ of elegit was not abolished in Virginia until the revisal of 1849, and a lien given by statute upon the debtor's entire real estate. *Gordon v. Rixey*, 76 Va. 604; *Hutcheson v. Grubbs*, 80 Va. 251.

2. NATURE OF THE LIEN.—Liens of judgments and their priorities and the right to enforce the same, are plain legal rights, expressly created by statute, and cannot be judicially modified to soften the supposed hardship of secret incumbrances. *Gurnee v. Johnson*, 77 Va. 712.

Judgment Vested Right—Retroactive Law.—A judgment is such a vested right of property that the legislature cannot, by a retroactive law, either destroy or diminish its value. It cannot alter its amount or destroy the effect theretofore given to it as a lien on real estate. The right to the lien upon the debtor's real estate is, in many cases, the sole inducement to the credit, which constitutes the basis of the judgment. Without the benefit of that lien, guaranteed by the law at the time the judgment is taken, the credit would not have been given. *Merchants' Bank v. Ballou*, 98 Va. 112, 33 S. E. Rep. 481.

3. CERTAIN ESSENTIALS.

a. Specific Sum of Money.—To create a lien the judgment must be for a specific sum of money. Thus, a decree providing that if the defendant does not, in a given time, pay the plaintiff a certain sum, that certain real and personal property of the defendant, on which the plaintiff has a specific lien, shall be sold, is not a judgment which creates a lien on other real estate of the defendant. *Linn v. Patton*, 10 W. Va. 187.

Insanity.—A judgment against a person insane at its rendition is not for that cause void, and is a lien

on land. *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. Rep. 316.

Lien of Decree.—A decree in chancery, equally with a judgment at law, creates a lien on lands. *Scriba v. Deane*, 1 Brock. (U. S.) 166; *Lee v. Swepson*, 76 Va. 178; *Parker v. Clarkson*, 4 W. Va. 407. See monographic note on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

b. Docketing of Judgments.—A judgment is not a lien on real estate as against subsequent purchasers for value and without notice, unless it is docketed in the mode and within the time prescribed by statute. Va. Code 1873, ch. 182, § 8; W. Va. Code, ch. 189, § 7; *Gurnee v. Johnson*, 77 Va. 712; *Duncan v. Custard*, 24 W. Va. 737; *Renick v. Ludington*, 14 W. Va. 367; *Hill v. Rixey*, 26 Gratt. 72; *Gordon v. Rixey*, 76 Va. 604. See also, *Bankers' Loan, etc., Co. v. Blair*, 99 Va. 606, 39 S. E. Rep. 231; Va. Law Reg., April 1902.

But the protection to purchasers for valuable consideration without notice of a judgment given them under sec. 7, ch. 189 of the W. Va. Code, only extends to the land so conveyed to such purchaser, it being liable to the satisfaction of judgments docketed according to law and to such judgments only. *Renick v. Ludington*, 14 W. Va. 367; *McClaskey v. O'Brien*, 16 W. Va. 792.

Where two judgments were recovered, one in 1868, and the other in 1869, and the one last recovered is docketed in 1870, while the one first obtained is docketed in 1871; but both are docketed before a contract in writing or deed to a purchaser for valuable consideration without notice is recorded, the judgment first recovered though last docketed had priority. *Anderson v. Nagle*, 12 W. Va. 98.

Where a valid judgment has been docketed, it is notice which will affect all subsequent purchasers of land from any of the defendants in the judgment. *Redd v. Ramey*, 31 Gratt. 265; *Sharitz v. Moyers*, 99 Va. 519, 39 S. E. Rep. 166.

Subsequent Recorded Mortgages.—And undocketed judgments are subject to subsequent recorded mortgages. *Duncan v. Custard*, 24 W. Va. 730.

Undocketed Deeds.—A deed executed before judgments have been obtained against the grantor, under which the purchaser has been put in possession and paid the purchase money, but which was not recorded until after judgments were obtained, is void as against such creditors, and the land conveyed thereby is subject to satisfy the judgments. *McClure v. Thistle*, 3 Gratt. 183; *Campbell v. Nonparell, etc., Co.*, 75 Va. 291; *Murdock v. Wells*, 9 W. Va. 552. See also, *Trout v. Warwick*, 77 Va. 731; *Davis v. Landcraft*, 10 W. Va. 718.

Prior Unrecorded Deed of Trust.—A prior deed of trust unrecorded is null and void as to a subsequent judgment; and the judgment is a lien upon the land embraced in the deed. *McCance v. Taylor*, 10 Gratt. 580. See *Hill v. Rixey*, 26 Gratt. 72.

If the owner of a tract of land executes a deed of trust, conveying his land to a trustee to secure certain debts, and afterwards a judgment is rendered against him, which is duly docketed, and he then makes a contract with a third party to advance for him the amount secured by the deed of trust, and to secure such advance, mortgages this land to the person advancing the money for him, and such mortgagee pays off the debts secured by the deed of trust, it would be a complete satisfaction of these debts both in law and equity; the deed of trust becomes wholly inoperative, and the mortgagee cannot be subrogated to the rights of the *cestui que trust*

and have the deed of trust kept alive for his benefit, thus securing priority over the judgment debtor. *Hoffman v. Ryan*, 21 W. Va. 415.

Statutory Provisions.—The act of March 3, 1843, Sess. Acts 1842-3, p. 51, does not apply to purchasers before the passage of the act. As to such the lien of a prior judgment is valid though not recorded. *McCance v. Taylor*, 10 Gratt. 580.

The act of March 2, 1866, Sess. Acts, 1865-66, p. 191, ch. 7, sec. 1, "to preserve and extend the time for the exercise of certain civil rights and remedies," is retrospective in its operation, and applies in favor of a judgment creditor as to the docketing of his judgment. *Hill v. Rixey*, 26 Gratt. 72.

Stay Law.—But the act of March 2, 1866, Sess. Acts 1865-66, ch. 69, p. 180, called the stay law, does not apply to a judgment creditor to relieve him from the necessity of docketing his judgment. *Hill v. Rixey*, 26 Gratt. 72.

Docketing as Affecting the State.—President Johnson, in a dictum, in *Hoge v. Brookover*, 28 W. Va. 304, was of opinion that the act requiring judgment liens to be docketed in order to preserve them as against purchasers of the property, to which they are attached, does not affect a judgment in favor of the state. See Va. Law Reg., April 1902.

As between Judgment Debtor and Creditor.—Moreover, it has been held that, as between the judgment creditor and debtor the statute requiring the judgment to be docketed has no application or force. *Renick v. Ludington*, 14 W. Va. 367; *Grantham v. Lucas*, 24 W. Va. 231; *McClaskey v. O'Brien*, 16 W. Va. 792.

Actual Notice or Knowledge of Unrecorded Lien.—Previous actual notice or knowledge by a subsequent purchaser's agent or trustee of a prior unrecorded lien on his real estate, will affect the creditor, provided the notice or knowledge was imparted or given to the agent in the same transaction, unless one transaction is closely followed by and connected with the other. *Morrison v. Bausemer*, 32 Gratt. 225; *Johnson v. Bank*, 33 Gratt. 473.

Lands in Another County.—A purchaser of land at a judicial sale in the county where the land lies, under a decree of the circuit court of that county, cannot be affected by constructive notice of a judgment obtained in another county, which is not recorded in the county where the land is situated, before the confirmation of the sale; actual notice or knowledge of the judgment must be brought home to the purchaser before the payment of the purchase money. *Logan v. Pannill*, 90 Va. 11, 17 S. E. Rep. 744.

Indexing Unnecessary.—It has been decided that indexing is not a necessary part of the docketing of a judgment, but the land is subject to the lien of the judgment without it. These decisions, however, were rendered on account of the particular wording of the statutes. *Granite Co. v. Clarke*, 28 Gratt. 617; *Calwell v. Prindle*, 19 W. Va. 604.

Mistake as to Name of Party to Judgment.—Where the plaintiff obtains judgment against Mrs. T. Frank S., which is indexed in the name of Mrs. T. Frank S., on July 31, 1891, but in 1897 is indexed in the judgment lien docket as against May M. S. such docketing and indexing of the judgment are not constructive notice to a purchaser that the judgment constituted a lien on the property of May M. S. in the absence of evidence that the purchaser had actual knowledge of the judgment or knew that Mrs. T. Frank S. and May M. S. were the same

persons. *Bankers' Loan & Investment Co. v. Blair*, 99 Va. 606, 39 S. E. Rep. 231.

Authenticated Copy of Abstract.—An authenticated copy from the recorder's docket of an official abstract of a judgment docketed under the provisions of the 3d and 4th sections of chapter 130 of the Code of 1868 of West Virginia, is evidence that such abstract was docketed, and when, and of notice to purchasers of lands upon which the alleged judgment is claimed to be a lien, when the existence of such judgment is properly proved; but where the judgment is put in issue, ordinarily, an authenticated copy of such abstract, as docketed by the recorder, will not be received as proof of the judgment and dispense with the necessity of producing a properly authenticated copy of the judgment. *Dickinson v. Railroad Co.*, 7 W. Va. 390; *Anderson v. Nagle*, 12 W. Va. 98.

Purpose of Docketing.—The docketing of a judgment is an act to be done to preserve or prevent the loss of a civil right or remedy, within the meaning of the acts of March 4, 1863, acts of 1861-2, ch. 81, and of March 2, 1866, Code of Va. 1878, ch. 146, §§ 6 and 7, pp. 998-99. And therefore in computing the time within which a judgment is required by § 8, ch. 186 of Va. Code of 1860, to be docketed, in order to preserve the lien of such judgment against purchasers, the period between the 17th of April, 1861 and the 2d of March 1866 is not to be computed as a part of such terms. *Borst v. Nalle*, 28 Gratt. 423.

Docketing Creditor's Privilege Not Duty.—To docket his judgment is a creditor's privilege, not his duty. If he fails to docket it, he may lose his lien on the real estate aliened to a purchaser for value without notice. *Gurnee v. Johnson*, 77 Va. 712.

Docketing, Conclusive Notice to All.—The docketing of a judgment is constructive but conclusive notice to all the world of the lien of such judgment. *Citizens' Nat. Bank of Charlottesville v. Manoni*, 76 Va. 802.

4. INTEREST SUBJECT TO LIEN.

Real Estate.—A judgment creditor has a legal lien on the lands of his debtor, and has a right to rest on that lien without pursuing his debtor's personalty. *Blakemore v. Wise*, 95 Va. 269, 28 S. E. Rep. 332.

Judgment Regarded as Lien in Chancery.—In equity, judgments are liens on the whole of the debtor's equitable estate; and the whole is first to be applied to the elder judgment, then the whole of the residue to the junior judgment; and in neither case is only a moiety to be applied to their satisfaction. *Haleys v. Williams*, 1 Leigh 140, 19 Am. Dec. 743. See *Buchanan v. Clark*, 10 Gratt. 164; *Withers v. Carter*, 4 Gratt. 407; *Parrill v. McKinley*, 6 W. Va. 67.

For a judgment creditor has a lien in equity on the equitable estate of the debtor, in like manner as he has a lien at law on his legal estate. *Coutts v. Walker*, 2 Leigh 268; *Michaux v. Brown*, 10 Gratt. 612.

Equitable Interest—Rule in Equity, at Law.—A judgment creditor, who has recovered judgment against the *cestui que trust*, under a deed of marriage settlement to a trustee, cannot, while the annuitant is still living, subject such equitable interest, *at law*, to the satisfaction of his debt, but such equitable interest is bound by the judgment *in equity*, which will apply it to the satisfaction of the debt. *Coutts v. Walker*, 2 Leigh 268.

Partial Payment for Land.—Where a party purchases land, and pays a part of the purchase money, but fails to pay the balance, whereby the land is resold, he has an equitable interest in the land,

which is liable to a judgment subsequently obtained against him by another party, on a debt existing against the delinquent purchaser at the time he made them partial payment on the land. *Davis v. Vass* (W. Va.), 35 S. E. Rep. 826.

Unrecorded Assignment—Subsequent Judgment.—Where a person has an equitable title to land under an executory written contract, and by written assignment transfers it to another, which assignment is not recorded, and a judgment goes against the assignor, the assignment is void as to such judgment, and the equitable right to the land under the contract and assignment is subject to the judgment, because of failure to record the assignment. *Dameron v. Smith*, 37 W. Va. 580, 16 S. E. Rep. 807.

Equity of Redemption.—A judgment is a lien upon an equity of redemption in land, and will be preferred to a subsequent purchaser of the equity of redemption not having the legal title. And the lien of the judgment extends to the whole equity of redemption. *Michaux v. Brown*, 10 Gratt. 612; *Hale v. Horne*, 21 Gratt. 112.

Judgment Subsequent to Deed of Trust.—A creditor, whose judgment is subsequent to a deed of trust on the debtor's land, has only a lien on his equity of redemption, and cannot have the deed of trust enforced, and the land sold to pay the debts thereby secured, until default. *Wytheville Ice Co. v. Frick*, 96 Va. 141, 30 S. E. Rep. 491; *Shurtz v. Johnson*, 28 Gratt. 657, and *note*; *Wise v. Taylor*, 44 W. Va. 492, 29 S. E. Rep. 1008.

Equity of Redemption First Liable.—The equity of redemption in land conveyed in trust by a judgment debtor must first be sold to satisfy a judgment before recourse can be had to aliened lands. *McClung v. Beirne*, 10 Leigh 894; *Michaux v. Brown*, 10 Gratt. 612. See *Buchanan v. Clark*, 10 Gratt. 164.

Damages on Dissolution of Injunction.—The damages on the dissolution of an injunction to a judgment become, as to the party obtaining it, a part of the judgment, and are embraced in the lien of the judgment upon the equity of redemption. *Michaux v. Brown*, 10 Gratt. 612.

Lien on Curtesy during Wife's Life.—Where property which constitutes a wife's separate estate is conveyed by a deed in which the husband unites, a judgment against him does not constitute a lien on the husband's estate by curtesy in such property, since during the wife's life the husband had no interest in the property to which the judgment could attach. *Bankers' Loan and Investment Co. v. Blair*, 99 Va. 606, 39 S. E. Rep. 281. See *monographic note* on "Curtesy."

Interest of Vendee.—Where a party by parol contract conveys property to another, under which the grantee takes possession and holds the property, and pays the purchase money, it will be unaffected by judgment recovered before a deed, made by the grantor to the grantee, is docketed, and the judgment is not a lien on the land, it being well settled that parol contracts are not embraced in the meaning of the registration acts, Va. Code 1873, ch. 182, § 67. *Long v. Hagerstown Agric., etc., Co.*, 30 Gratt. 665; *Burkholder v. Ludlam*, 30 Gratt. 355; *Floyd v. Harding*, 28 Gratt. 401; *Withers v. Carter*, 4 Gratt. 407; *Marling v. Marling*, 9 W. Va. 79; *Hurt v. Prillaman*, 79 Va. 257; *Powell v. Bell*, 81 Va. 222.

So, where the purchasers under a parol contract, take actual, visible, and notorious possession and pay the purchase money in full before notice of the judgment, a subsequent judgment against the vendor of the land, before the deed is recorded,

creates no lien thereon. *Brown v. Butler*, 87 Va. 621, 13 S. E. Rep. 71. See also, *Anderson v. Nagle*, 12 W. Va. 98.

A purchaser of land by a parol contract, which has been so far executed as to vest the right to compel his vendor to execute the parol contract in a court of equity, has an equitable right in the land so purchased, which a court of equity will fully protect against the lien of a subsequent judgment creditor of his vendor. *Snyder v. Martin*, 17 W. Va. 276; *Pack v. Hansbarger*, 17 W. Va. 813; *Snyder v. Botkin*, 37 W. Va. 355, 16 S. E. Rep. 591; *Yonng v. Devries*, 81 Gratt. 304.

Where a party sells land, by a verbal contract, to another, without receiving the purchase price, and subsequently becomes surety for his vendee, whereby the vendee agrees to allow his vendor to retain the legal and equitable title to the land until he pays the purchase money and until his liability as surety is discharged, which agreement is not recorded, and later the vendee becomes a bankrupt, it was held that as against the other judgment creditors of the vendee (bankrupt) the agreement between the vendor and vendee is valid though not recorded, and that they only have the equities of the vendee against the vendor. *Coffman v. Niswander*, 26 Gratt. 737.

Parol Contract Must Be Certain and Definite.—But in order that an equitable right held by a *bona fide* purchaser, under a parol contract, who has paid the purchase money and received possession, may be preferred in equity to the liens of judgment creditors subsequently acquired against the vendor, the parol contract relied on must be certain and definite in its terms, and sustained by satisfactory proof. *Hurt v. Prillaman*, 79 Va. 257; *Floyd v. Harding*, 28 Gratt. 401; *Wright v. Pucket*, 22 Gratt. 370.

Adverse Possession for Ten Years.—When the conveyance is by an unrecorded deed, and the vendee has held the property adversely for the period of ten years, before a judgment is recovered against the grantor, the land cannot thereafter be subjected to the lien of such judgment. As soon as such deed is made and delivered, though unrecorded, the holder thereunder will be adverse to the world. *Parkersburg Nat. Bank v. Neal*, 28 W. Va. 744.

Lands Purchased by Debtor under Executory Contract.—A judgment creditor has no lien on land which his debtor has purchased under an executory contract of sale, where the contract is set aside because of misrepresentation by the vendor, or because of default of the debtor in making stipulated payments, and it is immaterial whether the contract was set aside because of fraud in its procurement or the failure of the vendee to comply with his contract. *Nelson v. Turner*, 97 Va. 54, 33 S. E. Rep. 390.

When a Lien on Lands in Purchaser's Hands.—On the other hand, a judgment is a lien on the lands of the debtor after they pass into the hands of *bona fide* purchasers, if at the date of the judgment they were owned by the debtor. *Rodgers v. McCluer*, 4 Gratt. 81.

Injunction.—A judgment, moreover, is a lien upon land in the hands of a purchaser, though at the time of the conveyance execution upon the judgment was suspended by an injunction. And the lien exists though the judgment was not docketed, the purchaser having had notice thereof. *Craig v. Sebrell*, 9 Gratt. 131. See *Hutsonpiller v. Stover*, 12 Gratt. 579.

Judgments Recovered in Decedent's Lifetime.—The

judgment obtained during the life of an intestate is a lien upon the lands in the hands of his heirs for the payment thereof, and is entitled to priority of payment out of the proceeds of the sale thereof over a simple contract creditor, who acquired no equal or superior lien for his debt upon the realty during the life of the debtor. *Laidley v. Kline*, 8 W. Va. 218.

Judgment against Administrator Not Lien.—But the judgment obtained by a creditor against the administrator is not a judgment lien on the realty of the intestate. *Laidley v. Kline*, 8 W. Va. 218; *Woodyard v. Polesley*, 14 W. Va. 211.

Judgment Confessed by Administrator d. b. n., No Lien.—A judgment confessed by an administrator *de bonis non*, is no lien upon the lands of the intestate. And a decree showing upon its face, that it was enforcing such a judgment as a lien against such land, may be reviewed and reversed upon a proper bill of review brought for that purpose by the heirs. *Custer v. Custer*, 17 W. Va. 113.

Homestead.—While the lien of a judgment which attaches before a homestead in the land is claimed, cannot be enforced during the existence of the homestead, yet it will have priority on the land after the homestead is abandoned over a deed of trust executed during the occupancy of the land as a homestead. *Blose v. Bear*, 87 Va. 177, 12 S. E. Rep. 394.

Subsequently Acquired Realty.—The lien of a judgment extends to all the land owned by the judgment debtor at the date thereof, or which may have been afterwards acquired. *McClung v. Belrne*, 10 Leigh 394; *Brockenbrough v. Brockenbrough*, 81 Gratt. 580, and *note*.

So long as a judgment may be revived, it is a lien upon a moiety of all the lands owned by the debtor at the date of the judgment, or which are afterwards acquired, in whosoever hands they may have come. *Taylor v. Spindle*, 2 Gratt. 44.

The lien of a judgment will attach to after-acquired lands of a debtor. And such lands acquired and liened by the debtor subsequent to the rendition of a judgment, are within the terms and reason of sec. 10, ch. 186, Code of W. Va. 1860. *Handly v. Sydenstricker*, 4 W. Va. 605.

Judgments for Money.—Judgments for money, whether docketed or not, bind the unaliened lands to the debtor; certainly those owned by him at the date of the judgments, it may be, those subsequently acquired in the order in which the judgments are recovered, and the same is true of decrees for money; and so, though not docketed, they bind the debtor's lands subsequently aliened to a purchaser with notice, even though he be a purchaser for value; but unless docketed, they are not liens on lands subsequently aliened to *bona fide* purchasers for value without notice, and a trustee in a deed of trust given to secure a debt and the creditor secured are purchasers for value within the meaning of the registration law. *Rhea v. Preston*, 75 Va. 757; *Hill v. Rixey*, 26 Gratt. 72, and *note*.

Personal Estate.—If a judgment creditor (without suing out execution) files a bill in chancery, to get satisfaction out of the real and personal property of the debtor, the whole being conveyed by a deed of trust, executed during the terms in which the judgment was obtained, and providing that the property conveyed may be sold by the trustees to answer the purposes of the trust, the court ought to dismiss the bill as to the personal property, without prejudice to the plaintiff's right, if any, to the residuary

money resulting to the debtor, from the sale of that property, after satisfying the deed; but should direct the trustees to sell the lands, and out of the proceeds thereof, to satisfy the judgment in the first place, and afterwards perform the trusts reposed in them by the deed. *Mutual Assur. Society v. Standard*, 4 Munf. 589.

Purchase Money Bonds.—It was held in *Logan v. Pannill*, 90 Va. 11, 17 S. E. Rep. 744, that a judgment not docketed in the county wherein the land of the debtor lies, and is sold under a decree in partition, does not, upon being docketed in such county, become a lien upon bonds for the purchase money in the hands of the assignee who has no notice of the judgment, though title to the land was retained by the prior owners as security for the payment of the bonds, because the bonds are personalty, and not subject to the lien of any judgment when no execution is issued out upon them.

So also, a judgment is not a lien on notes given by a purchaser for unpaid purchase money for the land on which the judgment is a lien, nor do such notes, together with the unaliened lands of the judgment debtor, constitute a common fund for the payment of the judgment. *Blakemore v. Wise*, 95 Va. 209, 28 S. E. Rep. 332.

Equity Jurisdiction.—Section 8 of chap. 180, W. Va. Code 1868, confers upon courts of equity, jurisdiction and authority to enforce judgment liens against the lands of the judgment debtor, whether he has personal property or estate, out of which the judgment might be made by process of execution, or not. *Marling v. Robrecht*, 13 W. Va. 440; *Pecks v. Chambers*, 8 W. Va. 210.

Lands Exchanged—Failure of Grantee to Record.—If upon an exchange, the parties executed mutual conveyances, but the grantee of one tract fails to record his deed, judgment against the grantor binds the land so given in exchange as well as that received in exchange, the rights of the parties are not affected by the character of the consideration for the unrecorded deed. *Price v. Wall*, 97 Va. 334, 33 S. E. Rep. 599.

Principal's Lands—Sureties Secured.—A judgment against the principal debtor and sureties in the debt is a lien on the land of the principal, although the sureties are secured by a deed of trust. *Kent v. Matthews*, 12 Leigh 573.

Damages and Costs.—A judgment lien includes not only the amount of the original judgment, but also the damages and costs in the court of appeals. *McClung v. Belrne*, 10 Leigh 394; *McCance v. Taylor*, 10 Gratt. 586.

5. AMOUNT OF LIEN.—One who purchases land subject to a judgment lien is not affected by a subsequent judgment against the same land, for an amount in excess of such lien to which he was not a formal party and in which the true amount of the first judgment lien was not litigated, and he may satisfy such lien by the payment of the amount called for by the judgment under which he purchased. *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. Rep. 1078.

6. TERRITORIAL EXTENT.

Lands in Another County.—Where a creditor has judgments in one county against persons who have an interest in lands in another county, and knows of the pendency of a suit to partition such lands, and he does not intervene in such suit or record his judgments in the latter county till after a sale of the land is confirmed, and does not give the purchaser actual notice of his judgments before the

purchase money is paid, he cannot subject the land to the payment of such judgments. *Logan v. Pannill*, 90 Va. 11, 17 S. E. Rep. 744.

Where a judgment was recovered in the county court of Monroe county, W. Va., in March 1861, against three debtors, W., S. and G., and the latter lived in Bath county, but during the war, died, leaving real estate in Bath county, it was held that the judgment constituted as between the parties thereto, a lien on the real estate in Bath county, whether the judgment was docketed or not, and the lien of the judgment on the lands of G. in Bath county, was neither lost nor impaired by reason of the division of the state of Virginia into two states, and the falling of the county of Monroe into the state of West Virginia. moreover, the certificate of the clerk of the circuit court of Monroe county, West Virginia, of the records of which court the records of the former county court of Monroe form a part, is proper evidence of the judgment. *Gatewood v. Goode*, 23 Gratt. 880.

7. COMMENCEMENT AND PRECEDENCE OF LIEN.—The statutes give a direct, positive, express, and absolute lien of a judgment against all the lands of or to which the debtor shall be possessed or entitled at or after the date of such judgment, or if it was rendered in court, at or after the commencement of the terms, at which it was so rendered; and such lien continues until it is in some legal manner discharged. Code West Va., ch. 189, § 5; Code Va. 1860, ch. 186, § 6; *Renick v. Ludington*, 14 W. Va. 307; *McClaskey v. O'Brien*, 16 W. Va. 792; *Duncan v. Custard*, 24 W. Va. 780; *Anderson v. Nagle*, 12 W. Va. 98; *Borst v. Nalle*, 28 Gratt. 423; *Gurnee v. Johnson*, 77 Va. 712.

Judgment liens in their priorities should be fixed according to the dates of the judgments. *Grant-ham v. Lucas*, 24 W. Va. 231.

Forfeited Forthcoming Bond.—A forfeited forthcoming bond has the force of a judgment, so as to create a lien upon the lands of the obligors, only from the time the bond was returned to the clerk's office. *Cabell v. Given*, 30 W. Va. 760, 5 S. E. Rep. 442; *Land Co. v. Calhoun*, 16 W. Va. 361; *Jones v. Myrick*, 8 Gratt. 210; *Lipscomb v. Davis*, 4 Leigh 306.

Though a forthcoming bond is forfeited, and not quashed, yet in equity the lien of the original judgment still exists; and if the obligors in the bond prove insolvent, so that the debt is not paid, a court of law will quash the bond so as to revive the lien of the original judgment. *Jones v. Myrick*, 8 Gratt. 179.

Where the only evidence of the time a forthcoming bond was returned to the clerk's office was an indorsement as follows: "Notice proved and docketed in court, 10 October, 1868, and mo. to quash,"—such bond would have the force of a judgment from the date in the endorsements, and the requirement by the statute (Code W. Va. 1860, ch. 189, sec. 2) that the clerk of the court shall indorse on a forfeited forthcoming bond, "the date of its return," is directory. *Cabell v. Given*, 30 W. Va. 760, 5 S. E. Rep. 442.

Lien Not Divested by Cancellation of Deed of Trust.—A judgment becomes a lien on property conveyed to the judgment debtor as a trustee for his wife, where the husband, who was insolvent, paid the consideration, and such is not divested by a return and cancellation of the deed unrecorded. *Kline v. Triplett*, 2 Va. Dec. 429, 25 S. E. Rep. 886.

Priority of Judgment Lien Limited to Amount of Judgment.—A purchaser of land which is subject to the

lien of a judgment takes it subject only to the amount called for by the judgment, and it is not liable to the judgment, increased by usury, under a subsequent agreement between the creditor and judgment debtor. *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. Rep. 1078.

Whether Lien Attaches to Fund Received from Sale.—Where a judgment creditor has made an election to receive part of his debt out of the proceeds from the sale of lands on which his judgment was a prior lien, he cannot afterwards enforce his lien against the land. *Effinger v. Kenney*, 92 Va. 245, 23 S. E. Rep. 742.

Judgment against Sheriff—When Lien Commences.—A judgment against a sheriff is, under ch. 195 of W. Va. Code of 1872, a lien from the time he is served with notice or summons pursuant to which the judgment is afterwards rendered, and is superior to a deed of trust executed by the sheriff after such service of summons. *Hoge v. Brookover*, 38 W. Va. 304.

Order of Subjection of Lands—Lands Retained by Debtor.—If the judgment debtor retains sufficient lands to pay the judgment they should be first subjected. *Blakemore v. Wise*, 95 Va. 209, 28 S. E. Rep. 332.

Equity requires, where a judgment lien is sought to be enforced, that the lands owned by the debtor at the time of the attempt to enforce, should be applied to the discharge of the judgment before resorting to land upon which the judgment is also a lien, then in the hands of his alienee. *Handly v. Sydenstricker*, 4 W. Va. 605.

If a judgment is obtained which is a lien on the lands of the judgment debtor, and the judgment debtor sells and conveys part of it, generally the judgment creditor should be required in the first instance to exhaust the unsold portion. *McClaskey v. O'Brien*, 16 W. Va. 791.

If the first alienee of a portion of the land liable to judgment liens fails to put his deed of record, and a subsequent alienee, who bought another portion of the lands, liable to the judgment liens, puts his deed of record, still the lands of such last alienee must be held liable for such judgment liens before the lands of the first alienee. *Renick v. Ludington*, 20 W. Va. 511.

But if the lands owned by the debtor are not sufficient to satisfy the judgment lien, then the real estate last owned and aliened is liable, until it is fully satisfied. In the suit for the purpose of enforcing the lien, unless it shall appear that the land first liable would be sufficient to discharge it, it would not be error to decree or advertise together the sale of all the lands upon which the lien existed, and then proceed to sell it in the order in which it was liable until a sufficient sum is realized to pay off the suit. *Handly v. Sydenstricker*, 4 W. Va. 605.

Residue of Land Unaliened First Liable.—Where some of the land conveyed by a judgment lien is included in a deed of trust, subsequent to the judgment and the residue of it is not, such residue, not included, should first be sold to satisfy the prior judgment, and if insufficient to discharge the judgment, then the lands included in the deed of trust should be sold, and so much of the proceeds thereof, as, with the proceeds of the land not included in the deed, amount to a moiety of the whole, should be applied to the satisfaction of the judgment. If there is another judgment having priority over the deed of trust, the proceeds of the other moiety of the land sold, included in the deed

of trust, should be applied to satisfy it. *Buchanan v. Clark*, 10 Gratt. 164.

Liens of Undocketed Judgments—Proceeds of Land Unsold.—Various judgments are rendered against a debtor, and the junior judgments are docketed, and the senior undocketed, and in this state of things the debtor conveys a part of the land to a purchaser for valuable consideration without notice of the undocketed judgments, and the docketed judgment liens are not discharged, the liens of the undocketed judgments must be discharged out of the proceeds of the unsold lands, although the effect might be to require the holders of the docketed judgment to resort in whole or in part to the land so conveyed for the satisfaction of their judgment liens. *Renick v. Ludington*, 14 W. Va. 367; *McClaskey v. O'Brien*, 16 W. Va. 792. See also, *Duncan v. Custard*, 24 W. Va. 730.

Priority over Unrecorded Deed.—A judgment creditor, whose judgment has been duly docketed, and who has brought suit to enforce the lien on the judgment debtor's land, is entitled to priority over a grantee of the judgment debtor claiming under a deed, not recorded until after the commencement of the suit, and after the expiration of twenty months from its execution and acknowledgment; since such a deed is void, under Va. Code, § 2465, as to creditors whose rights have attached before it was recorded. *Robinson v. Bank*, 1 Va. Dec. 769, 17 S. E. Rep. 739.

Priority of Judgment over Purchase Money Notes.—Also judgments recovered against the vendor of land and docketed before his deed of conveyance to the purchaser is admitted to record, have priority over the notes given by such purchaser for deferred payments on the land, though such notes are secured by a deed of trust made contemporaneously with the deed of conveyance to him, and duly recorded before the recovery of such judgments. *Jones v. Byrne*, 94 Va. 751, 27 S. E. Rep. 591.

Priority of Trust Deed over Judgment.—Where a party conveys land in trust to secure the payment of a debt, and subsequently sells lands he holds as trustee for his wife and children to pay the debts, the wife and children have an implied trust in their favor on the tract of land deeded to secure the payment of the debt, which refers back to the date of the trust deed, and has priority over judgment creditors who recovered judgments between the recording of the deed and the payment out of the proceeds of the land held by him as trustee for his wife and children, even though the judgments were recovered before the payment by the husband. *Warwick v. Warwick*, 31 Gratt. 70.

Priority of Vendor's Lien.—Where the vendor's lien is retained in a contract for the sale of land, though the contract is not recorded, the vendor's lien has priority to that of the judgment creditors of the vendee. *Shipe v. Repass*, 28 Gratt. 716.

As between Principal and Surety.—In a suit to enforce judgment liens on the lands of the principal debtor and his sureties, the principal's lands should be exhausted before subjecting that of the sureties. *Wytheville Ice Co. v. Frick*, 96 Va. 141, 30 S. E. Rep. 491; *Womack v. Paxton*, 84 Va. 9, 5 S. E. Rep. 550; *Stovall v. Bank*, 78 Va. 188. See *Horton v. Bond*, 28 Gratt. 815; *Gentry v. Allen*, 32 Gratt. 254. See *Ross v. M'Lauchlan*, 7 Gratt. 86.

Where judgment is rendered against a principal and his sureties, which is paid by the sureties, the judgment is a lien in favor of the sureties prior to a subsequent trust deed, although the sureties have

permitted the proceeds of other property conveyed by their principal in trust for them to be applied in satisfaction of another judgment against their principal. *Kent v. Matthews*, 12 Leigh 573.

As between Two Trust Creditors of Same Debtor.—As between two trust creditors of the same debtor, secured on separate properties, a prior judgment lien must be first paid out of the proceeds of the property subject to the second trust, to the relief of the property subject to the first, both by reason of the statute and the doctrine of subrogation. *First Nat. Bank v. Simms* (W. Va.), 33 S. E. Rep. 525. See *Woods v. Douglas*, 46 W. Va. 657, 33 S. E. Rep. 771; *Ball v. Setzer*, 33 W. Va. 444, 10 S. E. Rep. 798.

Judgments Superior to Wife's Trust Deed.—Where during the pendency of a suit against an insolvent husband, instituted for the purpose of obtaining a judgment on a note executed by him, the husband executes a deed of trust on his real estate to a trustee, to secure to his wife the payment of a sum of money which she claims she had loaned him, which he had used in his business, and which sum was barred by the statute of limitations when the trust was executed, and amounted to nearly the value of the real estate, such trust deed cannot, as a lien, take precedence over judgments obtained by the *bona fide* creditors of the husband on debts created before the trust was executed, on the unsupported testimony of the husband and wife. *Miller v. Cox*, 33 W. Va. 747, 18 S. E. Rep. 960.

Specific Liens Paid First.—The proceeds of lands of a judgment debtor sold by a commissioner must be applied to the satisfaction of specific liens against such lands according to their respective priorities, and a judgment subsequently rendered cannot be made a general lien on such lands until the specific liens are paid. *Hutton v. Lockridge*, 22 W. Va. 159.

Equitable and Legal Estates on Same Footing.—As to the order of subjecting lands to a judgment lien, those conveyed by an equitable title stands on the same footing as those conveyed by a legal title. *Rodgers v. McCluer*, 4 Gratt. 81.

a. Lands Subject to Lien in Inverse Order of Alienation.—Lands subject to a judgment lien, parts of which have been aliened at different times, are liable to the satisfaction of the lien in the inverse order of alienation. *McClung v. Beirne*, 10 Leigh 394, overruling *Beverley v. Brooke*, 2 Leigh 425; *Harman v. Oberdorfer*, 33 Gratt. 497, and *note*; *Nelson v. Turner*, 97 Va. 54, 33 S. E. Rep. 390; *Hutton v. Lockridge*, 22 W. Va. 159; *Rodgers v. McCluer*, 4 Gratt. 81; *Alley v. Rogers*, 19 Gratt. 389; *Jones v. Phelan*, 20 Gratt. 229; *Jones v. Myrick*, 8 Gratt. 179; *Brengle v. Richardson*, 78 Va. 406. See *Londons v. Echols*, 17 Gratt. 20.

"The law is now well settled that where land which is subject to the lien of a judgment or other incumbrance, is sold in parcels to different persons by successive alienations, it is chargeable in the hands of the purchaser in the inverse order of such alienations. This rule is not only established by the decisions of courts of equity, but in Virginia it is prescribed by statute. *Harman v. Oberdorfer*, 33 Gratt. 497." Per STAPLES, J. *Whitten v. Saunders*, 75 Va. 567; *Renick v. Ludington*, 20 W. Va. 567. See also, *Schultz v. Hansbrough*, 33 Gratt. 567; *Miller v. Holland*, 84 Va. 652, 5 S. E. Rep. 701.

Lands Primarily Liable.—Lands being liable for judgments in the inverse order of alienation, those primarily liable should be first subjected before proceeding against the purchaser whose land is

only secondarily liable. *Nelson v. Turner*, 97 Va. 54, 33 S. E. Rep. 890.

Oldest Unpaid General Lien.—The holder of the oldest unpaid judgment lien is entitled to be first paid out of the property of the debtor, where his lien is a general one. *Max Meadows Land & Imp. Co. v. McGavock*, 98 Va. 411, 36 S. E. Rep. 490.

Parties to Suit Subsequent to Order for Account of Liens.—Where a judgment creditor brings suit to enforce his lien, and after an account of liens is ordered to be taken by the commissioner and other liens are proved, several other judgment creditors become parties to the suit and prove their liens, they are entitled to have the lands sold for their relief in the order of their respective merits and rights, and each is entitled to relief in the cause according to the merits of his cause, and the lands of the debtor are liable in the inverse order of alienation under Va. Code 1873, ch. 182, § 10. *Brengle v. Richardson*, 78 Va. 406.

Effect of Release or Waiver of Lien on One Parcel.—A judgment creditor having, by his contract, waived or lost his right to subject the land first liable to satisfy his judgments, is not entitled to subject the lands next liable for the whole amount of his judgment but only for the balance after crediting thereon the value of the land first liable. *Jones v. Myrick*, 8 Gratt. 179.

Release of Lands Alienated by Debtor.—The lands alienated by the debtor constitute a secondary fund for the payment of the judgment, and neither a release of these lands, nor the failure to subject certain notes for unpaid purchase money on land is prejudicial to subsequent judgment creditors who obtained their judgments after the alienation, but before the release by the first judgment creditor. *Blakemore v. Wise*, 95 Va. 269, 28 S. E. Rep. 832.

Effect of Release, by Prior Party of Property Subject to Second Deed.—If a prior judgment lienor releases the property subject to a second deed of trust, the proceeds of which are amply sufficient to satisfy his judgment lien, he cannot enforce payment of such judgment lien out of the property subject to a first deed of trust until such latter trust is fully satisfied. *First Nat. Bank v. Simms (W. Va.)*, 38 S. E. Rep. 525.

A defendant bought a tract of 166 acres of land for \$1,400, giving a deed of trust to secure the purchase money. He afterwards paid \$800 in cash, in consideration of the vendor's releasing 66 acres of the land, and agreeing to look to the other 100 acres for payment of the balance of \$600, for which the defendant executed new notes. These were assigned to the plaintiff, in whose favor the defendant afterwards confessed judgment thereon. *Held*, that the lien of this judgment extended to the defendant's interest in the whole tract of 166 acres, notwithstanding the release of part of it from the vendor's lien, of which the plaintiff had no notice. *McFarland v. Fish*, 84 W. Va. 548, 12 S. E. Rep. 548.

Failure to Record—Voluntary Release.—Where a grantee of land fails to record his deed until after a judgment is obtained against the grantor, the lien of the judgment plaintiff will not be postponed, as to other land of the grantor, to the liens of judgments rendered after such deed was recorded, because such judgment plaintiff voluntarily released his lien on the land conveyed. *Blakemore v. Wise*, 95 Va. 269, 28 S. E. Rep. 832.

Effect of Release of One of Several Joint Judgment Debtors.—One of several joint judgment debtors may be proceeded against to enforce the payment

of his part of the judgment, where the complainant has released him on the record from all liability for the shares of the other judgment debtors. Moreover, this objection, raised for the first time in an appellate court, comes too late. *Preston v. Bank*, 97 Va. 222, 33 S. E. Rep. 546.

Lands Sold Contemporaneously.—Where the different parcels of land are sold contemporaneously, they must contribute *pro rata* to the satisfaction of the judgment. *Harman v. Oberdorfer*, 38 Gratt. 497.

Voluntary Purchasers of Land Subject to Lien.—It seems that voluntary purchasers of lands subject to the lien of a judgment are personally responsible in equity to the creditors (the goods and chattels of the debtor being exhausted) for half the profits (or so much of half as may be sufficient to satisfy the judgment) jointly and not *pro rata*, notwithstanding they hold tracts of unequal values, and by distinct conveyances. *Winston v. Johnson*, 2 Munf. 305.

b. Doctrine of Relation.—"At common law, all judgments were, by legal fiction, it is said, supposed to be entered on the first day of the term of the court at which they were recovered. This rule has always prevailed in this state whenever the action, in which the judgment was rendered, was in such condition that it might have been tried, if it had happened to occupy the first place on the docket. And the law, not regarding fractions of a day, the lien of a judgment began by relation at the first moment of the first day of the term. *The Mutual Assurance Society v. Stanard*, 4 Munf. 539; *Countts v. Walker*, 2 Leigh 208; *Skipwith v. Cunningham*, 8 Leigh 371; *Horsley v. Garth*, 2 Gratt. 474; *Withers v. Carter*, 4 Gratt. 407; *Jones v. Myrick*, 8 Gratt. 179; *Brockenbrough v. Brockenbrough*, 31 Gratt. 580; *Yates v. Robinson*, 80 Va. 475; and *Janney v. Stephen*, 2 Pat. & H. 11." *Hockman v. Hockman*, 98 Va. 455, 25 S. E. Rep. 534.

The lien of a judgment upon the lands of the party relates back to the commencement of the term at which it is obtained. *Mutual Assur. Soc. v. Stanard*, 4 Munf. 539; *Jones v. Myrick*, 8 Gratt. 179.

Fractions of a Day.—As a general rule the law does not regard fractions of a day; but this rule is departed from in many cases where the purposes of justice require it. Courts would be very slow to decide that a man by a fiction of law, is to be considered a felon before the conviction has actually taken place. *Neale v. Utz*, 75 Va. 480.

Judgment by Confession in Vacation.—The lien of a judgment or decree begins with the first moment of the day on which it attaches. If it is a judgment by confession entered in vacation, the lien commences with the first moment of the day of such entry, irrespective of the hour at which the entry was in fact made. *Hockman v. Hockman*, 98 Va. 455, 25 S. E. Rep. 534.

"By reason of this rule that the whole term is one day, the common-law rule was that a judgment rendered on any day has relation to, and is a judgment of, its first day. This doctrine or rule had always been recognized in Virginia before we had a statute, but it is now embodied in a statute, as regards the effect of a judgment as a lien. Code of W. Va., ch. 139, sec. 5." *Dunn v. Renick*, 40 W. Va. 349, 23 S. E. Rep. 66.

Must Be in Condition to Be Heard.—But though a decree or judgment relates to the first day of the term, yet if the case was not ready for hearing or trial, and therefore no judgment or decree could have been given on such first day had it occupied the first place on the docket, it does not relate to the

first day, but has the date of its actual entry of record. *Dunn v. Renick*, 40 W. Va. 349, 23 S. E. Rep. 66; *Yates v. Robertson*, 80 Va. 475; *First Nat. Bank v. Huntington, etc., Co.*, 41 W. Va. 580, 23 S. E. Rep. 792; *Withers v. Carter*, 4 Gratt. 407; *Hockman v. Hockman*, 93 Va. 455, 25 S. E. Rep. 534.

A judgment in any case, fully matured, so that it could be tried on the first day of the term, after it had been set for that day, relates to the first day of the term, and this rule applies to a judgment on attachment. *Smith v. Parkersburg Co-Op. Ass'n (W. Va.)*, 37 S. E. Rep. 645.

Commencement of Term.—The commencement of the term to which the lien of a judgment has relation is the last day of the term upon which the court sits. *Skipwith v. Cunningham*, 8 Leigh 271. See *Brown v. Hume*, 16 Gratt. 462.

But the term is not considered as commencing on the day appointed by law for its commencement, when in point of fact the court is not held until afterwards. *Skipwith v. Cunningham*, 8 Leigh 271.

Judgments at Same Time Placed on Equality.—An office judgment confirmed on the last day of a term, and a judgment confessed on the first day of the same term, must be treated as judgments rendered on the same day, at the same time, and both judgments stand as of the same date; because of the well-settled rule which has already been set forth, that the office judgment would relate to the first day of the term, the law taking no notice of the fraction of a day. *Brockenbrough v. Brockenbrough*, 31 Gratt. 580.

Overreaches All Liens, etc., Entered Thereafter.—"It was the rule of common law (and this rule still obtains in some of the states) that the judgments of courts of record all relate back to the first day of the term, and are considered as rendered on that day, and therefore their lien will attach to the debtor's realty from the beginning of the term, and it will override a conveyance or mortgage made on the second or any succeeding day although prior to the rendition of the judgment." *Black, Judgm.* 441; *Smith v. Parkersburg Co-Op. Ass'n (W. Va.)*, 37 S. E. Rep. 645. See also, *Mutual Assur. Soc. v. Stanard*, 4 Munf. 589; *Coutts v. Walker*, 2 Leigh 268.

Overreaches a Deed of Trust.—It is well settled, as a general rule, that the lien of a judgment upon the land of the debtor relates back to the commencement of the term at which the judgment was obtained, and overreaches a deed of trust on the land executed by the debtor on or after the first day of the term. *Skipwith v. Cunningham*, 8 Leigh 271; *Brown v. Hume*, 16 Gratt. 462; *Brockenbrough v. Brockenbrough*, 31 Gratt. 580, and *note*.

Under Va. Code, § 3567, providing that a judgment is a lien as of the first day of the term at which it was rendered, a judgment rendered after the recordation of a deed of trust, but at a term which commenced prior to such recordation, is prior to the deed. *New South Bldg. & Loan Ass'n v. Reed*, 96 Va. 345, 31 S. E. Rep. 514.

Priority over Deed Recorded Same Day.—The lien of a judgment, moreover, has priority over a conveyance recorded on the same day on which the judgment was entered, though the endorsement of the clerk shows that the judgment was, in fact, entered, after the deed was filed for record. *Hockman v. Hockman*, 93 Va. 455, 25 S. E. Rep. 534.

Relation after Dissolution of Injunction.—Though a judgment is enjoined by a purchaser of land at the time of the purchase, yet, upon the dissolution of the injunction, the lien relates back to the date of

the judgment, and so has priority over the equity of the purchaser. *Michaux v. Brown*, 10 Gratt. 612.

Relation Allowed in Equity and Law.—A judgment has relation to the first day of the term at which it is rendered, and this relation is allowed in equity as well as at law. *Coutts v. Walker*, 2 Leigh 268.

Reasons for Rule.—This general principle of the common law, like many others, is of such remote antiquity, and so long recognized without dispute, that the reasons and policy on which it was founded are in a great degree left to conjecture. *Coutts v. Walker*, 2 Leigh 268; *First Nat. Bank v. Huntington, etc., Co.*, 41 W. Va. 580, 23 S. E. Rep. 792; *Smith v. Parkersburg Co-Op. Ass'n (W. Va.)*, 37 S. E. Rep. 545.

c. Judgments Obtained at Same Time.

Judgments Obtained at Same Time Share Pro Rata.—When the proceeds of lands, on which several judgments, obtained at the same time, are liens, are insufficient to pay them all, they must be paid *pro rata*. *Janney v. Stephen*, 2 P. & H. 11.

As between Judgments and Deeds of Trust.—A decree rendered or judgment confessed in vacation operates as a lien upon the first moment of the day on which the decree is rendered or judgment confessed regardless of the time of the day at which it is actually rendered or confessed, and takes precedence over the deed of trust admitted to record during the same day, though in point of fact the deed of trust may have been recorded before the decree was rendered, or the judgment confessed. The law takes no notice of the fraction of the day as to the decree, while the deed, as against subsequent purchasers for value and without notice, and creditors, is only operative from the time it is admitted to record. *Hockman v. Hockman*, 93 Va. 455, 25 S. E. Rep. 534.

d. Equitable Interests.

Priority of Lien as against Equitable Interest.—Judgment creditors may, in equity, have satisfaction out of the equitable estate of their debtor, in real estate, according to the order of their judgments in point of time, the oldest having priority over the youngest. *Haleys v. Williams*, 1 Leigh 140, 19 Am. Dec. 743.

Order of Liability of Equity of Redemption.—The equity of redemption in land conveyed in trust to secure debts, is subject to the lien of judgments subsequently obtained in the order of their priority in date. *Hale v. Horne*, 21 Gratt. 112; *Michaux v. Brown*, 10 Gratt. 612.

Contest between Judgment Creditor and a Purchaser.—If a judgment debtor purchases land and procures it to be conveyed to another as the purchaser, and he conveys it in trust to secure a *bona fide* debt, and the creditor is not informed that it has been purchased by the judgment debtor and conveyed to another as the purchaser, the judgment creditor has no lien upon the land for his debt as against the creditor under the deed of trust. *Moore v. Sexton*, 30 Gratt. 506.

e. Superior Rights of Third Persons.—It is well settled that where statute enactments do not interfere, a judgment creditor can acquire no better right to the estate of a debtor than the debtor himself has when the judgment is recovered. He takes it subject to every liability under which the debtor held it, and subject to all the equities which exist in favor of third parties; and a court of equity will limit the lien of the judgment to the actual interest which the debtor has in the estate. *Snyder v. Martin*, 17 W. Va. 276; *Pack v. Hansbarger*, 17 W. Va. 318; *Snyder v. Botkin*, 37 W. Va. 355, 16 S. E. Rep. 591;

Cleavenger v. Felton, 46 W. Va. 249, 33 S. E. Rep. 117; Shipe v. Repass, 28 Gratt. 716, and *note*; Floyd v. Harding, 28 Gratt. 401, and *note*; Borst v. Nalle, 28 Gratt. 423, and *note*; Sharitz v. Moyers, 99 Va. 519, 30 S. E. Rep. 166. See Powell v. Bell, 81 Va. 232.

Extent of Lien.—"Nothing is better settled in Virginia than that where statutory enactments do not interfere, only the actual interest of the judgment debtor can be subjected to sale to satisfy judgments against him. Floyd v. Harding, 28 Gratt. 401; Borst v. Nalle, 28 Gratt. 423; Summers v. Darne, 81 Gratt. 800; Coldiron v. Asheville Shoe Co., 93 Va. 364, 26 S. E. Rep. 238; 1 Black, Judgm. sec. 445." Dingus v. Imp. Co., 98 Va. 737, 37 S. E. Rep. 353. It was held in the latter case, that although the judgment debtor held the legal title to land, yet, as it was charged with a trust; it was paramount to the right of its judgment creditors.

"It has been over and over again decided that the judgment creditor can acquire no better right to the estate than the debtor himself has when the judgment is recovered." Floyd v. Harding, 28 Gratt. 401; Withers v. Carter, 4 Gratt. 407, approved.

"It is well settled that ordinarily no greater interest in real estate than the judgment debtor himself has is available for the satisfaction of a judgment against him. In other words, that the right of the judgment creditor is limited to the debtor's interest in the land sought to be subjected. The creditor is in no sense treated as a purchaser, and has no equity beyond what belongs to the debtor. These propositions have often been affirmed by this court. Floyd v. Harding, 28 Gratt. 401; Borst v. Nalle, 28 Gratt. 423; Summers v. Darne, 81 Gratt. 791." LEWIS, P. Cowardin v. Anderson, 78 Va. 88.

"It is well settled that a judgment lien on the land of the debtor is subject to every equity, which existed against the debtor at the rendition of the judgment; and courts of equity will always limit the lien to the actual interest of the judgment debtor. The lien of the judgment creates a preference over subsequently acquired rights, but a court of equity will always protect the equitable rights of third persons existing at the time the judgment lien attaches." GREEN, P. Snyder v. Martin, 17 W. Va. 299. See Withers v. Carter, 4 Gratt. 407.

Lands forfeited by nonentry on the assessor's land books under Code W. Va. 1868, ch. 31, § 84, vests in the state upon the forfeiture by the mere force of the statute, and therefore a judgment against the former owner rendered after such forfeiture is no lien on the land. Wiant v. Hays, 38 W. Va. 681, 18 S. E. Rep. 807.

Effect of Loss of Security.—Where a deed of trust is given to a creditor as collateral security for the payment of a judgment, and the property is afterwards purchased by the creditor at a sale under the trust deed, but is subsequently taken from him under a vendor's lien existing against the property when the trust deed was made, the debtor is not entitled to credit on the judgment for the price which the creditor agreed to pay for such property, but the judgment creditor may enforce the judgment for its full amount against other property of the judgment debtor. Deaton Grocery Co. v. Pepper, 98 Va. 587, 36 S. E. Rep. 988.

Lien on a Molety.—Though lands are conveyed in trust to secure debts, a judgment having priority to the deed is a lien upon but a molety of the land, except an equity of redemption.

"Where the legal estate is in the debtor at the

date of its judgment, the creditor can only subject a molety; and a subsequent alienation by the debtor cannot enlarge his rights." Buchanan v. Clark, 10 Gratt. 164; Mutual Assurance Society v. Stanard, 4 Munf. 539; Blow v. Maynard, 2 Leigh 29, 37; Haleys v. Williams, 1 Leigh 140, distinguished and explained.

If a debtor conveys land fraudulently and retains other lands, on setting aside the conveyance at the suit of a judgment creditor, there will be a decree for the sale of only one molety of the whole, embracing in the molety the land retained by the debtor. M'New v. Smith, 5 Gratt. 84.

Judgment in Favor of Commonwealth.—It was held in Leake v. Ferguson, 2 Gratt. 419, that prior to the act of 1822, Sup. Rev. Code, ch. 282, sec. 1, p. 339, the judgment in favor of the commonwealth against his general debtors, only binds one-half the land of the debtor.

But upon setting aside a conveyance of real estate as fraudulent, at the suit of a judgment creditor the court cannot decree a sale of only one molety of the lands to satisfy the judgment. M'New v. Smith, 5 Gratt. 84.

Issuance of Fl. Fa.—Lien of Molety.—Where a *fl. fa.* has been issued upon a judgment within a year and a day, the judgment is a lien upon a molety of all the land owned by the debtor at the date of the judgment, or which were afterwards acquired, in the hands of a *bona fide* purchaser for value, and without notice. Taylor v. Spindle, 2 Gratt. 44. See Kent v. Matthews, 12 Leigh 573.

Rights of Purchaser of Land Subject to Lien.—The lien of a judgment is a legal lien, and a purchaser of the legal title from the debtor takes it subject to the lien, though he had no notice of it. Leake v. Ferguson, 2 Gratt. 419.

Priority of Mortgage Executed Back to Secure Purchase Money.—Where a purchaser, contemporaneously with the delivery of a conveyance of the purchased land, executes a mortgage, trust deed, or other incumbrance to secure the purchase money, he acquires a temporary selsin, and not such an interest in the land as becomes subject to the lien of a judgment against him in preference to the deed of trust. And it applies equally in favor of a third person who advances the purchase money, and at the time of the conveyance takes a mortgage on the land for his indemnity. Cowardin v. Anderson, 78 Va. 88; Summers v. Darne, 81 Gratt. 791, 801; Straus v. Bodeker, 86 Va. 543, 10 S. E. Rep. 570.

Under Code Va. 1873, ch. 182, sec. 6, giving judgment creditors a lien on all realty of or to which the judgment debtor is possessed or entitled, where land is conveyed to a judgment debtor, and so *instantly* reconveyed by him to a trustee to secure the purchase money, he has no interest subject to the lien of the judgment as against the trust deed. Straus v. Bodeker, 86 Va. 543, 10 S. E. Rep. 570.

Unrecorded Deed.—Moreover, the judgment creditor acquires no preference over the deed of trust, whether the latter be directly for the vendor's benefit or for the benefit of a lender of the money to pay the purchase money, or whether the trust be recorded or not, the latter and the conveyance being parts of one transaction. Cowardin v. Anderson, 78 Va. 88. See Summers v. Darne, 81 Gratt. 791.

Vendor's Lien Reserved on Face of Conveyance.—A vendor's lien reserved on the face of the conveyance will have priority over a judgment against the grantee. Kline v. Triplett, 2 Va. Dec. 429, 26 S. E. Rep. 886.

& EXPIRATION OR EXTINGUISHMENT OF LIEN.

Expiration of Statutory Period.—It is settled law that the lien of a judgment ceases, when the right to sue out execution on the judgment, or to revive it by *scire facias*, is barred by the statute of limitations. *Reilly v. Clark*, 81 W. Va. 571, 8 S. E. Rep. 509; *Laidley v. Kline*, 23 W. Va. 565; *Werdenbaugh v. Reid*, 20 W. Va. 588; *Shipley v. Pew*, 23 W. Va. 487. See also, *Serles v. Cromer*, 88 Va. 426, 13 S. E. Rep. 559; *Kennerly v. Swartz*, 83 Va. 704, 3 S. E. Rep. 348; *McCarty v. Ball*, 82 Va. 875, 1 S. E. Rep. 189; *Eppes v. Randolph*, 2 Call 125.

Lien Barred at Law Unenforceable in Equity.—And it seems to be equally well settled that the lien of a judgment is not enforceable in equity after it ceases to be enforceable at law, such a lien being a creature of statute. *Sutton v. McKenney*, 82 Va. 46; *Hutcheson v. Grubbs*, 80 Va. 251; *McCarty v. Ball*, 82 Va. 872, 1 S. E. Rep. 189; *Shipley v. Pew*, 23 W. Va. 486.

It has been held, moreover, that courts of equity follow the law as respects Code Va. 1873, ch. 182, sec. 12 and 13, which declares that no execution shall issue, nor any *scire facias* or action be brought, on a judgment after the lapse of ten years from the return day of an execution on which there is no return by an officer, or after twenty years from the return day of an execution on which there is such return. Hence if a legal claim, barred at law, is asserted in equity, it is equally barred there. *McCarty v. Ball*, 82 Va. 872, 1 S. E. Rep. 189. See *Coles v. Ballard*, 78 Va. 149; *Rowe v. Bentley*, 29 Gratt. 756; *Hutcheson v. Grubbs*, 80 Va. 251; *Dabney v. Shelton*, 83 Va. 349, 4 S. E. Rep. 605.

It has been held that the language of the statute, Code of Va. 1873, ch. 182, sec. 9, "The lien of a judgment may always be enforced in a court of equity," implies only a purpose to confer jurisdiction on courts of equity to enforce the lien, whether the remedies at law are adequate or not. *Hutcheson v. Grubbs*, 80 Va. 251.

Execution Issued and Returned.—Where an action is brought to subject real estate to the payment of a judgment, 10 years after its rendition, it is not barred by the statute of limitations when the record shows that within a year thereafter an execution had been issued and returned, "no property." *Kennerly v. Swartz*, 83 Va. 704, 3 S. E. Rep. 348; *Hutcheson v. Grubbs*, 80 Va. 251, distinguished.

Legal Statutory Lien—Collateral Lien.—It was said, by the court, in *Paxton v. Rich*, 85 Va. 378, 7 S. E. Rep. 581: "The case of *Hutcheson v. Grubbs*, 80 Va. 251, referred to by counsel, has no application. In that case it was held that the lien of a judgment ceases with the life of the judgment, and obviously so, because the lien is a legal lien, conferred by statute, and is not collateral to, but grows out of the judgment. Hence the lien and the judgment are inseparable, and the extinguishment of the latter is the extinguishment of the former. But not so where there is a judgment for a debt secured by a mortgage, deed of trust, or a vendor's lien. There the lien is collateral to the judgment and may be enforced in equity although the judgment be barred or annihilated."

a. Extension of Lien.

(1) **Issuance of Execution.**—The lien of a judgment, on which no execution has ever issued, will not be enforced in a court of equity in a suit brought after the lapse of ten years from the date of the judgment, and where the debtor dies, the time in which

it can be enforced may be less as in no case can it exceed five years after the qualification of his personal representative, unless perhaps, it may be kept alive by suing out successive executions after the death of the debtor, or, by having sued out a *scire facias*, continued his right to do so. *Werdenbaugh v. Reid*, 20 W. Va. 588.

Where an execution has been issued upon a judgment more than ten years after the return day of the last preceding execution issued thereon, and a suit is brought by the creditor to enforce the lien of such judgment against the real estate of his debtor, the issuance of such execution will not avoid the bar of the right to enforce such lien, notwithstanding the execution is merely voidable, and not liable to be assailed in a collateral suit. *Reilly v. Clark*, 81 W. Va. 571, 8 S. E. Rep. 509.

Summons by Publication.—Where nonresident judgment creditors are summoned by order of publication and no order is made to suspend the issuing of executions, a suit to enforce a contract for the sale of the judgment debtor's land, is no such "legal process," as under Va. Code 1873, ch. 182, sec. 13, suspends judgment creditors' right to sue out executions and stops the running of the statute of limitations against such judgments. *Straus v. Bodeker*, 86 Va. 543, 10 S. E. Rep. 570.

Act Requiring Issuance and Return of Pl. Fa.—It was held in *Burns v. Hays*, 44 W. Va. 503, 30 S. E. Rep. 101, that ch. 95 of the W. Va. Code, Acts 1891, requiring the issue and return of a *pl. fa.* unsatisfied before a chancery suit to enforce the lien of a judgment, does not apply to suits pending when it went into force.

Execution Issues upon Dissolution of Injunction.—Upon the dissolution of an injunction to a judgment, execution may issue thereon within a year and a day from the dissolution of the injunction, without a *scire facias*, though the injunction was in force for more than ten years. *Hutsonpiller v. Stover*, 12 Gratt. 579.

Proceedings to Stay Execution.

Suspension of Limitation—Object of Suit.—In order that a proceeding instituted may have the effect of suspending the right to sue out execution on a judgment, it must be brought for that purpose, and when such is not the object of the suit, the rights of the judgment creditor under his judgment will be unaffected. *Dabney v. Shelton*, 83 Va. 349, 4 S. E. Rep. 605; *Straus v. Bodeker*, 86 Va. 543, 10 S. E. Rep. 570.

Under the law of West Virginia, a plaintiff, after obtaining a judgment for his debt can issue a writ of *scire facias* against the personalty of the defendant; if the execution be returned unsatisfied in whole or in part, and he wishes to reach the land of the defendant, he must file a bill in equity in aid of the execution. Such chancery suit will have the effect of holding the statute of limitations in abeyance until the date of the final decree. *Ryan v. Kanawha Val. Bank (W. Va.)*, 71 Fed. Rep. 912.

Judgment Entered with Stay of Execution.—A judgment, with a stay of execution, creates no lien on land, until the plaintiff has a right to issue execution thereon. *Scriber v. Deane*, 1 Brock. (U. S.) 166; *Enders v. Board of Public Works*, 1 Gratt. 373.

But the right to file a bill in equity to enforce a judgment lien is coextensive, as to time, with the right to issue execution thereon; and under Va. Code, sec. 3577, which prescribes the limitation of proceedings to enforce a judgment, in computing time there shall, as to a writ of *scire facias*, be omitted the time elapsed between January 1, 1869, and March 29,

1871. Hence the limitation to a suit in equity to enforce a judgment obtained June 8, 1870, commenced to run, March 29, 1871. *James v. Life*, 92 Va. 702, 24 S. E. Rep. 275.

Limitation Not Suspended by Agreement.—In a suit to enforce the lien of a judgment against real estate brought more than ten years after return day of the last execution issued thereon, the creditor cannot avoid the bar of the statute by a parol agreement binding him not to sue out execution or enforce the judgment until within ten years before the bringing of such suit. *Reilly v. Clark*, 81 W. Va. 571, 8 S. E. Rep. 509.

How Creditor May Avoid Bar of Statute.—To avoid the bar of the statute of limitations in respect to the right to enforce the lien of a judgment, the creditor must bring his case within one of the exceptions declared in the statute, and he cannot, by parol evidence or otherwise, avoid such bar upon any ground not embraced in the statute. *Reilly v. Clark*, 81 W. Va. 571, 8 S. E. Rep. 509.

Revivor of Judgment.—A judgment creditor may bring his suit in equity against the personal representative and heirs or devisees of his deceased debtor, before reviving his judgment at law. *James v. Life*, 92 Va. 702, 24 S. E. Rep. 275. See also, *Bank v. Allen*, 76 Va. 200; *Suckley v. Rotchford*, 12 Gratt. 60; *Burbridge v. Higgins*, 6 Gratt. 119.

Entry of Satisfaction—Fraud.—A judgment is recovered and an execution issued thereon, and while it is in the hands of the sheriff, an agreement is made between the creditor and debtor, by which certain claims are transferred to the creditor in satisfaction of the judgment, and thereupon the sheriff, at the instance of the creditor, returns the execution "satisfied," but it appears, that the agreement on the part of the debtor was fraudulent and the execution was not in fact satisfied; the lien of the judgment is not destroyed, and the position and priority is not disturbed, although its payment may affect purchasers of part of the land of the debtor, but it does not appear in the pleadings and proofs, that such return was brought home to the purchaser, and by it he was misled to his injury. *Renick v. Ludington*, 14 W. Va. 367.

Effect of Appeal from Justice's Judgment.—Where an appeal from the judgment of a justice or other inferior tribunal, has the effect of transferring the action to an appellate court for trial *de novo*, and the controversy is to be settled by a judgment in such court regardless of the judgment appealed from, the appeal operates not only to suspend the judgment of the justice or inferior tribunal, but vacates and sets it aside, so that it cannot be used as evidence or as the foundation of an action in any court. An appeal in such case is very different in its effect from a proceeding, which seeks to review a judgment by writ of error. In the latter case the judgment is merely suspended, but in the former the judgment is vacated and made ineffectual for any purpose. The judgment in legal construction no longer remains in force and cannot be the foundation of a new action. *Evans v. Taylor*, 28 W. Va. 184.

Effect of Partial Reversal and Affirmance.—It is a familiar doctrine, that where a decree is reversed in part and affirmed as to the residue, the reversal in part does not destroy the lien of so much of the decree as is unreversed or affirmed; and one prominent reason for this is, that equity looks to the substance of things, and not to the mere form. 3 Barton's Ch. Pr. (2d Ed.) sec. 296; *Knifong v. Hendricks*, 2 Gratt. 213; *Moss v. Moorman*, 24 Gratt. 97.

But the rule does not apply to a reversal of judgment and award of a new trial. *Shepherd v. Chapman*, 88 Va. 215, 2 S. E. Rep. 273.

Where an injunction to a judgment is only perpetuated as to a part of it, or a reversal is only as to a part of a judgment, the lien of the part not affected continues from the date of the judgment. *Grafton & G. R. Co. v. Davisson*, 45 W. Va. 12, 29 S. E. Rep. 1028; *Moss v. Moorman*, 24 Gratt. 97; *Graham v. Bank*, 45 W. Va. 701, 23 S. E. Rep. 245.

Payment Delayed by Injunction.—Where a judgment is rendered for the penalty of a bond, to be discharged by the payment of the principal sum due and interest; and the payment of the money has been delayed by an injunction until the principal sum and the interest exceed the penalty, the lien of the judgment only extends to the penalty, the damages upon the dissolution of the injunction, and the costs at law, without continuing interest. *Michaux v. Brown*, 10 Gratt. 612.

Judgment on Attachment—Merger.—On the rendition of a judgment on an attachment the lien of an attachment is merged in the judgment, and the priority of the lien is thereby preserved. *Smith v. Parkersburg Co-Op. Ass'n (W. Va.)*, 37 S. E. Rep. 645.

Joint Judgment—Effect of Service of Ca. Sa. on One.—It was held in *Leake v. Ferguson*, 2 Gratt. 419, that on a joint judgment against several, the service of *ca. sa.* on one, and the execution and forfeiture of a forthcoming bond by him, does not extinguish the lien of the judgment upon the land of the others.

Effect on Lien of Discharge of Debtor Taken under Ca. Sa.—A judgment creditor, whose debtor, after being taken in execution, has been discharged from custody by the jailer, for nonpayment of the jail fees, is remitted to the lien of his judgment, and will be entitled to satisfaction out of the debtor's land, in preference to creditors claiming under a deed of trust executed by the debtor, conveying the land, but not recorded in the county where it lies. *McCullough v. Sommerville*, 8 Leigh 415.

Destruction of Lien by Actual Service of Ca. Sa.—A recovers a judgment against B, at the August rules, and sues out a *ca. sa.* thereon in October, under which B. is taken in execution, and in November takes the oath of insolvency, and is discharged under the statute for the relief of insolvent debtors; and in the interval between the date of A's judgment and the service of his *ca. sa.* on B, sundry mortgages are executed by B, and duly recorded, to secure sundry debts to other creditors. *Held*, that by the actual service of A's *ca. sa.* on B, the lien of A's judgment was destroyed, and A. could then stand on the lien given to the *ca. sa.* executed by the statute of limitations, 1 Rev. Code, ch. 134, sec. 10, and that, therefore, the mortgagees are entitled to the benefit of their mortgages. *Rogers v. Marshall*, 4 Leigh 425. See also, *Foreman v. Loyd*, 2 Leigh 234.

Land, conveyed by deed of trust, which is void as to subsequent judgment creditors, because unrecorded, is subject to satisfy the judgments of a creditor, although he has issued a *ca. sa.* upon his judgment, whereupon the grantor in the deed is discharged as an insolvent. *McClure v. Thistle*, 2 Gratt. 182.

Purchase of Lands Subject to Lien of Judgment.—When, after the purchase of land subject to a judgment lien, another creditor brings suit to convene and enforce liens against the lands of the judgment debtor, but not against the land so purchased, and without making the administrator or heirs of the purchaser formal parties, and a personal decree is

rendered in such suit against the original debtor, based on the original judgment for the amount thereof increased by usury under an agreement between such debtor and his judgment creditor subsequent to the rendition of the judgment, and that the lands of the debtor be sold to pay that and the other liens conveyed, the administrator and heirs of the purchaser, in proceedings under an amended bill to subject the lands purchased to the payment of the first judgment debt as fixed by the personal decree, are not estopped from showing the usury and disputing the amount of the debt as fixed by such decree, although they proved a claim in the convention of creditors. *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. Rep. 1078.

Discharge in Bankruptcy.—The lien of a judgment is not defeated by the discharge of the debtor as a bankrupt; it may be enforced in the state courts. *McCance v. Taylor*, 10 Gratt. 580.

Judgments Acquired Pendente Lite.—Where a suit in equity is pending to enforce judgment liens against a debtor's lands, the fact, that persons after the commencement of a suit have acquired judgments against the debtor, generally does not make it necessary for the plaintiff to file an amended bill, making the answer of such subsequent or *pendente lite* judgment creditors parties to the suit; nor is it necessary for them generally to file their petitions asking to be made parties, if their judgments are obtained before the order of reference is made in the cause, or in time after the order of reference for them to prove their judgment before the commissioner. For such subsequent judgment creditor may be allowed to prove his judgment before his commissioner under the general order of reference, and thus make himself at least a *quasi* party to the cause, and be bound thereby as to his debt. *Marling v. Robrecht*, 13 W. Va. 440.

9. SATISFACTION, BY RENTS AND PROFITS, IN FIVE YEARS.—A judgment debtor's real estate cannot be decreed for sale to pay the judgment liens thereon until the real estate has been properly ascertained, and it appears to the court that the rents and profits thereof will not satisfy the liens within five years, or in a reasonable time. *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. Rep. 244; *Duncan v. Custard*, 24 W. Va. 730; *Hill v. Morehead*, 20 W. Va. 429; *Rose v. Brown*, 11 W. Va. 123; *Horton v. Bond*, 28 Gratt. 815, and *note*; *Ewart v. Saunders*, 25 Gratt. 203. See also, *Cronie v. Hart*, 18 Gratt. 739.

"The fact of the insufficiency of the rents and profits to satisfy the judgment within the prescribed period should be made to appear before any sale is made, and if the appellant desires it, he may have an inquiry to determine that fact." *Price v. Thrash*, 30 Gratt. 580. But see *Barr v. White*, 30 Gratt. 531.

The debts of both trust and judgment creditors ought to be ascertained, and the property sold, if the rents and profits will not satisfy the liens in five years, and the reference, if it does not appear in the papers, ought to be had to determine this latter question. *Laidley v. Hinchman*, 8 W. Va. 423.

Presumption of Waiver.—The failure by a defendant to demand an inquiry whether the rents and profits of the land would not satisfy the judgment within a reasonable time, raised a presumption that such right is waived. *McClung v. Beirne*, 10 Leigh 304.

How Shown.—But the insufficiency of the rents and profits to satisfy the judgment within the statutory period may be shown by the pleadings, by the admissions of the parties, by evidence taken, or by the

report of a commissioner on inquiry ordered. *Horton v. Bond*, 28 Gratt. 815.

Rule under Statute.—Under the Code of W. Va. 1868, it would seem unnecessary to aver, in a bill to enforce a judgment lien, that the rents and profits will not pay the debt in five years. *Handly v. Sydenstricker*, 4 W. Va. 605.

Account of Rents.—A party coming into equity to enforce the lien of a judgment is not entitled to an account for rents accrued before the decree. *Leake v. Ferguson*, 2 Gratt. 419.

Settlement of Administrator's Accounts.—Generally the court should not decree the sale of the realty of an intestate to pay debts or judgment liens before the accounts of the administrator have been settled and the administered assets ascertained. *Laidley v. Kline*, 8 W. Va. 218; *Martin v. Rellahan*, 3 W. Va. 480.

Partnership Accounts.—The court ought not, in a chancery suit brought to enforce the lien of a judgment between partners, order a settlement of partnership accounts with a view of ascertaining the amount for which the lands of each partner should be primarily subject, and with a view to the rendering of a proper decree among the codefendants after such settlement. *Kent v. Chapman*, 18 W. Va. 485.

Must Ascertain Amount of Liens and Their Priorities.—Where there are various judgment liens on the land of the judgment debtor, it is error to decree a sale of land without first ascertaining the amount of the liens and their priorities; and this should be done in an intelligible manner, for the reason that to decree such sale before ascertaining the amount of the several liens, and their respective priorities has a tendency to sacrifice the property, by discouraging the creditors from bidding, as they probably would, if their right to satisfaction of their debts and the order in which they were to be paid out of the property, had been previously ascertained. *Marling v. Robrecht*, 13 W. Va. 440; *McClaskey v. O'Brien*, 16 W. Va. 791. See *Crawford v. Wells*, 23 Gratt. 835.

Ascertaining Value of Real Estate.—In a suit to subject real estate to the payment of the judgment liens thereon, it is not necessary to ascertain the value of the real estate before its sale is ordered. *Grantham v. Lucas*, 24 W. Va. 231.

Two Judgment Liens.—But it is wholly unnecessary to refer a cause, in which it appears that there are but two judgment liens to a commissioner to ascertain the amount and priorities of liens, where the pleadings and proof show clearly what they are. *Anderson v. Nagle*, 12 W. Va. 98.

Commissioner's Report of Lien Presumed Correct.—In a suit brought by judgment creditors against the judgment debtor and other judgment and trust creditors, to obtain satisfaction of their several judgments by a sale of the lands owned by said debtor, and the cause has been properly referred to a commissioner to ascertain and report the several liens thereon, and their respective priorities, and also to ascertain and report the lands owned by said debtor, chargeable therewith, and where such commissioner has made and returned such report and no error appears upon the face thereof, it will be presumed by the court, that the character, amounts and priorities of the several liens, as well as the lands owned by the judgment debtor chargeable therewith, are correctly set forth therein "except in so far only, as to such parts thereof, as may be objected to by proper exceptions taken thereto before

the hearing" of the cause. *Hutton v. Lockridge*, 22 W. Va. 159.

10. WHO MAY MAINTAIN SUIT TO ENFORCE.

Judgment Creditors.—A suit to enforce the lien of a judgment, may be maintained by the judgment creditor, during the pendency of an action by attorneys to cancel satisfaction of such judgment, if it should be found to be subsisting in such latter suit; this second action should be treated as a cross bill in the first action. *Higginbotham v. May*, 90 Va. 233, 17 S. E. Rep. 941.

A judgment creditor has a right to come into a court of equity to enforce his judgment lien against the lands conveyed in a deed of trust prior to the obtaining of the judgment, subject to the debts secured by the trust; and after the debt secured by the trust falls due and no sale is made thereunder, the court will interfere for the benefit of judgment liens younger than the trust, and will direct a sale of the land, and not the redemption alone to satisfy the debts of both classes of creditors. *Laidley v. Hinchman*, 3 W. Va. 423.

Purchasers of Land.—Where there are several purchasers of land subject to a judgment lien, some may file a bill to question the lien, and if it is valid, asking that the different purchasers may be subjected to pay it. And though they ask for a ratable contribution, this will not prevent the court's subjecting the land last sold to satisfy the creditor. *Michaux v. Brown*, 10 Gratt. 612.

Special Receiver—Creditors' Bill—Practice.—A special receiver may bring a chancery suit to enforce the lien of a judgment against the judgment debtor's lands, for his own benefit, and that of all the other judgment creditors of the judgment debtor, or he might make other judgment creditors of the debtor defendants, in which case the court would have to audit all the judgment liens against the debtor, before it decreed a sale of the land; and if the special receiver made only the judgment debtor a defendant, and did not bring his suit as a creditors' bill, yet, where the judgment debtor alleges that he has other judgment creditors, the court will convert this suit into a creditors' bill by directing a commissioner to audit all judgment liens against the judgment debtor; but it would do the same had any other judgment creditors, by petition or otherwise, asked the court to do so. *Howard v. Stephenson*, 33 W. Va. 116, 10 S. E. Rep. 66.

How Suit to Be Brought.—If in a bill brought by a judgment creditor against a debtor to enforce the lien of his judgment against his lands, the creditor should fail to sue on behalf of himself and all other judgment creditors, but the court should afford to all judgment creditors an opportunity to have their judgments audited before a commissioner by directing a publication to be made, calling on them to present their judgments for auditing, the appellate court will regard this as a creditors' bill, the same as if the plaintiff in his bill had sued on behalf of himself and all other judgment creditors except those made defendants. *Neely v. Jones*, 16 W. Va. 625.

11. PARTIES TO SUIT.

Judgment Creditors.—Judgment creditors are necessary parties in proceedings to subject lands, upon which there are liens, to the payment of other judgment liens. *Hoffman v. Shields*, 4 W. Va. 490; *Snyder v. Brown*, 3 W. Va. 143.

It is necessary, in a bill to enforce a judgment lien by a surety, where such surety has paid the judgment, that the original judgment creditors, whose

judgment he had paid, be made parties. *Hoffman v. Shields*, 4 W. Va. 490; *Conaway v. Odibert*, 2 W. Va. 25.

A creditor, who brings suit against a debtor to enforce against his lands a judgment lien, should sue on behalf of himself and all other creditors excepting those made defendants, and he should make formally defendants in the suit all creditors who have obtained judgments in the courts of record in the county or counties in which the debtor owns lands sought to be subjected to the payment of the judgments, also all creditors who have obtained judgments in courts of records or before justices in any part of the state, and have had them docketed on the judgment lien docket of such county or counties. *Neely v. Jones*, 16 W. Va. 625; *Feamster v. Tyree*, 21 W. Va. 83.

Convention of Judgment Creditors.—Where there are several judgment creditors whose judgments are of equal dignity with that of the plaintiff, it is proper that they should be convened in a suit by a creditor seeking to enforce his judgment; but if it appears from the pleadings and proof, that such judgment creditors are enforcing their liens or debts in another court, against the parties liable for such other debts, and that there is a large fund under control of the latter court, applicable to such judgments or debts, it is error to decree a sale of the land, on the failure of the debtor to pay the entire amount of such judgment, without taking any steps to ascertain what would remain unpaid, after the application of such fund to the liquidation of such judgments. *Murdock v. Welles*, 9 W. Va. 552.

Effect of Failure to Make Judgment Creditors Parties.—If all the judgment creditors are not made parties to a suit by a creditor against a debtor to enforce against his lands a judgment lien, either formally or informally, and this is disclosed in any manner by the record, the appellate court will reverse any decree ordering the sale of the land or the distribution of the proceeds of such sale. *Neely v. Jones*, 16 W. Va. 625.

Judgment Creditors of Vendee.—Where a vendor of land, who has retained the title, files a bill against the widow and infant children of the vendee, for a sale of land to satisfy his debt, the judgment creditors of the vendee may make themselves parties to the cause, and have the land, subject to the vendor's lien, and the widow's dower, applied to the payment of their debts. *Simmons v. Lyles*, 37 Gratt. 922, and *note*.

Judgment Debtors.—But where a special receiver obtained judgment against two debtors in the circuit court of a county, and then brought a chancery suit in that court to enforce the lien of this judgment against the lands of *one of the debtors* in the county where the judgment was obtained, it was held unnecessary to make the other judgment debtor a party defendant in this chancery suit, as in it the plaintiff sought no redress against him or his property. *Howard v. Stephenson*, 33 W. Va. 116, 10 S. E. Rep. 66.

Lien Creditors—Trustees.—In a proceeding in chancery by a judgment creditor to subject the real estate of his debtor to the lien of his judgment it is the duty of the plaintiff to make all the lien creditors of the debtor known to him, and which are disclosed by the judgment lien docket, or the records of the court of the counties in which the lands sought to be sold are situated, parties to the suit, and where there are liens by trust deeds

the trustees in such deeds must be made formal parties before any sale of the debtor's lands can be ordered, and such trustees cannot be made informal parties by publication. *McMillan v. Hickman*, 85 W. Va. 705, 14 S. E. Rep. 237; *Bilmyer v. Sherman*, 23 W. Va. 656. See also, *McCoy v. Allen*, 16 W. Va. 73.

Prior Liens.—Moreover, in a suit in equity, to sell land to satisfy a judgment lien, or to enforce the payment of the purchase money, if it appears that there is a prior lien for unpaid purchase money on the land, those entitled to the benefit of such prior purchase money lien, should be made parties to the suit. *Dickinson v. R. Co.*, 7 W. Va. 300.

Trust Creditors.—So also, to a bill by a judgment creditor to enforce his lien against the subject of the trust, creditors in interest should be made parties. *Laidley v. Hinchman*, 8 W. Va. 423.

Trustee and Cestui Que Trust.—And, in a suit to enforce a judgment lien against lands covered by a deed of trust, both the trustee and *cestui que trust* are necessary parties defendant. *Bensimer v. Fell*, 35 W. Va. 448, 19 S. E. Rep. 545.

Moreover, a judgment adjudging creditors' liens on land of a debtor will not bar a holder of a debt by deed of trust, who does not prove his debt, from sharing in the proceeds of the sale under the decree, unless the trustee and *cestui que trust* are made formal parties thereto. *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. Rep. 1078.

Remaindermen.—On the other hand, the remaindermen are not necessary parties to a bill to subject a life estate to the lien of a judgment. *Moore v. Bruce*, 35 Va. 130, 7 S. E. Rep. 195.

Assignor and Assignee.—But, the assignor and assignee of a judgment may be properly made coplaintiffs in a chancery suit to enforce the lien of the judgment on the debtor's lands. *Neely v. Jones*, 16 W. Va. 626.

Personal Representative of Surety.—In a chancery suit however, to enforce the lien of a judgment against a principal and sureties, where it appears that judgment has also been obtained against the personal representative of another surety for the same debt, such personal representative and sole devisee and legatee of the deceased surety are necessary parties in order that the deceased surety's part of the judgment remaining unpaid, after exhausting the realty of the principal, may be ascertained, and his estate subjected to its payment. *Wytheville Ice Co. v. Frick Co.*, 96 Va. 141, 30 S. E. Rep. 491.

But in a suit in chancery to enforce a lien in judgment against the principal and sureties, if other judgments are proved upon which others than those before the court are also bound, it is not necessary to make such others parties. *Wytheville Ice Co. v. Frick Co.*, 96 Va. 141, 30 S. E. Rep. 491.

Heirs of Deceased Purchaser.—Where, in a suit by a judgment creditor to subject lands in the hands of a *bona fide* purchaser for the vendee, and the purchaser dies pending the suit, his heirs are necessary parties. *Taylor v. Spindle*, 2 Gratt. 44.

Creditor Holding Lien against Debtor.—A creditor holding a debt against a judgment debtor constituting a lien on his land, who is not made a formal party to a judgment adjudging creditors' liens on the land of the debtor, and who does not prove his lien in such proceeding, is thereby barred from sharing in the proceeds of the sale under the decree, except in the surplus remaining after the satisfac-

tion of the liens decreed. The debt, as a personal debt against the debtor, is not barred by such proceeding. *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. Rep. 1078.

Former Owner of Land.—But, a judgment adjudging creditors' liens on the land of a debtor will not bar a lien thereon created by a former owner of the land because of a failure to prove the lien, unless its owner is made a formal party to the proceeding. *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. Rep. 1078.

Joint Obligors.—Moreover, a judgment at law being obtained against one of two obligors, in a joint and several bond, and no proceedings to enforce it appearing, a court of equity ought not to charge the lands of the other obligor, in the possession of his devisees, without having made the obligor, against whom the judgment was rendered, or his representatives, parties to the suit. *Foster v. Crenshaw*, 3 Munf. 514.

How Parties Interested May Come into Suit.—When a suit in equity is brought by a judgment creditor to enforce his lien against the land of his debtor, and persons claiming to be purchasers of the debtor's land complain that they were not made parties to that suit, their remedy, if they have notice of that suit, is by motion or petition to be made parties defendant thereto, and not by an independent suit to set aside the decree in the cause, upon the principal ground that the judgment therein sought to be enforced was itself void. *Neale v. Utz*, 75 Va. 480.

Allegation in Bill to Enforce.—It is unnecessary to allege, in a chancery suit, brought by a special receiver, to enforce a judgment lien against the lands of a judgment debtor, that the suit in which the judgment on the common-law side of the court was had, or that the chancery suit brought to enforce the judgment, was brought by the receiver, by the direction of the court which appointed the receiver. *Howard v. Stephenson*, 33 W. Va. 116, 10 S. E. Rep. 66.

Supplemental Bill.—Where a suit is brought to enforce a judgment lien, and is revived in the name of an administrator *d. b. n.*, who subsequently assigns the judgment to another, and the suit proceeds in the name of the administrator *d. b. n.*, and it is charged in the answer of a defendant that a party other than the assignee of such administrator had become the owner of the judgment, and that it had been paid off and ratified therein, it becomes necessary for the assignee to file a supplemental bill, and it is error in the court to refuse to permit him to do so. *List v. Pumphrey*, 3 W. Va. 672.

Exhibits.—Where a judgment or decree is obtained for a debt, in a proceeding in chancery to enforce the lien of such judgment or decree against lands, ordinarily it is not necessary that a complete copy of the whole record of the case in the court in which the judgment or decree was had, should be produced or filed, but only a properly authenticated copy of such judgment or decree. In such case a copy of the judgment is an extract from the record of the cause, and not a complete copy of the whole record, and being an extract from the record, and a copy of the judgment, as entered, it may be read as evidence in the cause. *Dickinson v. R. Co.*, 7 W. Va. 300; *Sayre v. Edwards*, 19 W. Va. 353; *White v. Clay*, 7 Leigh 68; *Wynn v. Harman*, 5 Gratt. 157.

Real Estate Held Jointly—Extent of Decree.—Where a suit in equity is brought by a party to enforce his judgment lien against real estate which his debtor holds jointly with another, and both of the owners of the real estate are made parties to the suit, and

served with process, although no allegation is made or lien asserted against the party holding the real estate jointly with such judgment debtor, and the cause being referred to a commissioner to ascertain the liens existing against the real estate, and their priorities, who reports a judgment lien existing against the real estate belonging to the party who is not the judgment debtor mentioned in the bill, it is error to decree a sale of the entire property, and such a decree may be set aside by a bill of review filed in proper time. *Calvert v. Ash* (W. Va.), 85 S. E. Rep. 887.

So also, where a bill to enforce a judgment lien, filed against the judgment debtor, alleges that after the judgment was rendered, the debtor obtained an injunction against the judgment, giving Cl. and T. assurities in the injunction bond, that the injunction was dissolved and the bill dismissed, but the bill only seeks the sale of the judgment debtor's real estate, a personal decree against Cl. for a balance of the judgment, after exhausting the judgment debtor's estate would be proper but, under this bill, a decree for the sale of the real estate of Cl. would be erroneous. *Sinnett v. Cralle*, 4 W. Va. 600.

Time to Redeem.—It is not *per se* error to decree a sale of land to enforce judgment liens without giving the debtor time to redeem, as in the foreclosure of mortgages, though such practice ought not in general to be pursued, but where the debtor does not show that he has sustained any damage by the failure to do so, it is not ground for setting aside the sale. *Crawford v. Weller*, 28 Gratt. 835.

Resistance to Enforcement.—After a judgment has been recovered in an action at law, and a suit in equity has been pending for more than ten years to enforce the lien of the judgment, the defendant cannot prevent the enforcement of this judgment, on the ground that they did not employ counsel to defend them in the action at law, and that their appearance by counsel was false, when it appears in the record of the action at law, in which the judgment was recovered, that the defendant did appear by counsel and file pleas. *Cabell v. Given*, 30 W. Va. 760, 5 S. E. Rep. 442.

Only Two Judgment Creditors.—Where a suit in chancery is instituted to enforce a judgment lien and the bill alleges that there is but one other judgment lien on the real estate sought to be held liable to the satisfaction of the judgment, and sets it up also as a lien on the land, the decree should provide for the payment of both judgments, if the land is subject thereto. *Anderson v. Nagle*, 12 W. Va. 98.

XV. COLLATERAL IMPEACHMENT.

A. IN GENERAL.—The judgment of a court possessing competent jurisdiction in the proceeding before it and over the person against whom it is rendered, is binding and conclusive, and however irregular and erroneous it may be, yet so long as it remains unreversed, it cannot be drawn in question in a collateral proceeding, nor can any allegation be made against its validity. *Pates v. St. Clair*, 11 Gratt. 22; *Spotts v. Com.*, 85 Va. 531, 8 S. E. Rep. 375; *Wimblish v. Breeden*, 77 Va. 324; *Woodhouse v. Fillbates*, 77 Va. 317; *Wilson v. Smith*, 22 Gratt. 493. See *Shelton v. Jones*, 26 Gratt. 898; *Brengle v. Richardson*, 78 Va. 406; *Adams v. Logan*, 27 Gratt. 201; *Lawson v. Moorman*, 85 Va. 880, 9 S. E. Rep. 150.

Limits to Judgment.—Though the court has jurisdiction of the subject-matter and the parties, yet it is limited in its mode of procedure and the extent and the character of its judgment; and if it tran-

scend such limits, its judgments are void and may be so treated collaterally. *Anthony v. Kasey*, 83 Va. 338, 5 S. E. Rep. 176.

Want of Jurisdiction Apparent on Record.—While it is well settled that every reasonable presumption will be indulged in the support of the regularity of the proceedings, and the validity of the judgment of a court of competent general jurisdiction when both the subject-matter and the parties are within the territorial limits of the court's jurisdiction; yet, even with respect to such a court, no presumption is allowable when the want of jurisdiction affirmatively appears on the face of the proceedings. Want of jurisdiction makes such judgments null, and they may be so treated by any court in any proceedings direct or collateral. *Dillard v. Cent. Va. Iron Co.*, 82 Va. 784, 1 S. E. Rep. 124.

Must Be Shown by Record.—The judgment of a court of competent jurisdiction is presumed to be right, but it will not be presumed that a question has been determined, unless it be shown by the record expressly or by necessary implication that it was in fact determined. *Wynn v. Heninger*, 82 Va. 172; *Ferguson v. Teel*, 82 Va. 690.

The validity of a judgment cannot be collaterally attacked on the ground that the court had no jurisdiction, unless the want of jurisdiction appears upon the face of the record. *Wandling v. Straw*, 25 W. Va. 692; *Smith v. Johnson*, 44 W. Va. 378, 29 S. E. Rep. 509.

But, in a collateral attack upon a judgment of a court of general jurisdiction, the recital in the judgment that the defendant was duly served with notice as required by law, is conclusive of that fact, unless there is something in the record which plainly shows that the defendant did not have notice, or the character of the proceeding is such as to make it necessary that the evidence of notice should affirmatively appear in the record. *Chesapeake & Western R. Co. v. Washington, Cincinnati & St. Louis Railway*, 99 Va. 715.

"To impeach and overturn judgments of courts of competent jurisdiction involves consequences of too much moment to be lightly regarded; and when a court of general jurisdiction has pronounced judgment, its adjudication should be as conclusive on the question whether a party was duly notified as on any other point necessary to a proper determination of the cause." *Ferguson v. Teel*, 82 Va. 696.

B. GROUNDS OF ATTACK.—A judgment of a court of record cannot be impeached in another action, except for want of jurisdiction in the court, or fraud in the parties or actors in it. "This is a settled doctrine of the courts. It is not merely an arbitrary rule of law, established by the courts, but it is a doctrine founded upon reason and the soundest principles of public policy. It is one which has been adopted in the interest of the peace of society and the permanent security of titles. If, after the rendition of a judgment by a court of competent jurisdiction, and after the period has elapsed when it becomes irreversible for error, another court may in another suit enquire into the irregularities or errors in such judgments, there would be no end to litigation, and no fixed established rights. A judgment, though unreversed and irreversible, would no longer be a final adjudication of the rights of litigants, but the starting point from which a new litigation would spring up; acts of limitation would become useless and nugatory; purchasers on the faith of judicial process would find no protection;

every right established by a judgment would be insecure and uncertain, and a cloud would rest upon every title." *Lancaster v. Wilson*, 27 Gratt. 624, and *note*; *Woodhouse v. Fillbates*, 77 Va. 317; *Gray v. Stuart*, 33 Gratt. 351; *Lavell v. McCurdy*, 77 Va. 763; *Blanton v. Carroll*, 86 Va. 539, 10 S. E. Rep. 329; *Fairfax v. Alexandria*, 38 Gratt. 16, and *note*.

Errors Not Affecting Jurisdiction.—Where a judgment or decree of a court of civil jurisdiction is offered in evidence, collaterally in another suit, its validity cannot be questioned for errors which do not affect the jurisdiction of the court. *Hall v. Hall*, 13 W. Va. 1; *Miller v. White*, 46 W. Va. 67, 23 S. E. Rep. 332; *Cooper v. Reynolds*, 10 Wall. (U. S.) 308.

The maxim, *omnia presumuntur rite esse acta*, applies to sustain the judgments and decrees of a court, rather than forced presumptions to defeat them. *Pennybacker v. Switzer*, 75 Va. 671.

"The settled rule of law is, that jurisdiction having attached in the original cause, everything done within the power of that jurisdiction, where collaterally questioned, is to be held conclusive of the right of the parties unless impeached for fraud. Every intendment is made to support the proceedings; it is regarded as if it were regular in all things, and reversible for error." *Connett v. Williams*, 20 Wall. (U. S.) 249, approved in *Pennybacker v. Switzer*, 75 Va. 671.

Judgment Presumed Right.—Where the judgment of, and actions of, the court below is definite, and intelligibly presented in the record, and does not appear from the record to be wrong, it is presumed to be right, and cannot be collaterally attacked. *Ramsburg v. Erb*, 16 W. Va. 777; *Anderson v. Doolittle*, 38 W. Va. 629, 18 S. E. Rep. 724; *Cox v. Thomas*, 9 Gratt. 323; *Shelton v. Jones*, 26 Gratt. 891, and *note*; *Ferguson v. Teel*, 82 Va. 600; *Wright v. Smith*, 81 Va. 777; *Womack v. Tankersley*, 78 Va. 242; *Harman v. Lynchburg*, 33 Gratt. 37; *Shipman v. Fletcher*, 91 Va. 473, 22 S. E. Rep. 456; *Hill v. Woodward*, 78 Va. 765; *Sargeant v. Irving*, 2 Va. Dec. 338, 24 S. E. Rep. 334.

"Nothing is better settled than that the judgments and decrees of a court of general jurisdiction, acting within the scope of its authority, are presumed to be right until the contrary appears, and are not open to collateral attack; and this is so even though the party against whom, or in whose favor, the judgment or decree was rendered was dead at the time. Such a judgment or decree is irrevocable in a collateral action, not because a judgment rendered without notice is good, but because the law does not permit the introduction of extrinsic evidence to overthrow that which, for reasons of public policy, it treats as an absolute verity. The record is conclusively presumed to speak the truth, and can be tried only by inspection." *Pugh v. McCue*, 86 Va. 475, 10 S. E. Rep. 715.

The rule was stated thus in *Board v. Dunn*, 27 Gratt. 608: "The principle is universal, that an appellate court in reviewing the decision of the trying court, will always presume that the verdict and judgment were founded upon sufficient evidence unless the contrary is *plainly* made to appear. This principle is carried so far, that where there is a bill of exceptions professing to state the evidence, this presumption will still prevail, unless it can be fairly inferred that it contained all the evidence adduced at the trial. See *Cooper v. Hepburn*, 15 Gratt. 551."

Motion to Abate, Bill of Exceptions, etc.—Where there is in the record no motion to abate the at-

tachment, no exception to the rulings of the court below, no bill of exceptions, no certificate of the evidence or of the facts proved, then the supreme court must presume the judgment to be right. *Kenefick v. Caulfield*, 88 Va. 122, 13 S. E. Rep. 348.

Want of Notice—Onus Probandi.—However assailed, unless want of authority plainly appears on the face of the record, every presumption exists in favor of the judgments of courts of general jurisdiction, and the entire record will be inspected. The same rule prevails where the defendant alleges want of summons or notice, and the onus of showing want of notice is on the impeacher. Mere failure of the record to state affirmatively that notice was given, is insufficient for the impeachment. *Hill v. Woodward*, 78 Va. 765; *Ferguson v. Teel*, 82 Va. 600.

Jurisdiction Statutory.—The rule as to the conclusiveness of an unreversed judgment of a court of competent jurisdiction, applies with equal force in respect to a judgment where the jurisdiction exercised is purely statutory. *Wimblish v. Breeden*, 77 Va. 324; *Pennybacker v. Switzer*, 75 Va. 671.

Judgment in Personam against Nonresident.—A personal judgment for money against a nonresident on publication, without service of process or appearance is void, is no lien on the land, and may be attacked collaterally. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447. See also, *Gray v. Stuart*, 33 Gratt. 351.

Judgment for Costs.—Where a court is wholly without jurisdiction to render any judgment against a party, a judgment or decree rendered by such court for costs is wholly inoperative and void in any direct or collateral suit or proceeding. *Hall v. Hall*, 30 W. Va. 779, 5 S. E. Rep. 260. See also, *Grinnan v. Edwards*, 21 W. Va. 347.

Right to Be Heard.—"It is a cardinal principle in the administration of justice, that no man can be condemned or divested of his rights until he has had the opportunity of being heard; and if judgment is rendered against him before that is done the proceeding will be as utterly void as though the court had undertaken to act where the subject-matter was not within its cognizance." *Underwood v. McVeigh*, 23 Gratt. 419; *Staunton Perpetual B. & L. Co. v. Haden*, 92 Va. 201, 23 S. E. Rep. 285.

Absence in Military Service.—Where process in an action of debt was served upon a defendant whilst he was in the military service of the Confederate States, and there is an office judgment confirmed whilst he is in the service, the judgment is a valid judgment, and cannot be questioned in another suit. *Terry v. Dickinson*, 75 Va. 475; *Turnbull v. Thompson*, 27 Gratt. 306.

Mere Absence of Return.—Thus, mere absence of return of service on summons is insufficient for impeachment, where the record shows that at rules the cause was matured as to all the defendants. The assailant must show want of summons. *Ferguson v. Teel*, 82 Va. 600.

United States Court.—A judgment rendered in a United States district court in 1880 vacating a commission of bankruptcy issued in 1801, cannot now be collaterally impeached. *Harman v. Stearns*, 95 Va. 58, 27 S. E. Rep. 601.

County Courts.—"The county court is a court of record, and its judgments or sentences cannot be questioned, collaterally in other actions, provided it has jurisdiction of the cause. And this is to be understood as having reference to jurisdiction over the subject-matter; for though it may be that the facts do not give jurisdiction over the particular case,

yet if the jurisdiction extends over that *class of cases*, the judgment cannot be questioned; for then the question of jurisdiction enters into and becomes an essential part of the judgment of the court. Thus, if a county court were to give judgment of death against a white man, the sheriff would have no lawful authority to execute him; or if a court of chancery were to grant probate of a will, it would be *ipso facto* void, since that court has no jurisdiction in any case of probates. It is held void *ipso facto* because no inquiry is necessary to ascertain its invalidity. But where the court has jurisdiction of cases *ejusdem generis*, its judgment, in any case, is not merely void; because its invalidity cannot appear without an inquiry into the facts; an inquiry, which the court itself must be presumed to have made, and which will not therefore be permitted to be revived collaterally." *Fisher v. Bassett*, 9 Leigh 181. See *Devaughn v. Devaughn*, 19 Gratt. 556; *Shelton v. Jones*, 26 Gratt. 891.

Unauthorized Appearance of Attorney.—"It has been contended by eminent jurists, and many adjudicated cases have given color of authority to the proposition insisted upon by the defendant in error here, that where there has been no service of process on the defendant, and he has not personally appeared to the action or proceeding, and the record shows that the defendant 'appeared by his attorney,' in a collateral proceeding founded upon such judgment, or in a proceeding wherein the effect of such judgment properly comes in question, such defendant may in such collateral proceeding impeach such judgment by proving that he did not in fact so appear by attorney, and that the attorney who assumed authority to appear for him, had no authority to do so." *Wandling v. Straw*, 25 W. Va. 692.

Courts of General Jurisdiction.—"If a court of general jurisdiction had jurisdiction to render the judgment which it did render, no error in its proceeding which did not affect its jurisdiction will render the proceeding void, nor can such errors be considered when the judgment is collaterally brought in question. *Wandling v. Straw*, 25 W. Va. 690; *Cox v. Thomas*, 9 Gratt. 828; *Woodhouse v. Fillbates*, 77 Va. 317.

Where the case is submitted to the court in lieu of a jury, upon its merits, it is presumed that the prerequisites necessary to the making of the judgment were complied with by the court, whether the record of the judgment recites the fact or not. *Phelps v. Smith*, 16 W. Va. 523.

The judgment of the circuit court against a high sheriff is conclusive of its jurisdiction, unless reversed on appeal, and his deputy and sureties cannot question it on the motion of the personal representative of the high sheriff against them. *Cox v. Thomas*, 9 Gratt. 828.

Special Statutory Court.—"Where a court of general jurisdiction acts within the scope of its general powers, its judgments will be presumed to be in accordance with its jurisdiction, and cannot be collaterally impeached. So also, when a court of general jurisdiction has conferred upon it special powers by special statute, and such special powers are exercised judicially, that is, according to the course of the common law and proceedings in chancery, such judgment cannot be impeached collaterally. *Pulaski County v. Stuart*, 28 Gratt. 872, and *note*.

But where a court of general jurisdiction has conferred upon it special and summary powers, wholly derived from statutes, and which do not belong to

it as a court of general jurisdiction, and when such powers are not exercised according to the course of the common law, its action being ministerial only and not judicial, in such case its decision must be regarded and treated like those of courts of limited and special jurisdiction, and no presumption of jurisdiction will attend the judgment of the court. But in such cases the facts essential to the exercise of the special jurisdiction must appear upon the face of the record. *Pulaski County v. Stuart*, 28 Gratt. 872.

Degree of Proof Required.—"Mere absence of return of service on summons against husband and wife is insufficient for impeachment, where there is nothing in the record to show affirmatively that process was not served on the wife as well, and where the record shows that at rules the cause was matured as to all the defendants, the court saying, 'To impeach a judgment under such circumstances, it being a judgment of a court of general jurisdiction, and the party being within its jurisdictional limits, it is not enough to raise a doubt merely; nor will it suffice that the record fails to show that notice was given, the *onus* lies upon the party assailing the judgment to show that it is wrong, and it is only when he satisfies the conscience of the court that the judgment is wrong, that it should be disturbed, the recognized rule being that everything must be presumed in favor of the proceedings of a court of general jurisdiction, unless there is a plain excess or want of authority.'" *Ferguson v. Teel*, 83 Va. 697.

Void Judgments.—"A void judgment is *ex vi termini* a nullity, and may be so declared and treated by this and every other court when the validity or invalidity of the judgment is a question to be determined; either in a direct or collateral proceeding." *BURKS, J. Wade v. Hancock*, 76 Va. 620; *Lavell v. McCurdy*, 77 Va. 763; *Hollins v. Patterson*, 6 Leigh 457; *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S. E. Rep. 568.

"A void judgment is in legal effect no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings on it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void." *Freem. Judgm.* § 117; *Anthony v. Kasey*, 83 Va. 338, 5 S. E. Rep. 176; *Wade v. Hancock*, 76 Va. 626; *Lavell v. Jordan*, 77 Va. 763; *Staunton Perpetual B. & L. Co. v. Haden*, 93 Va. 201, 23 S. E. Rep. 280; *L. & W. R. Co. v. Taylor*, 93 Va. 228, 24 S. E. Rep. 1013; *Grinnan v. Edwards*, 31 W. Va. 347; *Neale v. Utz*, 75 Va. 484.

Jurisdiction of Subject-Matter.—"The general and well-established rule of law is that when proceedings are collaterally drawn in question and it appears upon the face of them that the subject-matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities of any court are to be corrected by some direct proceeding either before the same court to set them aside, or in an appellate court. *Pennybacker v. Switzer*, 75 Va. 671; *Lancaster v. Wilson*, 27 Gratt. 624; *Gibson v. Beckham*, 16 Gratt. 831, and *note*.

Judge and Counsel.—"Where a judge sits in an action in which he is or has been counsel, such act renders the judgment voidable only, and not void. The proceedings are good and valid until set aside upon motion to the court in which they were had, or until reversed upon appeal or error by an appellate court. *L. & N. R. Co. v. Taylor*, 93 Va. 228, 24 S. E. Rep. 1013.

Judgment upon Defective Summons.—"So also, a

judgment rendered upon a defective summons after general appearance of the defendant is not void. *Blair v. Henderson* (W. Va.), 88 S. E. Rep. 552; *Brown v. Chapman*, 90 Va. 174, 17 S. E. Rep. 855.

Nonresident Heirs.—A judgment or decree authorizing the sale of decedent's lands to pay his debts is erroneous, where it appears upon its face that the affidavit on which rested the order of publication against the heirs as nonresidents was defective and insufficient. *Hull v. Hull*, 85 W. Va. 155, 18 S. E. Rep. 49.

Process, Notice, Summons.—But, a judgment against a person who has not been served with notice is a void judgment, and is *ex vi termini*, a nullity. *Ferguson v. Teel*, 82 Va. 600; *Lavell v. McCurdy*, 77 Va. 703; *Wade v. Hancock*, 76 Va. 620.

Notice to Officers—Strict Compliance with Statute.—For example, in a proceeding to confiscate property of a person charged to be in rebellion, the directions of the attorney general are, that the method of seizure of the property shall be conformed as nearly as may be to the state law, if there be such; when therefore the proceeding is to confiscate debts due from a municipal corporation, the notice to the debtor must be upon the mayor or other officer named in the Virginia statute; and notice given to the auditor of the corporation is of no effect; and the judgment based upon such notice is null and void. *Fairfax v. Alexandria*, 28 Gratt. 16.

Fraud.—But, a judgment, valid on its face, cannot be impeached by other creditors except for fraud; and that cannot be done otherwise than by a direct proceeding brought to set it aside on that ground. *First Nat. Bank v. Huntington, etc., Co.*, 41 W. Va. 530, 23 S. E. Rep. 792.

Thus, where it is sought to set aside or annul a regular judgment or decree upon the ground that it was obtained by fraud practiced by a party, or in prosecuting the suit or obtaining the judgment or decree, it is necessary, it is said, that the plea should state a case of actual fraud; and that the suit should be brought for the express purpose of impeaching the judgment or decree, otherwise it will be regarded as a collateral attack. *Harrison v. Walton*, 95 Va. 721, 30 S. E. Rep. 372.

"The rule is, however, settled that unless there is good reason to impute fraud or collusion, a judgment is conclusive of the existence and amount of the debt, and cannot be impeached collaterally either by parties or by strangers." *Gentry v. Allen*, 82 Gratt. 254.

Fraud and Collusion.—Where a judgment creditor files a bill against a debtor to subject his lands to the lien of his judgment, and makes a trust creditor of the same debtor who holds a deed of trust on the land a party, such trust creditor cannot question the validity of the judgment against the debtor, except upon grounds that would avoid it, between the judgment creditor and the debtor, or on the ground that there was fraud and collusion between them in procuring the judgment. *Gentry v. Allen*, 82 Gratt. 254.

Mistake, Surprise, Accident.—A judgment of a justice founded on a sufficient summons cannot be collaterally attacked in equity on the ground alone that the cause of action arose in another county, the place of the defendant's residence; he can only be relieved therefrom collaterally on such equitable grounds as fraud, accident, mistake, surprise, or some adventitious circumstance beyond the control of the party. The question is purely legal, and does not give equity jurisdiction to review such judgment.

Newlon v. Wade, 48 W. Va. 283, 27 S. E. Rep. 244. See *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. Rep. 807. See *infra*, this note, title, "Equitable Relief against Judgments."

Unwarranted Reservation.—Thus, a judgment reserving from sale a sawmill on certain land, though there is nothing on the record to warrant the reservation, is not void, but voidable only by appeal, and cannot be collaterally attacked. *First Nat. Bank v. Hyer*, 46 W. Va. 13, 32 S. E. Rep. 1000.

Coverture.—On the other hand, a judgment rendered by a court of common law against a married woman, either in her own name or in the name of the company, under which she does business, upon a contract made during coverture, is absolutely void, and an execution or suggestion sued out upon such judgment is invalid and ineffectual for any purpose. Such judgment may be assailed collaterally in proceedings upon a suggestion thereon. *White v. Foote Lumber & Mfg. Co.*, 29 W. Va. 385, 1 S. E. Rep. 572.

Infancy.—It is well settled, as a general rule, that an infant is as much bound by a decree against him as a person of full age. The law recognizes no distinction between a decree against an infant and a decree against an adult. Therefore an infant can impeach a judgment or decree only upon such grounds as would invalidate it in the case of another person, such as fraud, collusion, or error. *Harrison v. Walton*, 95 Va. 721, 30 S. E. Rep. 372; *Pennybacker v. Switzer*, 75 Va. 688; *Zirkle v. McCue*, 26 Gratt. 517; 1 Min. Inst. (8d Ed.) 507, 508.

Thus the judgment of the board of commissioners, under the land law, is conclusive and cannot be impeached, notwithstanding the plaintiff was an infant at the time the judgment was given. *Stephens v. Cobun*, 2 Call 440.

Death.—When there is a joint action against two or more persons, all of whom are served with process, and one dies before judgment, and his death is not suggested on the record, and there is a judgment rendered against all the defendants, such judgment cannot be collaterally attacked. *King v. Burdett*, 28 W. Va. 601; *Watt v. Brookover*, 85 W. Va. 323, 13 S. E. Rep. 1007, 29 Am. St. Rep. 811; *McMillan v. Hickman*, 85 W. Va. 705, 14 S. E. Rep. 227; *Evans v. Spurgin*, 6 Gratt. 107.

Commonwealth's Lien.—Where a bond given to the commonwealth to secure the purchase money of land bought at a sheriff's sale is on default returned to the circuit court from whence the *venditioni exponas* issued, whereby it acquired the force of a judgment against the principal and sureties, under Va. Code 1873, ch. 40, § 16, the lien of the commonwealth so acquired cannot be collaterally impeached in a suit brought by the trustee of one of the sureties, claiming a homestead under an earlier purchase of the land, to audit the liens of the latter's creditors, in which suit the commonwealth becomes a party. *Spotts v. Commonwealth*, 85 Va. 581, 8 S. E. Rep. 375.

C. WHO MAY IMPEACH.

Strangers.—All strangers are not entitled to impeach a judgment; it is only those strangers who, if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right, that are permitted to impeach the judgment. *Wilcher v. Robertson*, 78 Va. 603; *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. Rep. 216.

State.—Where a proceeding is instituted by a commissioner of school lands in a circuit court of a county to sell land forfeited for nonentry in that county, and there is a redemption under it, and the

land declared exonerated from forfeiture, and it turns out that no part of the land is in the county of the court rendering the judgment, yet the state cannot, in a collateral proceeding, deny the validity of the judgment or redemption, for want of jurisdiction in the court. *Cecil v. Clark*, 44 W. Va. 659, 80 S. E. Rep. 216.

Third Persons.—Though a judgment cannot be collaterally attacked by one of the parties thereto; a third person, whose rights are affected thereby, is not thus precluded. *Perpetual B. & L. Co. v. Haden*, 92 Va. 201, 23 S. E. Rep. 285.

"The learned judge of the chancery court has declared that neither the judgment nor the substitution of other securities will prevent a court of equity, where a deed is sought to be impeached as voluntary, from looking to the original cause of action in order to ascertain whether it was a subsisting debt contracted at the time the deed was made. The correctness of that proposition will not be controverted; but where the rights of third persons have intervened, as in the case of a settlement upon a wife and children, it is certainly competent for them to show that not only the judgment, but the debt upon which it is founded, has been satisfied and discharged by the substitution of a new security." *Morriss v. Harveys*, 75 Va. 726.

XVI. CONCLUSIVENESS OF JUDGMENTS.

It is a well-established doctrine, that the unreversed judgment of a court of competent jurisdiction is conclusive, and cannot be collaterally attacked. *Hill v. Woodward*, 78 Va. 765; *Wimblish v. Breeden*, 77 Va. 324; *Woodhouse v. Fillbates*, 77 Va. 317; *Fox v. Cottage Association*, 81 Va. 677; *Wilson v. Smith*, 22 Gratt. 493; *Howison v. Weeden*, 77 Va. 710; *Cottom v. Cottom*, 4 Rand. 192.

Jurisdiction of Subject-Matter, Parties.—Jurisdiction of the subject-matter and the parties is essential to the conclusiveness of judgments or decrees. A court may rightfully obtain jurisdiction, and its decrees may be void, because, in the progress of the cause, it has exceeded its jurisdiction. In such case the decrees may be attacked directly or collaterally. *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. Rep. 36.

"Golden Rule."—The general rule is that verdicts and judgments bind conclusively, parties and privies; because privies in blood in estate, and in law, claim under the person against whom the judgment is rendered; and they, claiming his rights are, of course, bound as he is. But, as to all others, they are not conclusively binding, because, it is unjust to bind a party by any proceeding, in which he has had no opportunity of making a defence, of offering evidence, of cross-examining witnesses, or of appealing if he was dissatisfied with the judgment; and this is called by the court, in *Bourke v. Granberry*, Gilmer 25, "a golden rule." *Munford v. Overseers of the Poor*, 2 Rand. 313.

Judgment against Principal—Sureties.—But a judgment against a principal in a bond, is not conclusive evidence against his sureties. *Munford v. Overseers of the Poor*, 2 Rand. 313.

It was said by JUDGE GREEN in *Munford v. Overseers of the Poor*, 2 Rand. 313, that, "the question, how far sureties are bound by a judgment, or other evidence against their principal, which estops or concludes him, has never as far as I am informed, been settled in this court, except in the case of *Baker v. Preston*, Gilmer's Rep. p. 235, decided in the special court."

The books kept by the treasurer are conclusive

evidence of the balance actually in the treasury at any given time, both against the treasurer, and his sureties, without being pleaded as an estoppel, so as to charge them with balances carried forward from year to year, as if those balances were actually on hand. "These books thus conclusive against the treasurer, are also conclusive against his sureties. If a judgment against him is to bind them, so also is the evidence on which that judgment is rendered." *Baker v. Preston*, Gilmer 235.

The admissions of partners are not evidence against each other after the dissolution, though both are bound, and both were conjunct and principals in the partnership transactions. *Skelton v. Cocke*, 8 Munf. 191; *Rootes v. Wellford*, 4 Munf. 215.

JUDGE GREEN in *Munford v. Overseers of the Poor*, 2 Rand. 313, said that these decisions seem to have a strong bearing on the question how far a judgment against a principal is conclusive against his surety.

But it has been held in an action by an execution creditor against the high sheriff for the failure of his deputy to pay over money made on the execution, where the deputy is present at the trial and examined as a witness, but there is verdict and judgment for the plaintiff, that in the subsequent action by the high sheriff against the deputy and his sureties, on their bond with condition to indemnify the high sheriff from all loss and damages for the conduct of the deputy in the office, the judgment against the high sheriff, in the absence of fraud and collusion, is conclusive evidence of the default of the deputy against not only the deputy, but also his surety, even though the declaration in the action by the high sheriff does not allege that the deputy was requested to defend the suit against the high sheriff or had an opportunity of doing so, or had notice thereto, but his presence at the trial and act of defence of the action may be proved by the oral testimony. *Crawford v. Turk*, 24 Gratt. 176, and *note*. In this case the court distinguished and explained the cases of *Munford v. Overseers*, 2 Rand. 313; *Jacobs v. Hill*, 2 Leigh 308; *Baker v. Preston*, Gilmer 235; *Cox v. Thomas*, 9 Gratt. 323.

Foreign Court of Admiralty.—The judgment of a foreign court of admiralty is not conclusive that the property and owners are enemies, in a suit between the underwriters and insured. *Bourke v. Granberry*, Gilmer 16.

Where the issue in a cause is one of law and fact namely, whether a judgment pleaded by the defendant as a set-off was assigned to him with the fraudulent intent of depriving the plaintiff of his legal right to exemptions and a second trial is had in a justice's court upon this issue, and judgment rendered, such judgment, rendered in the second trial, is final and irreversible, and conclusive between the parties thereto as to all matters involved in that controversy, and under art. 8, sec. 18 of the Constitution of West Virginia. The facts involved in this issue, having been tried by a jury, cannot be otherwise re-examined than according to the rules at common law, and under sec. 91, ch. 50 of Va. Code, no new trial can be had in a court of equity. *Ensign Mfg. Co. v. McGinnis*, 30 W. Va. 532, 4 S. E. Rep. 788.

Legally Authenticated Record.—A record legally authenticated, of the proceedings of a court of competent authority, in any other of the United States, is conclusive evidence in the courts of Virginia, to show that a judgment was rendered, and that the party was compellable to pay the amount recovered

against him; but it may be opposed by proof of fraud or collusion, or of subsequent payments or discounts. *Buford v. Buford*, 4 Munf. 241.

Suit to Enforce Judgment Lien.—In a suit in equity to enforce a judgment lien against the real estate of the judgment debtor, the judgment, as between the judgment creditor and other judgment creditors, is conclusive of the justness and amount of the debt. *First Nat. Bank v. Huntington Distilling Co.*, 41 W. Va. 530, 23 S. E. Rep. 792.

Conclusiveness as to Strangers.—Moreover, a judgment for a debt is conclusive, not only between the parties, but also as to strangers, to establish the amount and existence of the debt, and strangers can attack it only for fraud or collusion. *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. Rep. 1078.

Judgment Prima Facie Evidence.—Where a creditor, who claims under a judgment at law, comes into equity to enforce his judgment, that judgment is *prima facie* evidence against the debtor, or mere strangers; unless they can impeach it on the ground of fraud, or by showing that a full defence was not made, and can produce new proof showing that the debt is not due. *Garland v. Rives*, 4 Rand. 282; *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. Rep. 1078; *Chamberlayne v. Temple*, 2 Rand. 384.

XVII. ARREST OF JUDGMENT.

A. GROUNDS OF ARREST.

Errors Apparent on Face of Record.—It seems to be a well-established rule of law that a motion in arrest of judgment lies only to correct an error that is apparent on the face of the record. *Gray's Case*, 92 Va. 772, 22 S. E. Rep. 858; *Hall's Case*, 80 Va. 555; *Watts' Case*, 4 Leigh 672; *Stephen's Case*, 4 Leigh 679; *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. Rep. 604; *Gerling v. Agricultural Ins. Co.*, 39 W. Va. 689, 20 S. E. Rep. 691; *State v. Martin*, 38 W. Va. 568, 18 S. E. Rep. 748; *Com. v. Linton*, 2 Va. Cas. 476.

Defect in Pleading—Joinder of Parties.—When a person, who ought to join as plaintiff, is omitted, and the objection appears upon the pleadings, the defendant may demur, move in arrest of judgment, or bring a writ of error. *Prunty v. Mitchell*, 76 Va. 169.

Declaration Sufficient.—But where the declaration sufficiently sets forth a good cause of action, and there is no objection to the form or sufficiency of the verdict, a motion in arrest of judgment will be overruled. *Travis v. Ins. Co.*, 28 W. Va. 584.

Defective Declaration.—Likewise, it is not error sufficient in arrest of judgment, in an action of assumpsit in a superior court of a county, that the declaration lays the venue in a different county and omits to state that the cause of action arose within the jurisdiction of the court. *Buster v. Ruffner*, 5 Munf. 27.

Profert.—Nor will judgment be arrested for omission to make profert of a bill. *Terrell v. Atkinson*, 2 Wash. 143.

No Offence Charged.—On the other hand where an information is filed on a defective presentment, but the defendant pleads to the information and there is a verdict against him, he can arrest the judgment because the presentment charged no offence. *Com. v. Chalmers*, 2 Va. Cas. 76.

Improperly Receiving Juror.—Thus, a motion in arrest of judgment does not lie to correct an error in improperly receiving a juror, where the impropriety, if any, is only shown by a bill of exceptions. *Gray's Case*, 92 Va. 772, 22 S. E. Rep. 858.

Petty Juror Not a Freeholder.—Nor is it a good

reason for arresting a judgment, on a motion in arrest, that several of the petty jury were not freeholders, when this is a matter of fact not appearing on the record. *Stephen's Case*, 4 Leigh 679.

Juror Pardoned.—So, a motion for arrest of judgment does not lie because a juror, convicted of a felony, had been pardoned in 1868. *Puryear v. Com.*, 83 Va. 51, 1 S. E. Rep. 512; *Edwards' Case*, 78 Va. 43.

Consideration for Assignment.—But judgment may be arrested, if, in assumpsit against the assignor of a bond, a consideration for the assignment is not set forth in a declaration. *Hall v. Smith*, 8 Munf. 550.

Statutory Elements Apparent.—Likewise, omission to direct a new *venire facias* or omission of any statutory essential apparent on the record, is such an error as may be taken advantage of after verdict by motion in arrest of judgment. *Hall v. Com.*, 80 Va. 555.

Action in Requiring Bill of Particulars.—On the other hand, motion in arrest of judgment is not the proper method of raising the question as to the propriety of the court's action in requiring the defendants in ejectment to file the particulars of their defence; the question should be raised by a bill of exceptions. *Va. & Tenn. Coal & Iron Co. v. Fields*, 94 Va. 102, 26 S. E. Rep. 426.

Failure to Set Forth Award.—A judgment in favor of a plaintiff, ought to be arrested after verdict, where he neglects to set forth the award in his declaration, and reply generally, in debt on bond with condition to perform an award, to be made by certain arbitrators, and aver a breach of the condition by special replication, the conditions being made a part of the record by oyer, and the defendant having pleaded "conditions performed." *Green v. Bailey*, 5 Munf. 246.

Variance.—However, where a party fails to take advantage in due time of a variance between the presentment of the grand jury and the indictment, a judgment thereon cannot be reversed by the appellate court. *Wells v. Com.*, 2 Va. Cas. 333; *Com. v. Jones*, 2 Gratt. 555; *Com. v. Chalmers*, 2 Va. Cas. 76.

Objection to Jurisdiction—Nonresidence.—For example, nonresidence is not a ground for arresting a judgment; if it is good ground for objection to the jurisdiction of the court, it must be taken by plea in abatement before the defendant pleads in bar. *Washington & New Orleans Telegraph Co. v. Hobson*, 15 Gratt. 122. See Va. Code, ch. 171, § 19, p. 648.

Jurisdiction over Felonies.—But if upon an indictment for a felony the prisoner is tried and found guilty in the county or corporation court having no jurisdiction to try the prisoner, the verdict should be arrested, and all proceedings subsequent to the indictment should be quashed. *Rider v. Com.*, 16 Gratt. 499.

After a verdict convicting a prisoner of a felony, a plea in arrest of judgment, that he has not been examined for the offence by a court of competent jurisdiction (alleging that the corporation court, by which he was examined, has no criminal jurisdiction), ought to be overruled; because the said plea suggests matter making no part of the record, but matter which, if true, is proper for a plea in abatement, or for a motion to quash the indictment. *Com. v. Cohen*, 2 Va. Cas. 158.

Verdict Uncertain and Defective.—But, judgment against a prisoner tried for a felony will be arrested, where the verdict against him is too uncer-

tain and defective to authorize a judgment thereon. *Com. v. Hatton*, 3 Gratt. 623.

Defective Service of Writ.—So also, if by direction of the plaintiff, the writ be served on one only of two partners in trade, when the declaration shows that the plaintiff knew the names of both, and he gets a verdict upon the plea of nonassumpsit, pleaded by the partner, on whom the writ was served, judgment ought to be arrested. *Shields v. Oney*, 5 Munf. 550.

Errors of Committing Magistrate.—On the other hand, judgment will not be arrested because of errors in the examination before the committing magistrate, or because he was not examined for the felony of which he is indicted, for such objection comes too late after verdict. *Morris v. Com.*, 9 Leigh 636; *Angel v. Com.*, 2 Va. Cas. 281.

Statute of Limitations.—But after verdict for the plaintiff, on the plea of *nil debet*, it is no ground for arresting the judgment, that the claim, as shown by the declaration, was barred by act of limitations. *Murdock v. Herndon*, 4 Hen. & M. 200.

Informal Errors.—Where the clerk, in arraigning the prisoner, erroneously states to the jury the maximum punishment for the offence, but the jury fix the maximum punishment, showing that they were not misled by the error of the clerk, such error is not sufficient to set aside or arrest the judgment. *Mitchell v. Com.*, 75 Va. 856. See also, *Burgess v. Com.*, 2 Va. Cas. 488.

Arrest of Judgment, New Trial—Order of Consideration.—Where a motion in arrest of judgment and a motion for a new trial are made at the same time, and are acted upon by the court at the same time, the order in which they may be considered by the court is not material, as under such circumstances the motion in arrest of judgment cannot be regarded as a waiver of objection to its verdict, or as an admission that the verdict is unobjectionable. *Gerling v. Agricultural Ins. Co.*, 39 W. Va. 689, 20 S. E. Rep. 691. See also, *Sweeney v. Baker*, 18 W. Va. 158.

Court May Arrest Ex Mero Motu.—Where the indictment and the verdict are fatally defective, a judgment may be reversed by the appellate court, though no motion in arrest of judgment was made in the court below. *Randall v. Com.*, 24 Gratt. 644; *Old v. Com.*, 18 Gratt. 915.

Anything which is good cause for arresting a judgment, is good cause for reversing it, though no motion in arrest is made. *Matthews v. Com.*, 18 Gratt. 989. See also, *Randall v. Com.*, 24 Gratt. 644.

Effect of Arrest—Discharge of Prisoner.—Where the court, at a trial for murder, overrules a motion in arrest of judgment, but sets aside the verdict the next day *ex mero motu*, the defendant is not entitled to discharge on the ground that his motion in arrest of judgment has been allowed. *Curtis v. Com.*, 87 Va. 589, 13 S. E. Rep. 73.

Time for Motion.

File Errors at Next Term.—It seems, that the party, to whom a new trial is granted, may, at the next term, without claiming such trial, file errors in arrest of judgment. *Hall v. Smith*, 3 Munf. 550.

Delay until after Verdict.—Where the objection to sending to the jury an indictment endorsed with verdict of guilty found at a first trial is delayed until after verdict, such error, if any, cannot be remedied by motion in arrest of judgment. *Forbes v. Com.*, 90 Va. 550, 19 S. E. Rep. 164; *Angel v. Com.*, 2 Va. Cas. 281.

Where the administrator of a defendant in det-

inue, who dies pending the action, consents that the cause shall stand revived against him, and instead of pleading *de novo*, goes to trial upon the plea put in by his intestate, he cannot, after verdict against him, arrest the judgment because of his own failure to plead anew. *Greenlee v. Bailey*, 9 Leigh 526.

Other Errors after Verdict.—Judgment cannot be arrested, after verdict against a defendant, because the presentment does not state whether the witnesses on whose evidence it was found, were called by the grand jury, or sent to them by the court, or because the name of the prosecutor was not written at the foot of the information. *Com. v. Chalmers*, 2 Va. Cas. 76.

Practice.—The appellate court, upon overruling a motion in arrest of judgment, will not send the case back for a decision upon the motion for a new trial, but will proceed to give final judgment for the plaintiff. *Sims v. Alderson*, 8 Leigh 479.

XVIII. SATISFACTION.

A. PAYMENT TO WHOM.

Attorneys.—The payment of a judgment or decree to an attorney of record, who obtained it, before his authority is revoked, and due notice of such revocation given to the defendant, is valid and binding on the plaintiff, so far as the defendant is concerned, and his receipt will discharge the judgment. *Harper v. Harvey*, 4 W. Va. 539; *Yoakum v. Tilden*, 3 W. Va. 167; *Branch v. Burnley*, 1 Call 147.

Cancellation of Satisfaction by Attorney.—The attorney who obtains a judgment may maintain an action to cancel an indorsement of satisfaction of the judgment, made by them, on the ground that the satisfaction was procured by fraud or mistake. *Higginbotham v. May*, 90 Va. 233, 17 S. E. Rep. 941. See monographic *note* on "Attorney and Client" appended to *Johnson v. Gibbons*, 27 Gratt. 632.

Deposit in Branch Bank.—Where the judgment debtor of a bank deposited money with the branch subject to his own check, and the money was lost by the bank's failure, it was held that the deposit did not discharge the judgment. *Spilman v. Payne*, 84 Va. 435, 4 S. E. Rep. 749.

Payment to Sheriff after Return Day of Writ.—A payment to sheriff in discharge of an execution, after the return day of the execution is passed, is not binding on the creditor. *Chapman v. Harrison*, 4 Rand. 386.

Payment to Clerk—Acceptance.—Where a judgment debtor, who is absent in the army, sends confederate money to his son to pay the judgment, and the payment is made to the clerk, who deposits the money in the bank, with an "ear-mark," and subsequently the judgment debtor and his son see the judgment creditor and tell him of this payment, but the latter does not accept in so many terms, such payment to the clerk does not discharge the judgment. *Moore v. Tate*, 23 Gratt. 351.

B. MEDIUM OF—PAYMENT.

Money.—The payment of the judgment or decree to an attorney of record must be a payment of money, or if not a payment of money, it must be accepted by the plaintiff in lieu of money, or the attorney must have special authority to receive it. *Harper v. Harvey*, 4 W. Va. 539; *Wilkinson v. Holloway*, 7 Leigh 277.

Confederate Money.—The payment of confederate states treasury notes made to an attorney, without the authority of the plaintiff to receive them, was held not a payment in money that would satisfy a

judgment or decree against the defendant. *Harper v. Harvey*, 4 W. Va. 539.

Bond.—An attorney at law has no power to receive in satisfaction of his client's judgments a bond from the judgment debtor. *Smock v. Dade*, 5 Rand. 689.

Substituted Note.—When the parties provided for the extinguishment of the judgment it may be fairly presumed they contemplate the extinguishment of the debt upon which it is founded. If the substituted note is accepted in satisfaction of the judgment the presumption is, in the absence of proof to the contrary, that it was accepted in satisfaction of the debt represented by the judgment. *Morris v. Harveys*, 75 Va. 726.

Faulty Forthcoming Bond.—A faulty forthcoming bond, whilst in force, is a satisfaction of the judgment, and a second execution cannot issue until it is quashed. *Downman v. Chinn*, 2 Wash. 189; *Rhea v. Preston*, 75 Va. 757.

Forfeited Forthcoming Bond.—But where judgment is obtained against a principal and surety to a bond, and the latter gives a forthcoming bond, which is forfeited, the original judgment is not thereby satisfied, although any further proceedings on it will be barred, until the forthcoming bond shall be quashed. *Randolph v. Randolph*, 3 Rand. 490; *Rhea v. Preston*, 75 Va. 757.

Fi Fa. Returned "No Property."—Where a *fi. fa.* issued on a judgment based on a forthcoming bond has been returned "no property," equity will regard the bond as a nullity, and the original judgment as in full force. *Cooper v. Daugherty*, 85 Va. 343, 7 S. E. Rep. 387. The court in this case said: "And in *Rhea v. Preston*, 75 Va. 744, it is said by this court: 'When the obligors in a forthcoming bond, which has been forfeited and returned, though solvent when the bond was taken, become insolvent afterwards, the plaintiff may have the bond quashed, and be restored to his original judgment. And though the bond be not quashed, a court of equity will regard it as a nullity, and the original judgment in full force.' *Jones v. Myrick*, 8 Gratt. 211-12; *Leake v. Ferguson*, 2 Gratt. 432; *Robinson v. Sherman*, 2 Gratt. 178; *Garland v. Lynch*, 1 Rob. 545; *Powell v. White*, 11 Leigh 309."

Satisfaction by Set-Off.—The practice of setting off judgments is indicated in 2 Freem. Judgm. § 407, where it is said: "The satisfaction of a judgment may be wholly or partly produced by compelling the judgment creditor to accept in payment a judgment against him in favor of the judgment debtor, or, in other words, by setting off one judgment against another. This is usually brought about by a motion in behalf of the party who desires to have his judgment credited upon, or set off against, a judgment against him. The court in a proper case, will grant the motion. Its power to do this cannot be traced to any particular statute, and exists only in virtue of its general equitable authority over its officers and suitors." See *Zinn v. Dawson* (W. Va.), 34 S. E. Rep. 784.

In West Virginia, opposite demands arising out of judgments or decrees between the same parties in the right may be set off against each other when it is equitable to do so and when the interests of third parties are not involved, but the court is not bound to set off such judgments in all cases, but in the same exercise of its discretion even when the set-off might be legally made, will not allow the set-off if it clearly appears that injustice will be done thereby. A party entitled to such set-off, having

subject to his control a special fund primarily applicable to the satisfaction of the judgment, will not be permitted to avail himself of his right to set off against the assignee of such opposite judgment or decree until such special fund is exhausted, and then only for any unsatisfied balance of his demand. *Payne v. Webb*, 29 W. Va. 627, 2 S. E. Rep. 330, following *Nuzum v. Morris*, 25 W. Va. 559.

Judgment Annulled on Appeal.—A debtor cannot set off a judgment which has been annulled on appeal. *Magarity v. Succop*, 90 Va. 561, 19 S. E. Rep. 200. See *Shipman v. Fletcher*, 83 Va. 349, 2 S. E. Rep. 198.

Allowance of Set-Off Inequitable.—Where a suit in chancery was pending to subject land to the payment of liens charged thereon, and a decree of sale, and a decree confirmed in the sale were on petition of the debtor reversed in the appellate court and the judgment there entered for the debtor against the first lien creditors, for the costs in the appellate court, which judgment the creditor assigned to his attorney in part payment of his attorney's fee and the cause was remanded, and it appeared that the property was sufficient to pay the first lien, and the court refused to allow the assignee and attorney to be paid out of the fund, but set off the judgment for costs against a part of the judgment against the assignor, it was held, that under the circumstances, the allowance of the set-off was inequitable, and should not have been made; but a decree should have been entered for the whole amount of the plaintiff's claim against the debtor, and then the decree should have required the creditor, out of the money realized, to pay the assignee and attorney the amount of his claim. *Payne v. Webb*, 29 W. Va. 627, 2 S. E. Rep. 330.

Payments on Reversed Judgment.—If payments have been made on a judgment which has been reversed, they should be credited on the debt on which the judgment was rendered. *Effinger v. Kenney*, 92 Va. 245, 23 S. E. Rep. 742.

Voluntary Payment—Subrogation.—The voluntary payment of a debt by judgment constituting a lien on land, does not entitle the party paying it, to be substituted to the lien of the judgment creditor, the benefit of the doctrine of subrogation being extended by courts of equity only to those who are bound by law to pay debts or liens, as sureties or otherwise, or are compelled to pay in order to protect their own rights. *Janney v. Stephen*, 2 Pat. & H. 11.

Promise to Pay—Consideration.—A creditor's forbearance to enforce a judgment against land on which it was a lien is a sufficient consideration for a promise by a subsequent purchaser of the land to pay it, although the landowner was not previously liable for the judgment. *Bradshaw v. Bratton*, 96 Va. 577, 32 S. E. Rep. 56.

It was held in *Rowe v. Hardy*, 97 Va. 674, 34 S. E. Rep. 625, that payments made in 1885 on a judgment rendered in 1869, admit that the judgment had not been discharged.

Effect of Releasing Principal.—A recovered judgment against B and C, his surety, and issued execution, which was levied on the property of B. A, on receiving a part payment of the judgment, gave B further time for the payment of the balance, and ordered the property to be released to B. It was held that in consequence the judgment was discharged at law, and the surety, not having assented to, or acquiesced in the agreement, was discharged in equity, and could have an injunction against a

second execution. *Baird v. Rice*, 1 Call 18, 1 Am. Dec. 497.

C. PROOF OF PAYMENT.

Presumption of Payment from Lapse of Time.—Presumption of payment of a judgment cannot arise from lapse of time less than the period of limitation. *James v. Life*, 92 Va. 702, 24 S. E. Rep. 275. See monographic note on "Laches" appended to *Peers v. Barnett*, 12 Gratt. 410.

Legal and Natural Presumption.—Upon a *scire facias* to revive a judgment which had been suspended by an injunction for forty-six years, issue was made up on the plea of payment and upon the trial the court instructed the jury, that the pendency of the injunction cause repelled the legal presumption of payment which would have arisen from lapse of time if the injunction had not been pending, and it was held that such instruction was proper, and it was not necessary to distinguish to the jury between legal presumption and natural presumption arising from lapse of time. *Hutsonpiller v. Stover*, 12 Gratt. 579.

Lapse of Twenty-Three Years.—It was held in *Brown v. Campbell*, 88 Gratt. 402, that under the circumstances of the case, the proof is sufficient to establish the payment of a debt on which judgment had been rendered and execution issued twenty-three years before the filing of a bill to enforce the payment of the judgment. See also, *Cox v. Carr*, 79 Va. 28.

Insufficient Proof of Payment.—Where a defendant testified that he had satisfied a judgment filed in a creditors' suit, with a debt due him from the plaintiff, who swore the contrary, and showed by receipts how he had paid the debt, and that at the time of the alleged satisfaction the judgment had been assigned as collateral to a third party, by whom it was subsequently reassigned, it was held that a confirmation of a commissioner's report, showing the judgment unpaid, was proper. *Barrett v. Wilkinson*, 87 Va. 442, 12 S. E. Rep. 885.

Indorsement on an Execution.—It was held in *Saunders v. Prunty*, 89 Va. 921, 17 S. E. Rep. 231, where an execution issued on a judgment was indorsed levied, April 14, 1861, on a negro named Wyatt, and was returnable on the first Monday in May following, that there was no *prima facie* presumption that the judgment was satisfied by such levy as the stay law was passed on the 30th of April, 1861, which fully accounts for no sale having been made, and a succession of stay laws prevented the sale of the slave, until the property was destroyed by emancipation. See also, *Shannon v. McMullin*, 25 Gratt. 211; *Hamilton v. McConkey*, 83 Va. 533, 5 S. E. Rep. 724.

Misrepresentation or Fraud.—A charge that a confession of judgment was obtained by fraudulently representing that the lien on the defendant's land, for which lien the judgment was confessed, was still in force, when in fact, it was at the time barred by the statute of limitations, of which the defendant was ignorant, is not sustained when it appears that, while the lien was in force, the defendant, for a valuable consideration, gave the plaintiff a promise in writing to pay the lien, for this he might have been compelled to do. *Bradshaw v. Bratton*, 96 Va. 577, 32 S. E. Rep. 56.

Arrest on Ca. Sa.—If a debtor be arrested on a *ca. sa.* and discharged by order of the creditor or his agent, no other execution can be had on the same judgment or decree. *Windrum v. Parker*, 2 Leigh 361.

But the taking in execution the bond of one of two joint obligors is no satisfaction of the debt, and does not bar an action against the other obligor. *Atwell v. Towles*, 1 Munf. 175.

But a judgment or decree authorizing the sale of decedent's lands to pay his debts, but not declaring upon its face what particular debts are to be paid, or fixing their order or priority, is erroneous, and will not support a sale thereunder. *Hull v. Hull*, 35 W. Va. 155, 18 S. E. Rep. 49.

Decree of Sale to Satisfy Judgment.—It is a settled practice in Virginia, to entertain the suit of the judgment creditor for relief in equity, when the debtor has, subsequent to the judgments, conveyed his land in trust for the payment of debts, or on other trusts authorizing the sale of land. And in such case, the court will decree a sale to satisfy the judgment. *Taylor v. Spindle*, 2 Gratt. 44.

XIX. FOREIGN JUDGMENTS.

While the judgment of a competent court of any state that has jurisdiction over the person or subject-matter is conclusive upon the merits of the controversy in every state, a court of another state has not the power, without service of process or voluntary appearance, to render a judgment on a contract, which is absolutely void, under the statute of the state where it is made. *Stewart v. Northern Assur. Co.*, 45 W. Va. 734, 23 S. E. Rep. 218.

"Jurisdiction of the cause and parties is essential to the conclusiveness of the judgment or decree. To acquire jurisdiction of the defendant, it is necessary that in some appropriate way he be notified of the pendency of the suit. If upon inspection of the record, it appears that no such notice had been given, the judgment or decree is void. On the other hand, if it be a judgment or decree of a domestic court of general jurisdiction, and the record declares that notice has been given, such declaration cannot be contradicted by extraneous proof. * * * The record is conclusively presumed to speak the truth, and can be tried only by inspection. * * * And especially is this so in respect to decrees under which sales are made to *bona fide* purchasers." *Wilcher v. Robertson*, 78 Va. 602.

In order that the judgment of one state may have in another the effect provided for by the Constitution of the United States, art. 4, § 1, and the act of congress made in May 26, 1790, the court in which the judgment was rendered must have had jurisdiction of the case when it pronounced the judgment. *Bowler v. Huston*, 30 Gratt. 266.

Presumption as to Jurisdiction.—If the court of another state, which rendered a judgment sought to be enforced in the home state, is a court of general jurisdiction, the presumption is that it had jurisdiction of the particular case, and to render the judgment void, this presumption must be overcome by proof. *Gilchrist v. W. Va. O. & O. L. Co.*, 21 W. Va. 115; *Stewart v. Stewart*, 27 W. Va. 167.

Inquiry as to Jurisdiction.—Where the judgment of a sister state is sought to be enforced in the home courts, the jurisdiction of the court rendering the judgment may be inquired into, and if it appear that the court had not jurisdiction, the judgment will be void. *Crumlish v. Cent. Imp. Co.*, 38 W. Va. 390, 18 S. E. Rep. 456; *Gilchrist v. W. Va. O. & O. L. Co.*, 21 W. Va. 115; *Stewart v. Stewart*, 27 W. Va. 167.

Where a court of law in the state of Maryland, having jurisdiction of the subject and person of the citizen, renders judgment in the cause, therein pending against such citizen, for money, the valid-

ity of such judgment, rendered by such court, cannot be questioned in the courts of West Virginia; nor will the courts of that state look into the transaction upon which the Maryland judgment is founded, in order to ascertain if that judgment ought not to have been rendered by that court. But while this is true generally, a judgment of the court of law rendered in West Virginia based upon a judgment of the court of law of Maryland, may be inquired into for equitable causes and equities, and, if not for all, for most of the causes, which would authorize an injunction in equity to a judgment of a court of law of West Virginia. *Black v. Smith*, 13 W. Va. 780.

Judgment having been obtained in Louisiana against executors, and only partially satisfied by them, it is competent to pursue the assets in the hands of heirs and legatees in Virginia, and the Virginia court will only look at the Louisiana judgment, and not go behind it into the merits of the case. *DeEnde v. Wilkinson*, 2 Pat. & H. 663.

Partners Not Served with Process.—A judgment rendered in another state, against all the former members of a dissolved partnership, will not personally bind one of the partners who was not served with process and did not appear, although by the law of that state such judgment is enforceable against the joint partners; and in an action on such judgment in Virginia, such partner may show that he was not served and did not appear, although the record states that he was summoned and appeared. *Bowler v. Huston*, 30 Gratt. 266.

The following language was used by TUCKER, P., in delivering the opinion of the court in *Wilson v. Bank of Mt. Pleasant*, 6 Leigh 574: "It seems to be agreed, on all hands, that the doctrine of the conclusiveness of the judgments of the respective states, is to be taken with the qualification that where the court has no jurisdiction over the subject-matter or the person, or where the defendant has no notice of the suit, or was never served with process and never appeared to the action, the judgment will be esteemed of no validity."

"It is not a question of state policy, whether we will or will not give effect to the judgments of courts of competent jurisdiction of other states. It is a question, whether he will in good faith live up to the constitutional obligations, which we have assumed." *Stewart v. Stewart*, 27 W. Va. 167.

Illustration.—Where the plaintiff's intestate is killed, through the defendant's negligence, in West Virginia, and the plaintiff institutes his action in Virginia to recover damages therefor where the defendant is found, a judgment of the Virginia court would be a bar to an action by an administrator appointed in West Virginia, brought in that state against the defendant, the rights of the parties being determinable by the laws of that state, which do not provide that suit shall be brought only by a personal representative appointed there. *Nelson v. C. & O. R. Co.*, 88 Va. 971, 14 S. E. Rep. 838.

A. JUDGMENTS OF SISTER STATES.—It is well settled that the judgment of a sister state must be accorded in the home state the same faith and credit which it has in the state where rendered. *Wells-Stone Mercantile Co. v. Truax*, 44 W. Va. 531, 29 S. E. Rep. 1006; *Crumlish v. Imp. Co.*, 38 W. Va. 390, 18 S. E. Rep. 456; *Gilchrist v. W. Va. O. & O. L. Co.*, 31 W. Va. 115; *Stewart v. Stewart*, 27 W. Va. 167.

But a judgment in a court of a sister state, without service of process in any manner, and with-

out appearance, is void in the home state. *Crumlish v. Cent. Imp. Co.*, 38 W. Va. 390, 18 S. E. Rep. 456.

Judgments of Sister States Are Domestic Judgments.

—Under the provision of the Constitution of the United States, art. 4, § 1, judgments of another state of the Union, are not to be regarded in Virginia as foreign judgments, but have the same effect as judgments of our own courts. *Clarke v. Day*, 2 Leigh 172.

"In American state courts, the unbroken current of decision has been that foreign judgments, as contradistinguished from the judgments of the courts of a sister state, are not conclusive." PARKER, J. *Draper v. Gorman*, 8 Leigh 637.

"It seems beyond controversy that the validity of the contract upon which a judgment is rendered by a court of competent jurisdiction in a foreign state is established by the judgment, and the judgment must be given the same credit and effect in the state, in which it is sought to be enforced, as it had in the state where rendered. 3 Black, Judgm. § 925; *Clarke v. Day*, 2 Leigh 172; *Dicey, Confd. Laws* 435." *Vaught v. Meador*, 99 Va. 509, 30 S. E. Rep. 235.

It was held in *Black v. Smith*, 13 W. Va. 780, that the defendant to a Maryland judgment, to whom a day and opportunity has been allowed to make his defence in the court of law in Maryland, which rendered the last-named judgment, against the demand, for which such judgment was rendered, but who has wholly failed to avail himself of them, will not be entertained in the court of equity of West Virginia on a bill seeking relief against a judgment rendered by a court of law, based upon said Maryland judgment, rendered in consequence of his default, upon the ground, which might have been successfully taken in the Maryland court of law, unless some reason founded in fraud, accident or surprise, or some adventitious circumstances beyond the control of such defendant, be shown why the defence was not made in the Maryland court.

Does Not Affect Land Elsewhere.—A judgment or decree of a court of another state has no effect to pass title to or affect land in West Virginia, nor can a sale or conveyance under it by a trustee or commissioner appointed by it do so. *Wilson v. Braden* (W. Va.), 36 S. E. Rep. 367.

"No court, which is but a creature of the state, can, by its judgments or decrees, directly bind or affect property beyond the limits of that state; and hence it is axiomatic that no writ of sequestration, or execution, or order, judgment or decree of foreign court, can be directly enforced against real estate situate without the limits of the foreign state." *Wimer v. Wimer*, 82 Va. 890, 5 S. E. Rep. 536. See also, *Dickinson v. Hoomes*, 8 Gratt. 410.

Foundation of Right.—The seizure of the property of the defendant under the proper process of the court, is generally the foundation of the court's jurisdiction in proceedings *in rem*, and defective or irregular affidavits, though they might reverse a judgment or decree in such case for error, in departing from the directions of the statute, do not render such a judgment or decree, or the subsequent proceedings, void. *Hall v. Hall*, 12 W. Va. 1.

Statute of Limitations.—It was held in *Watkins v. Wortman*, 19 W. Va. 78, that a judgment obtained in Ohio, if no bar there, is no bar in West Virginia, under § 18, ch. 104, Code W. Va. 1868, which provides that, "Every action upon a judgment or decree rendered in any other state or country shall be barred, if by the laws of such state or country such action

would there be barred, and the judgment or decree be incapable of being otherwise enforced there."

A judgment or decree against heirs in a suit in one state, authorizing the sale of decedent's lands situated there to pay his debts, will not prevent the running of the statute of limitations against the suit in another state to subject the land situated therein to the payment of the same debts. *Hull v. Hull*, 35 W. Va. 155, 13 S. E. Rep. 49.

Construction of Statutes.—If the validity of a foreign judgment depends upon the construction of the statutes of the state in which the foreign court rendered the judgment, the home courts will adopt the construction put upon the statutes by the courts of the state which enacted them. *Gilchrist v. W. Va. O. & O. F. Co.*, 21 W. Va. 115.

Conflict of Laws.—In an action brought in Virginia, on a judgment obtained in North Carolina, the act of limitations of North Carolina cannot be pleaded in bar; but the law of the former must prevail: the act of limitations affecting the remedy, and not the right. "I consider the law as clearly settled, that whatever relates to the essence of the contract, is to be governed by the law of the place where the contract was formed; but that which relates to the remedy for enforcing the contract is to be governed by the law of the place where the contract is sought to be enforced." *Jones v. Hook*, 3 Rand. 308.

Merger.—A judgment in Maryland upon a covenant, binding upon the covenantor's heirs, is not so merged with the covenant (the execution thereon having been returned "no effects") as to prevent the covenantee from proceeding upon the covenant against the heirs of the deceased covenantor or in respect to real assets in Virginia. *Beall v. Taylor*, 2 Gratt. 532.

Federal Judgments.—Code of West Virginia 1868, ch. 130, § 5, applies as well to the record of the district court of the United States, held within the state, as to the records of the courts of the state; and the copy of the judgment rendered in a district court of the United States, in the state of West Virginia attested by the clerk of that court according to the statute above mentioned, will ordinarily be received as evidence of the existence of such judgments; but sec. 19 of ch. 130 of the W. Va. Code 1868, does not apply to the records and judicial proceedings of the district court of the United States, held within the state of West Virginia. *Dickinson v. Railroad Co.*, 7 W. Va. 390.

Evidence.

Admiralty.—*Quare*, how far is the sentence of a foreign court of admiralty, or other foreign tribunal, to be regarded as evidence by the courts of Virginia. *Hadfield v. Jameson*, 2 Munf. 53. See also, *Bourke v. Granberry*, Gilm. 16.

Authentication.—For a discussion of what is sufficient evidence to authenticate, in the courts of this country, the sentence, or act, of a foreign tribunal, or government, after the destruction of such government by revolution or conquest, see *Hadfield v. Jameson*, 2 Munf. 53.

Where in a suit pending in the court of probate of New Orleans, against the executors of a Louisiana testator, a certified copy of the record of a suit in Virginia against the administrator of the decedent, appointed by a court of competent jurisdiction in Virginia, is offered in evidence, and is held by the supreme court of Louisiana to be proper and sufficient evidence of a debt due from the estate, the

court of Virginia cannot question the propriety of that decision, but must give effect to the judgment rendered in accordance with it. *DeEnde v. Wilkinson*, 3 Pat. & H. 663.

Judgment against Decedent.—A record of a judgment against heirs in one state, authorizing the sale of decedent's lands situated there for the payment of his debts, is not admissible as against such heirs in an action in another state to subject lands of decedent situated therein to the payment of the same debts, either for the purpose of establishing them or fixing their amounts. *Hull v. Hull*, 35 W. Va. 155, 13 S. E. Rep. 49.

So also, a judgment or decree rendered in one state, authorizing the sale of decedent's lands there to pay his debts, but which is void as to his heirs, is not admissible against them in a suit in another state to subject the lands of the decedent situated there to the payment of the same debts. *Hull v. Hull*, 35 W. Va. 155, 13 S. E. Rep. 49.

Pendency of Suit in Foreign State.—It seems to be well settled that the pendency of a suit for a matter in a foreign state or territory is no bar to an action for the same matter in another state, either at law or in equity. The states in a jurisdictional sense are foreign to one another. The judgment of the court of another state does not merge the original cause of action in the home state. *Davis v. Morris*, 76 Va. 21; *Beall v. Taylor*, 2 Gratt. 532.

XX. CONSTRUCTION.

A judgment in the name of the commonwealth, for W, treasurer of C county, founded on a notice in the name of the commonwealth proceeding by W, late treasurer of C, against F, the collector of township M, and his sureties, upon his official bond, is a judgment in the name of the commonwealth. On such a judgment the commonwealth, at the relation of the auditor of accounts, may maintain a suit against F, collector of township M, and his sureties. *Com. v. Ford*, 29 Gratt. 683. See also, *Brown v. Greenhow*, 80 Va. 118.

Judgment in General Terms.—In an action against several defendants, the *captas* being returned executed in part only, who appeared and defended the suit, and a discontinuance as to the rest having taken place, by a failure to take out a further process against them, a judgment against the defendants in general terms, must be understood as against those only who appeared, notwithstanding the declaration charged them all as "in custody" etc., and the caption of the entry of the judgment in the order book mentioned the names of all. *Moss v. Moss*, 4 Hen. & M. 293; *Graham v. Graham*, 4 Munf. 205.

When the writ and declaration in the cause are against two defendants therein named, and the record shows that the defendants appeared in court by their attorney, and pleaded in bar to the declaration, and that the defendants made a motion, at the same time to the court in the cause, and afterwards, at another term of the court, the record recites, "this day came the parties," etc., and judgment is rendered in favor of the plaintiff against the defendants, it must be taken that the judgment is against the defendants mentioned in the writ and declaration. *Perry v. McHuffman*, 7 W. Va. 306.

A judgment on a verdict virtually overrules all demurrers to the declaration, and each count thereof. *Fleming Oil & Gas Co. v. South Penn. Oil Co.*, 37 W. Va. 645, 17 S. E. Rep. 203; *Hood v. Maxwell*, 1 W. Va. 219.

476 *Griffin's Ex'or & als. v. A. Macaulay's Adm'r.

Same v. E. Macaulay's Ex'or.

Dismal Swamp Land Co. v. A. Macaulay's Adm'r & als.

April Term, 1851, Richmond.

(Absent CABELL, P., and MONCURE,* J.)

1. **Deeds of Trust—Sale of Land—Misapplication of Trust Fund—Liability of Co-trustee.**—A person named trustee in a deed to secure debts, unites in sales necessary in the execution of the trust, and other formal acts, but he receives none of the trust funds; they being received by his co-trustee; and he is guilty of no fraud in relation thereto. **Held:** He is not responsible for the misapplication or waste of the funds by his co-trustee.

2. **Same—To Secure Creditors—Statement of Amount of Debts—Effect.**—A trust deed to secure creditors reciting the amount of the debts due to the different creditors, is not conclusive, even as against the grantor and his administrator, of the amount of the respective debts.

3. **Same—Evidence—Books of Grantor—Admissibility.**† —Under the circumstances, the books of the grantor in the deed of trust are proper evidence of the amount of the debts due to the creditors secured by the deed.

4. **Same—Trustee—Estimated Rents.**—Trustee not responsible for estimated rents when he has received none, where his delay in selling the property arose out of the difficulty of finding a purchaser.

5. **Same—Creditor's Right to Show Intention of Grantor.**§ —A creditor of the grantor in a deed to secure creditors, may shew by proofs that his debt was intended to be secured under the provision for another creditor.

6. **Same—Same—Delay—Case at Bar.**—Under the circumstances such creditor not barred by the delay from asserting his claim and obtaining relief.

7. **Partnership—Incorporation—Suit for Debt—How Brought.**—A debt is due to a partnership, and the partners are afterwards incorporated, and the debt then becomes the debt of the corporation. **Held:** It is competent to sue for it in the corporate name in a Court of equity.

*The case was argued before his appointment.

†**Deeds—Recitals.**—On this subject, see principal case cited in *foot-note* to *Monteith v. Com.*, 15 Gratt. 172.

§**Same—Evidence—Books of Grantor—Admissibility.**—In *Cann v. Cann*, 40 W. Va. 188, 20 S. E. Rep. 917, it is said: "That original entries on plaintiff's books may, in certain cases, be evidence for himself, see *Downer v. Morrison* (1845), 2 Gratt. 250. See also, *Griffin v. Macaulay* (1851), 7 Gratt. 476."

§**Same—Creditor's Right to Appear before Commissioner.**—In *Feamster v. Withrow*, 9 W. Va. 328, it is said: "In all cases of this sort, each creditor interested in the trust subject, and who is a party, should be allowed to appear before the commissioner, and should be permitted, there, if he chooses, to contest the claim of any other creditors. *Stor. Eq. Jur.* vol. 1, sec. 548; *Wilkins v. Gordon and Wife*, and *Others*, 11 Leigh 547; *Griffin's Ex'r et als. v. Macaulay's Adm'r*, 7 Gratt. 476, 2 vol. Robinson (old) Practice 46." See also, citing the principal case, *Conrad v. Buck*, 21 W. Va. 411.

477 *8. **Deeds of Trust—Construction—Case at Bar.**—

Under the words in a deed of "all debts due the grantor," the indebtedness of a partner of the grantor to the partnership will pass.

9. **Same—Same—Same.**—Under these words, a claim which the grantor has on a foreign government for damages for the detention of his ship, will pass.

10. **Assignor and Assignee—Evidence—Answer—Case at Bar.**—Under the circumstances, the answer of the assignor of a claim held to be competent evidence against his volunteer assignee, in a controversy between said assignee and third persons.

By deed bearing date the 15th of November 1797, Alexander Macaulay of the town of York, in order to secure the payment of the following debts, that is, in the first place, to secure the payment £ 2000. to Dr. Corbin Griffin of the town of York; in the second place, to secure the payment of £ 5000. to John Jamieson of the county of Culpeper; and in the third place, to secure the payment of £ 3000. to Francis Jerdone of the county of Louisa, conveyed in trust to Thomas Griffin and Thomas Nelson, a tract of land in the county of Warwick, lots in the town of York, tenements and lots in the town of Norfolk, lots and tenements in Hanover town, thirty slaves, all the stock, furniture, tools, &c., upon or belonging to the land in Warwick county, the stock and furniture in Yorktown, which was specified, including all his household and kitchen furniture, all his goods in his store in the town of York, one ship called the Charles Carter, one rig called the Helen, one sloop called the John, ten shares in the Dismal Swamp Canal Company, one half share in the Dismal Swamp Land Company, and one moiety of a tract of eight thousand acres of land lying in the county of Norfolk, held in company with Isaac Sexton, deceased. And he assigned to the same persons "all debts due to him;" all of which debts were stated to be expressed in a schedule annexed to the deed; but there was in fact no such schedule.

478 *The trusts declared in the deed were, that the trustees should, as soon as they conveniently could, proceed to sell the property at public auction, and out of the moneys arising from the sale, should, after paying the expenses attending the execution of the trust, first pay the debt above mentioned to be due to Corbin Griffin, and fully indemnify him in all sums and charges in which he was or might be bound as security of Alexander Macaulay; in the second place, to pay the debt above mentioned to be due to John Jamieson, and fully to indemnify him as Macaulay's security; and in the third place, to pay the debt above mentioned to be due to Francis Jerdone, and fully to indemnify him as Macaulay's security; and to apply the residue of the

§**Deeds of Trust—Construction.**—Upon the question of the description of the debts secured in a deed of trust, see the principal case cited in *foot-note* to *Wickham v. Lewis Martin*, 13 Gratt. 427; *Feckheimer v. Nat. Bank*, 79 Va. 85; *Lewis v. Glenn*, 84 Va. 965, 6 S. E. Rep. 866; *Keagy v. Trout*, 85 Va. 399, 7 S. E. Rep. 820.

money arising from the sales of the property, if any residue there should be, to the use of any other creditors of Macaulay.

It appears that Macaulay, with the consent of the creditors, retained the trust property in his possession, and managed it for the purposes of the trust until his death, which occurred in July 1798. After his death the trustees took possession of all the property they could find; and it was sold in 1798, 1799, 1800 and 1801; except the Hanover town property, which was sold in 1811 for £ 49. 10. Although the trustee Nelson joined in advertising the property for sale, in giving Corbin Griffin a power of attorney to sell the Norfolk property, in conveying the land sold, and perhaps in some other formal acts, yet in fact none of the proceeds of the sales went into his possession; and he died late in 1803. Thomas Griffin was the acting trustee. He commenced to make payments to Corbin Griffin in September 1798; and these were continued until the 23d of November 1800. This was the date of the last payment made to Corbin

Griffin during his life, though he lived 479 until 1813. In December 1801 *the

trustee Griffin commenced to make payments to John Jamieson; and in that month paid him £ 2297. Of this sum, £ 750 was the price of the one half share of the stock of the Dismal Swamp Land Company, which was purchased by Jamieson; and £ 1200 was the price of the moiety of eight thousand acres of land in Norfolk county, which was also purchased by Jamieson. On the 11th of February 1804, Jamieson executed two papers, admitting he had bought this property to satisfy a debt due himself, which was discharged, or nearly so, and afterwards for the Dismal Swamp Land Company. And in July 1809 he conveyed the property to the company by two deeds, in which he recited that Jamieson was a manager of the Dismal Swamp Land Company, and the intention of the deed of November 1797 was, after paying a private debt due from Macaulay to Jamieson, to pay a considerable debt due from Macaulay to the Dismal Swamp Land Company; and that the trust had been completely executed as to the claims of Corbin Griffin and John Jamieson as individuals.

In 1815 Robert Anderson, who had married Mrs. Peyton Southall, a daughter of Alexander Macaulay, qualified as administrator de bonis non upon his estate; and in July 1819 he exhibited his bill in the late Chancery court at Williamsburg, against Thomas Griffin in his own right and as administrator of his father Corbin Griffin, Carter Berkeley and Frances his wife, who was Frances Nelson, the administratrix of Thomas Nelson, John M'Neale executor of John Jamieson, and the sheriffs to whom the estate of Alexander Macaulay had been previously committed. In his bill he states that his intestate, Alexander Macaulay, a merchant of long standing and extensive dealing, having a short time before his death encountered considerable losses in his shipping business, by reason of captures at

480 sea and mercantile failures, found himself, after many years of *laborious enterprise, involved in difficulties and perplexities, from which he was unable with promptitude to extricate himself. These captures and losses having temporarily drawn from their usual course of trade so great a portion of his funds, he was unable to meet with his accustomed punctuality, the payment of all his moneyed engagements; and as is usual in such cases, many of his creditors pressed him with the lashes of the law. Owning and possessed of a very considerable estate in lands situated in various parts of the country, vessels and cargoes at sea, and in ports foreign and domestic, slaves, merchandise, debts, and numerous other personal estates, he could not justly, and therefore did not, apprehend that his creditors were jeopardized by his situation, although he had to encounter such numerous and extensive difficulties. Confident of his ability in time to command his funds, which were in amount beyond the just demands of his creditors, indulgence was all he wanted; but by many this was denied him. And in order to place his creditors on a more general and equal footing than some of them were willing to remain on, he conveyed to Thomas Griffin and Thomas Nelson as trustees, by deed dated on the 15th of November 1797, the greater part of his estate.

After stating the trusts of the deed, the bill charges that Macaulay, at the time of its execution, was not indebted to Corbin Griffin as much as £ 2000., or anything near that sum; and that he never was so largely indebted to him: and of the debt which he did owe him at the time of executing the trust, a considerable part of it was paid to him between that period and Macaulay's death. That Macaulay was indebted to John Jamieson in only a small sum, at the time of executing the trust deed; and that he did not become more so after its date. The plaintiff believed that the debt of £ 3000. secured by the deed to Francis Jerdone was really due to him, and perhaps a 481 greater sum; but that *neither Jerdone or Jamieson was bound as security for Macaulay for a cent when the deed was executed, or became so bound afterwards. That Corbin Griffin was bound as Macaulay's security in several instances at the time of executing the said deed; and that he probably became a further security for him after its execution; but that from the debts for which he was bound as surety for him before the execution of the deed, Macaulay afterwards released him in a great degree, by the settlement of the debts before his death. And thus the sums of £ 2000. to Corbin Griffin, and £ 5000., to John Jamieson, were in a great degree merely nominal debts; and the £ 5000. to Jamieson almost entirely so. In order to secure these three sums however, amounting nominally and really together to ten thousand pounds, Macaulay had conveyed to Thomas Griffin and Thomas Nelson, by the said deed, property to an amount of more than five times the

sum; most of which the plaintiff charged had been, could be or would have been realized by the proper diligence of the said trustees.

The complainant then proceeded to state the death of Macaulay, in July 1798, leaving a widow and four infant children. That the trustees took possession of all his property, and also of all his books and papers. That since his qualification as administrator, he called upon Berkeley, the administrator of Nelson, and upon Thomas Griffin, for an account of their actings and doings in execution of the trust, but had not obtained any satisfactory account. And after stating at great length, the property which he charged had gone into the hands of the trustees, and interrogating them with great minuteness, upon all the subjects embraced in the bill, he asked for an account of their transactions, and a payment to himself of the amount which might be ascertained to be in their hands, and for general relief.

482 *Thomas Griffin filed an answer to the bill, which was excepted to by the plaintiff, for his failure to respond to some of the allegations and interrogatories of the bill; and some of the exceptions being sustained, he filed an amended answer. He stated that some of the property mentioned in the bill, the trustees had never been able to find. That such was the fact as to the ships Helen and John. That the ship Charles Carter had been sold by a decree of the United States court, at the suit of Thomas Lane, who had a lien upon it. That other property mentioned in the deed had been sold by Macaulay, in his lifetime, who remained in possession of the property up to the time of his death, by the permission of the creditors. That he had never seen the schedule of debts mentioned in the deed. That the trustees proceeded soon after the death of Macaulay, to sell all the trust property they could find, and had applied the proceeds as stated in the account presented to the complainant.

The defendant further stated that the books of Macaulay shewed that he was indebted to Corbin Griffin at his death; and also that said Griffin was bound as his surety for a large amount. Of the debt due from Macaulay to Jamieson and Jerdone, the defendant Griffin knew but little, except that Macaulay during his life, frequently informed him that he was indebted to Jamieson for large sums of money, which Jamieson, as agent of the Dismal Swamp Land Company, had suffered Macaulay to receive, and for which Jamieson was bound to account to the company; and that Jerdone had lent him a good deal of money in his distress. But that, however all that might be, he conceived the trustees had nothing to do with this part of the case, for the trust deed itself acknowledging the existence of the debts therein mentioned, and directing payment thereof by the trustees, it was not for them to enquire whether

483 the debts were due or not; but their business was to *execute the trusts

and powers committed to them, in order to the satisfaction of these demands. He did not admit that Macaulay ever made any other payments to Corbin Griffin after the execution of the deed, than such as appeared on Macaulay's books, or that Macaulay relieved him from his liabilities as his surety.

The defendant Griffin further said that he knew nothing of the accounts between Macaulay and Corbin Griffin, except what was disclosed by Macaulay's books; but as these books shewed a much less balance due at the time of the execution of the deed of trust that was therein stated by Macaulay himself, the defendant always conceived, that as trustee he was bound to settle with the creditors mentioned in the deed, according to its directions, and not according to the appearance of accounts existing prior to its date, and not then closed; and under these impressions all payments were made by the trustees, to Corbin Griffin and Jamieson.

M'Neale, the executor of Jamieson, also answered the bill. After admitting the execution of the deed of trust, and that it secured to Jamieson £ 5000., he said that he did not admit that Macaulay was indebted to Jamieson in a small sum only; nor had he been able to discover the evidence of his being indebted to Jamieson in a sum less than the whole amount, although it was probable that such was the case; which, if it were so, ought to be shewn, as the deed was a solemn instrument, and carried upon its face evidence that the whole sum was due. That from the best information he had been able to obtain, Macaulay was considerably indebted to Jamieson, if not to the whole sum of £ 5000. He had been informed and believed that part of the sum of five thousand pounds consisted of £ 3000. or upwards, belonging to the Dismal Swamp Land Company, which was loaned by Jamieson to Macaulay some time in the year 1796; and that the other part of the

484 debt secured by the deed of trust, to be paid to Jamieson, *was a private debt due from Macaulay to Jamieson; but as Jamieson was a careless accountant and kept no books, and had left no account of the transactions between him and Macaulay, the defendant was not enabled to say from anything derived from that source, what was the amount of the debt due from Macaulay to Jamieson; but from an account taken from the books of Macaulay, by Corbin Griffin, and furnished to the defendant, it appeared that on the 15th day of May 1797, a few months before the execution of the trust deed, Macaulay was indebted to Jamieson in about the sum of £ 173. 10. 7. And although it was probable that these two sums with the interest due thereon, formed the aggregate, to secure the payment of which the said deed of trust was given, the defendant could not admit it was the case, and it was probable that Macaulay might have been indebted to Jamieson on some other account that did not appear.

In October 1819, Elizabeth Macaulay, the

widow of Alexander Macaulay, exhibited her bill in the late Williamsburg Chancery court, against Thomas Griffin, as trustee in the deed from Alexander Macaulay, and as executor of Corbin Griffin, Carter Berkeley and Frances his wife, late Frances Nelson, widow and administratrix of Thomas Nelson, M'Neale as the executor of John Jamieson, and the sheriffs to whom the estate of Macaulay had been committed before Robert Anderson qualified as administrator, in which, after setting out the deed executed by Macaulay to Thomas Griffin and Nelson, she alleges that Francis Jerdone was her brother, and that he had assigned to her all his right in the £ 3000. secured to him by the deed aforesaid.

The charges as to the debts of Corbin Griffin and Jamieson, the conduct of the trustees, and the property conveyed, are substantially the same as in the bill of Anderson, administrator of Macaulay; 485 but there is nothing *said as to the embarrassments of Macaulay, or his motives or objects in executing the deed.

The bill further charged, that independent of the claim which the plaintiff had upon the trustees in virtue of the assignment to her by Francis Jerdone, she had claims upon them and upon others who had since held the lands, for money due from them to her in right of her dower in the lands conveyed to the said trustees by Alexander Macaulay; for that the annual profits of a portion of the said real estate so conveyed were considerable, until the sales were all received by the trustees, and that she had as yet received from them only a portion of what came to their hands of the said dower interest.

The prayer of the bill was, that the Court would decree the defendants to render on oath, proper accounts of their and each of their transactions, and that the plaintiff might be paid the amount of her said several claims, and for general relief.

To the bill of Mrs. Macaulay, Griffin and M'Neale, answered substantially as they did to the bill of Anderson as administrator of Macaulay. Berkeley and wife answered that they knew nothing of the transactions in the bill mentioned, further than that Thomas Nelson was named a trustee in the deed of the 15th of November 1797; but they believed he never acted under the deed, except to join in certain formal acts to which his assent was necessary; and that Thomas Griffin had been the sole acting trustee.

In 1820, the president and managers of the Dismal Swamp Land Company instituted a suit in the Chancery court of Williamsburg, against Alexander Macaulay's administrator, Thomas Griffin, as trustee of Macaulay and executor of Corbin Griffin, Jamieson's administrator, Berkeley and wife, Jerdone, and Turner Christian, executor of William B. Christian, which, owing 486 to some error in the institution of the suit, was *permitted to abate. And

then in 1823 the company instituted another suit in the same court against the same parties. In their bill they state that

as owners of a large tract of land in the Dismal Swamp, the members of the company had for many years derived a profit from working the timbers on said land into shingles, which operation had been attended to by agents under the immediate control of directors, until 1814, when by an act of the General Assembly of Virginia, the company was incorporated. That in the year 1793 and until 1797, Alexander Macaulay was a member and director, and as such had an equal control with other directors over the funds and property of the company. That during this period Macaulay as director, with the consent of John Jamieson, also a member and director, received and applied to his own use at different times, large sums of money, which with the interest, amounted in the month of November 1797, to the sum of 13,395 dollars 69 cents, with interest on the several items from their respective dates, at which time the affairs of Macaulay becoming embarrassed, he executed to Thomas Griffin and Thomas Nelson of York, a trust deed conveying an immense property to secure Dr. Corbin Griffin in the sum £ 2000., with other liabilities, said John Jamieson in the sum of £ 5000. and Francis Jerdone in the sum of £ 3000. and any balance for the benefit of his creditors generally.

They charge that at the time of executing this deed, Jamieson was still a member and director of the company; and that it was the object and intention of Macaulay to secure to the members of said company, through their director John Jamieson, the sum of money due to them; and that in fact the £ 5000. was intended to cover that sum, and a small debt due to Jamieson individually; and although the deed does not state the fact, they have abundant evidence to prove it, obtained through the frequent acts and acknowledgments of 487

*Jamieson himself. And they exhibit two deeds dated July 20th, 1809, by one of which Jamieson conveys to William Nelson and others, members of the Dismal Swamp Land Company, a moiety of eight thousand acres of land; and by the other he conveys to the same parties a half share of the stock to the company. And they charge that in both these deeds, Jamieson expressly acknowledges that the deed of trust was intended, after paying a small debt to Jamieson, to pay a large debt due the Dismal Swamp Land Company, and that the trust was completely executed as to the claim of Corbin Griffin and the individual debt due to Jamieson. That all parties have tacitly acknowledged the claim of the company through Jamieson. That they have not been disturbed in the enjoyment of the property transferred to them by the deeds aforesaid; and the trustee himself, a member of the company, not only in the full knowledge of these facts, but for two years past, had induced the company to believe that a large portion of the balance due to them would be paid by him out of funds still held by him as trustee. They charge that Griffin had been guilty of gross negligence

and mismanagement in his execution of the trust. That he had failed to collect debts that he might have collected. That he had allowed property to waste without selling it. That he had not paid over to the proper parties the proceeds of such property as he did sell. And that he paid himself as executor of Corbin Griffin, more than he was properly entitled to under the deed of trust. They charge that Thomas Griffin had expressly promised to pay to them a sum of upwards of 5000 dollars, which he received in 1819 from the government of the United States, as due to Alexander Macaulay's trust fund, and that he deceived them. And they charged that there was a large debt due the trust fund from the estate of William B. Christian and others.

488 *The plaintiffs refer to the suit of Anderson as administrator of Macaulay against Griffin and others, in which he claims any balance in the hands of the trustee as well as to collect all debts due the estate of Alexander Macaulay; and they insist that they are first entitled to any balance in the hands of the trustee, and to any fund which may arise out of the property conveyed in the trust deed until they are paid. They call upon the defendants to answer as to the facts stated in the bill. They ask that Griffin shall give an account of the trust fund and his administration of it. That Anderson shall exhibit an account of his administration of Macaulay's estate, shewing the money and property he has received, and the debts he has collected. That M'Neale say what he knows of the claim secured to Jamieson, and whether he does not know that a great portion of the sum of £ 5000. was secured to him as a manager of the Dismal Swamp Land Company; and if from the books of Jamieson he can ascertain how much of said money was due to Jamieson individually. That Francis Jerdone say if he has received any portion of his debt due from Macaulay, and how much; and that Turner Christian, executor of William B. Christian, may shew what property he became possessed of as executor, and what disposition he had made of it. And that the plaintiffs may be considered as interested in the decision of the suit of Macaulay's administrator.

In July 1824 Anderson answered the bill. He admitted that Macaulay had been a member of the Dismal Swamp Land Company, but did not admit that he was a director of the company; or if he was that he had control over the funds of the company during the period referred to in the bill, equal to that exercised by their directors; but he alleged that a certain John Brown, then a member of the company, was the treasurer, and received and disbursed its funds. He denied that his intestate ever

489 did, during the said period, either with or *without the consent of John Jamieson, receive from the company and apply to his own use, either at different times or at any time, either large sums or any sum of money, other than such as may have been his dividends.

The defendant admitted the execution of the deed of trust by Macaulay to Griffin and Nelson, but believing as he said, that his intestate was not indebted at all to the Dismal Swamp Land Company, he denied that Macaulay had any such object or intention in view as to secure to said company through said Jamieson or otherwise any sums of money whatever; or that the said £ 5000., or any part thereof, was intended to cover or secure any sum of money whatever to the company. He said that Macaulay's debt to Jamieson was less than £ 200., and as he believed was paid off in 1801.

The defendant charged that the trustees had sold the property at most inadequate prices, and had conducted the sales improperly; allowing Corbin Griffin to sell for them, and to buy at most inadequate prices, at his own sale. That Corbin Griffin and Jamieson were managers of the company, and Thomas Griffin the acting trustee under Macaulay's trust deed, these parties claiming too under the trust deed £ 7000.; and yet under these circumstances, the company lay still for five and twenty years without making one effort to secure their alleged debt, which they now say amounted in November 1797 to the enormous but precise sum of 13,395 dollars 69 cents.

He denied that the trustees became assignees of all debts due to Macaulay at the time the trust deed was executed. He alleged that there was a schedule of such debts as Macaulay conveyed by the deed, and that the surviving trustee withheld it as defendant believed, because he had collected many of those debts, of which no discovery ever would be made without its production. But if the deed passed all the debts then due to Macaulay, the defendant insisted that the claim which

490 *his estate had on William B. Christian would not be embraced therein; for Macaulay and Christian were partners in a mercantile concern in Hanover, and Christian survived Macaulay, who lived more than eight months after the date of the trust deed. That the partnership went on as usual, Macaulay continuing to supply the store with merchandise. That the concern had not been settled up, but a suit was then pending for that object; and that in that case the surviving trustee, Thomas Griffin, had filed an answer in which he disclaimed all right under the deed to claim any sum that might be found due to Macaulay on a final settlement of that concern.

Finally, the defendant denied that Macaulay owed the Dismal Swamp Company anything. But if he did, he denied the right of the company to claim payment through Jamieson, under the trust deed or otherwise. And he moreover denied their right to claim of him at all in a Court of chancery. He insisted that their recourse against him, if any thing was due, was in a Court of law: and in either case he pleaded the lapse of time as a complete and final bar to any claim which the company had or might set up against his intestate.

Griffin in his answer to the bill said that

he had received no money from the United States government "under the treaty of peace with France." That he had received money arising from the sale of the trust estate, the collection of debts and other sources, all or nearly all of which had been administered by him, and paid away as directed by the deed. That he had paid to the executor of Corbin Griffin, the first named creditor in the deed, the balance which appeared to be due to his estate. That he did this because he was advised by counsel that the trust deed ought to be his sole guide: that this deed expressly acknowledged a debt to be due to Corbin Griffin of £ 2000., and directed *the same to be paid. That the deed fully indemnified Corbin Griffin for his sureties for Macaulay; and that said Corbin Griffin had been compelled to pay considerable sums of money as the surety of Macaulay. That he was advised by counsel that the debt due from the estate of William B. Christian did not come within the deed, because that could only include such debts as were then due to Macaulay; and that the partnership of William B. Christian & Co. continued, and their operations proceeded until the death of Macaulay. That this debt arose out of this partnership, and became a debt only at the dissolution thereof.

Francis Jerdone in his answer said that there was no debt due to him individually from Macaulay. That he had been informed and believed that Macaulay in his lifetime had transactions with a certain William Douglass; and received from him timber and produce from an estate at that time managed by said Douglass, of which estate defendant was half owner; and that Macaulay was indebted to Douglass and defendant on account of that timber and produce; but to what amount he was unable to say. That no payment had been made to him on that account either by Macaulay in his lifetime or by any one since. That since the death of Macaulay he had assigned to Mrs. Macaulay, his sister, the debt aforesaid, and that he therefore had no claim against Macaulay's estate.

M'Neale in his answer said that he had been informed and believed that a part of the debt secured by the deed to be paid to his testator, consisted of the sum of £ 3000. or upwards, belonging to the Dismal Swamp Land Company, which was loaned by his testator to Macaulay, and for which Jamieson feared he had incurred a personal responsibility. That the other part of the sum secured, or a considerable part thereof, was a private debt due from Macaulay to Jamieson; but his testator was careless and kept no books, and therefore

492 *he could not say from any thing derived from that source, what was the amount of the debt due from Macaulay to Jamieson: but from an account taken from the books of Macaulay by Corbin Griffin, and furnished to the defendant, it appeared that Macaulay was indebted to Jamieson, on the 15th day of May 1797, a few months before the deed was executed, in the sum of

about £ 173. 10. 7. And although it was probable that these two sums formed an aggregate, to secure the payment of which the deed was given, the defendant could not admit it to be the case, as it was probable that Macaulay might have been indebted to Jamieson on some other account also.

The defendant stated the purchase by Jamieson of the moiety of the tract of eight thousand acres of land, and the half share of the stock of the Dismal Swamp Land Company, and his conveyance of these to the company in 1809, for the purpose of reimbursing them for the aforesaid £ 3000. He also stated certain sums of money he had received in 1801. He further stated that since the death of Jamieson the defendant had settled his account with the Dismal Swamp Land Company, and had obtained from the company a complete discharge and release of and concerning the premises.

In July 1823, the two first of these causes were removed to the Chancery court at Richmond; and on the 18th of March 1825, the case of E. Macaulay against Griffin and others came on to be heard, when the Court made a decree directing the defendant Thomas Griffin to render before one of the commissioners of the Court accounts of the joint transactions of himself and Thomas Nelson, during the lifetime of the latter, as trustees of Alexander Macaulay, and of his own transactions as surviving trustee of said Alexander Macaulay, since the death of said Nelson; and that he produced before the said commissioner, under oath if required, all the books and papers of every description, in his possession or 493 *power, belonging to the estate of Alexander Macaulay; and that he moreover, if required, submit to be examined in solemn form touching the said books and papers, and his joint and separate transactions as trustee of said Alexander Macaulay. That he render before said commissioner accounts of his testator Corbin Griffin's transactions with the said Alexander Macaulay, during their joint lives, and with the estate of the latter after his death; also an account of all receipts or collections made by the said Corbin Griffin of the debts or effects of Macaulay individually, or as agent of said Thomas Griffin and Thomas Nelson, jointly or separately, as trustees of said Macaulay; and that he also render before said commissioner an account of his actings and doings as administrator of the said Corbin Griffin.

And the Court further decreed Carter Berkeley and Frances his wife to render before the same commissioner an account of their intestate Thomas Nelson's joint and separate transactions as a trustee of Alexander Macaulay deceased; and also accounts of their administrations of the estate of Thomas Nelson deceased.

And the Court further decreed the defendant John M'Neale to render before the same commissioner accounts of his testator John Jamieson's transactions with Alexander Macaulay during their joint lives, and with

the estate of the latter after his death; and that he also render an account of all moneys and effects of said Alexander Macaulay which came to his said testator's hands, either direct from the said Thomas Griffin and Thomas Nelson, or from either of them, as trustees of the said Alexander Macaulay or otherwise; and that he also render before the same commissioner an account of the dividends, proceeds and profits of the lands and Dismal Swamp Land Company's shares, of the said Alexander Macaulay, which came to the possession, or whilst they remained under the direction of the said

494 *John Jamieson or his agents. And that he also render an account of his transactions as executor of said John Jamieson.

On the 25th of March, the Court, on the motion of the defendant Griffin, ordered that the cases of A. Macaulay's administrator against Griffin and others, and of E. Macaulay against Griffin and others, should be consolidated, and thereafter prosecuted as one suit; and that the foregoing decree entered in the last of the causes, should be considered as entered in both.

In obedience to the foregoing decree, commissioner Baker in October 1826, made a report containing numerous statements of the accounts directed by the decree; and to this report the plaintiffs and the defendants filed many exceptions.

The case of the Dismal Swamp Land Company against Macaulay's administrator and others, was removed to the Chancery court at Richmond by an order made on the 19th day of July 1825. And on the 7th day of March 1827, the three causes came on to be heard together; and after argument they were continued until the 29th of June 1829, when the Chancellor held that Anderson, as administrator of Macaulay, was not the proper plaintiff in the first of these suits; but that it should have been brought in the name of the widow and heirs of Alexander Macaulay. As to Mrs. Macaulay's claims, he held that she not having joined in the trust deed, she was entitled to dower; and that so far as the trustees had sold any of Macaulay's lands, she might waive her claim for dower therein, and might upon a proper bill for that purpose, be allowed compensation out of the purchase money, perhaps, in lieu of dower; or she might be allowed the benefit of any contract in relation thereto. And he also held that she was entitled as the assignee of Francis Jerdone, to the full amount assigned by him to her, as fixed by the deed. And he

495 left it to her counsel to *say how far her bill made a proper case as to her rights, except as assignee as aforesaid, to any other matter or right she had under the said Alexander Macaulay. Wherefore the Court, setting aside so much of any order made in these causes, before or since they were consolidated, or any report under the same as conflicted with what followed, decreed that the bill of the plaintiff in the first suit be dismissed with costs. And that leave be given to the plaintiff in the

second suit to amend her bill and make new parties within thirty days; and if not done within that time, that so much of her bill stand dismissed as an act of this day. And it was ordered that the second and third of these causes be so far consolidated as to render it unnecessary to take the account of the trustees in relation to the whole of the trust subject in both. And the accounts were referred to a commissioner with instructions.

On the 2d of July 1829, the three causes were again brought on, when the following decree was entered in them:

"The parties, by their counsel, having consented, as hereinafter mentioned, the decree pronounced in these causes on the twenty-ninth day of June last, is set aside; and by consent of parties, in the first of these causes, in writing, Robert Anderson and Helen M. his wife, Robert Anderson, administrator of Alexander Macaulay jr., and of Francis Macaulay deceased, Patrick Macaulay and Elizabeth Macaulay, (which said Helen and Patrick are, and the said Alexander jr. and Francis were the children, and the said Elizabeth is the widow of Alexander Macaulay deceased, and his only heirs and distributees,) are admitted parties plaintiffs in the first of these causes; and by like consent the bill therein is amended so as to add to it a prayer, that the balance of the trust subject that may be found in the hands of either or any of the defendants, or with which either or any of them

may be chargeable directly or indirectly, *may be decreed to the parties

496 now admitted as plaintiffs, in their rights as heirs and distributees aforesaid, if the same should not be decreed to the administrator of said Alexander Macaulay deceased; and by like consent, the answers heretofore filed are to stand as answers to the bill in which the said parties are as aforesaid admitted plaintiffs, and which is amended as aforesaid, and the first of these causes heard on the bill so amended as aforesaid, the said answers with general replications thereto, the examinations of witnesses, exhibits and accounts heretofore filed or returned, without any further proceedings at rules. And thereupon these causes came on this day to be again heard together on the papers formerly read, and the pleadings amended in the first of these causes as aforesaid, and were argued by counsel: On consideration whereof, the Court doth recommit the reports made by commissioner Baker, with the several exceptions thereto, to any other commissioner of the Court, for him to re-state and settle the accounts between the parties, and make report thereof to the Court, with any matters specially stated deemed pertinent by himself, or which may be required by the parties to be so stated. It will not escape the attention of the commissioner, that in taking the accounts of the trustees, they should not be taken jointly unless they so expressly acted: it will follow, therefore, that where they did not so expressly act, each will be held to have acted for him-

self, and liable accordingly; and that whether one or more of the trustees permitted the said Corbin Griffin, in his lifetime, to interfere with the books of the said Alexander Macaulay deceased, he or they must be liable for his acts.

"The commissioner, in the absence of all other proof, will resort to the trust deed as fixing the debts therein enumerated to be first charged on the trust fund, subject to be controlled by legal proofs in relation to the same. He will not be misled by the
497 imaginary claims *of any party blotted out by time, but will suffer all such to sleep undisturbed. The trustees, however, cannot be protected, as to any of their own acts, by lapse of time.

"And the Court doth give leave to the plaintiff in the second of these causes, to amend her bill in relation to her dower claim, if she shall be so advised within thirty days from this day; and if not done within that time, so much of her bill is to stand dismissed as an act of this day. But if the plaintiff in the second of these causes, shall so amend her bill, the re-settlement of the accounts before the commissioner is not to be delayed thereby."

The causes having been transferred by operation of law to the Circuit Superior court for the county of Henrico, on the 24th of November 1832, on the motion of the plaintiffs in the first suit, so much of the order made in these causes on the 29th of June 1829, as recommitted the report of commissioner Baker, with the exceptions thereto, was set aside. And Elizabeth Macaulay having died, the second suit was revived in the name of her executor, Robert Anderson; and on the 3d of December 1833, the first two causes came on again to be heard upon the papers formerly read, when the Chancellor—Brockenbrough—delivered an opinion in which he passed upon all the exceptions to commissioner Baker's report. The most of these exceptions it is unnecessary to notice; but the opinion of the Judge presents the questions which arise in the cause, and gives the facts in relation thereto; and will save the necessity of any other statement of them. That part of the opinion is as follows:

"The first question which arises in this case is, what was the extent of the debt due from Macaulay, at the time of the execution of the deed (that is, on the fifteenth
498 day of November, one thousand seven hundred *and ninety-seven,) to the three preferred creditors, Corbin Griffin, John Jamieson and Francis Jerdone? I am not disposed to admit that the deed furnished conclusive evidence of the extent of that debt, as the counsel of Griffin contends. I have always supposed that in a Court of equity especially, it was allowable for either party to aver and prove that the true consideration of a deed is different from that expressed in the deed. This position is recognized to be correct by Judge Tucker, in the case of Duval v. Bibb, 4 Hen. & Munf. 113; and in the case of Epps v. Randolph, 2 Call 185, a different and ad-

ditional consideration was allowed to be proved than that expressed in the deed; and in the case of Harvey v. Alexander, 1 Rand. 219, the Court decided, that where there was a good consideration, and a valuable consideration of only one dollar expressed in the deed, parol proof was admissible to prove other valuable considerations. If in those cases the true consideration may be proved, I do not see why a grantor in a deed of trust, or his representatives, may not be allowed to prove that the debts which he intended to secure, are not so large as is shewn by the recital of the deed.

"Again, I do not think that there is any distinct affirmation in this deed that the sums specified are actually due to the three preferred creditors, Griffin, Jamieson and Jerdone. In the beginning of the deed, it recites the purposes for which the subsequent conveyance of the mass of the grantor's property, real and personal, is made; it witnesseth, that the grantor, 'in order to secure the payment of the following debts, that is to say, in the first place to secure the payment of two thousand pounds, current money of Virginia, to Dr. Corbin Griffin,' &c. &c. This is not a direct affirmation, like an obligation by which he binds himself to pay the money, or a promissory note by which he promises to pay
499 it, but a mere recital that he intends to secure the *payment of a debt, from which the inference is that he does owe it. And in so declaring the duties of the trustees, it directs that they shall proceed 'the debt to pay, above mentioned to be due to the said Corbin Griffin,' &c. This is not a simple affirmation, as in the before mentioned obligation, but a recital merely, from which it may be inferred, however strongly, that he does owe those sums to those persons. Would the grantor be estopped in any proceeding at common law, to deny that he owed those sums? I think not; for we have the highest authority for saying, that 'every estoppel must be certain to every intent, and not to be taken by argument or inference.' And again, 'every estoppel ought to be a precise affirmation of that which maketh the estoppel, and not to be spoken impersonally,' &c. Neither does a recital conclude, because it is no direct affirmation. Co. Litt. 352 c. If this be true in common law, much more is it true in equity.

"In perusing this deed, it strikes the mind as a remarkable circumstance that Alexander Macaulay should be in debt, on the 15th day of November 1797, in the round sum of ten thousand pounds, to his three friends; and not only so, but that that sum should be composed of a round sum due to each of them; to one two thousand pounds, to another five thousand pounds, and to the third three thousand pounds. Is it possible, that to neither of them a few pounds, shillings, pence or farthings, less or more than the exact sums of two, three or five thousand pounds, were due on that day? Were those precise sums lent to him on that day, and no more or less? Or if the money

lent, or articles sold, were advanced at previous times, did the interest on the advances, when added to the principal, make an aggregate of principal and interest, in each case, on that day, of the exact sums specified in the deed? It is not to be believed. The mind is necessarily drawn to

the conclusion, that there were debts due to those three gentlemen *on that day, but that there was no settlement of accounts between them, no calculation of principal and interest; (if there had been, where are the settled accounts, the bonds or the notes?—none such are produced;) that the grantor was anxious to secure those particular creditors, in preference to others, who had not equal claims on him, and that sums were mentioned which were amply sufficient to embrace the whole amount due to each and all of them, leaving it to a future settlement to ascertain the precise amounts due to each.

"Having thus ascertained, at least to my own satisfaction, that the nominal sums recited in the deed are not those which are really due, and Dr. Corbin Griffin having left no bond, note or settled account of his debtor, and the defendant Thomas Griffin, either as trustee of Macaulay, or administrator of his father, having produced none, the next enquiry is, whether the mercantile books of Macaulay can be resorted to as evidence for the purpose of ascertaining the amount really due? Under particular circumstances, I think it is clear that the books, or even an account of a merchant, may be adduced as evidence in his behalf, against his debtor, and that they may form at least very strong presumption against him. If it be proved that a customer is in the habit of dealing with a merchant, and the latter render an account of items, which is delivered to the customer, with a request that he examine them, and he retains the account for that purpose, and makes no objections to the items, or makes objection to some of them, that account rendered is competent evidence to charge him. In this case, the deed of trust was executed on the fifteenth day of November 1797, and the grantor died on the seventeenth day of July 1798. During that period, it appears that Dr. Griffin had frequent access to the books of Macaulay, and particularly had a full view

of his own account, and that he even made *entries in his own account on Macaulay's books, at the request of Macaulay; that the books were taken possession of by the trustees, after the death of Macaulay, and that the practice was continued by Dr. Griffin, with the permission of the trustees, of making such entries in those books, and he was appointed by the trustees their agent in assisting Miller Brown, the clerk, to post up the books.

"Nothing can be more clear, than that Corbin Griffin and the acting trustee, his son, were perfectly acquainted with the fact that he stood creditor on those books for a much smaller sum than the two thousand pounds mentioned in the deed. Would not this circumstance create uneasiness in the

mind of Dr. Griffin, even during the lifetime of Macaulay, if he were really a creditor to that extent? Would he not have expressed that uneasiness to Macaulay, and insisted strenuously on the account in the books being rectified, and made to consist with the true state of affairs between them? It seems to me that any prudent man having the least regard to his own interest, would have required it; and his failure to make complaint of the books and to require their correction, affords a strong presumption that in his own estimation they were right.

"There is another circumstance which appears to me to be strong, if not irresistible, to prove that the sum recited in the deed was not the actual sum due, and that the books shew the real amount of the debt. Corbin Griffin was the preferred creditor of Macaulay, over all others. Jamieson was, according to the deed, (and in fact, so far as the Dismal Swamp Land Company's claim extended,) a larger creditor, but in point of preference he was second to Griffin. At a very early period it was evident to the trustees, as well as to Dr. Griffin, that there would be very great difficulty, from the proceeds of the trust fund, to pay the preferred

creditors their debts, and to secure them in their *liabilities for Macaulay. Dr. Griffin had every motive to wish for a speedy payment of his debt, and for his complete indemnification. If the large sum of two thousand pounds were actually due to him, it is not credible that he would be willing to see the greater part of that debt jeopardized by permitting the trustees to pay over to the second creditor the greater part of the large sum of three thousand pounds, in preference to his own. Yet such was the fact. The trustees, or one of them, certainly paid over to Jamieson large sums of money, with the full knowledge of Dr. Griffin, between the years 1800 and 1809, whilst they do not appear to have paid any thing to Dr. Griffin after the year 1800, in payment of his large debt, during the residue of his life, which continued some twelve or thirteen years. They not only paid Jamieson, but they pressed him, by letters, to assert his claim, and to attend at some of the sales. This knowledge and acquiescence on the part of Dr. Griffin, prove to my mind, very satisfactorily, that he was conscious that he had been paid all that was due, and that the books of Macaulay were to be relied on as evidence of the actual state of the debt.

"Connected with this question of the amount due from Macaulay to Corbin Griffin, is the subject of two payments made to Benjamin Waller, as attorney for Joseph Holmes & Co., in the lifetime of Macaulay, and which two sums are claimed by Thomas Griffin, as having been paid by Corbin Griffin as security for Macaulay, and as such within the deed; one of whose objects was 'to indemnify him (Corbin Griffin) in all sums and charges in which he stands, or may be bound as security to the said Alexander Macaulay.' These two sums

are £ 250. paid to Waller on the nineteenth day of March 1798, and £ 300. on the twenty-second day of May 1798. It seems that Waller gave receipts to Corbin Griffin for these two sums, and hence the

503 *claim set up to charge them against Macaulay. But in the document furnished by William Waller, executor of Benjamin Waller, marked WAC, these two sums are stated to be received from Alexander Macaulay. The difficulty then is, to ascertain whose money it was by which these two sums were paid. As to the £ 300., there seems to be not much dispute, from the document WAD, in Thomas Griffin's handwriting, it appears that six slaves of Macaulay's were sold by himself, 'and money appropriated to discharge in part the debt due to Holmes & Co., with Corbin Griffin security £ 300.' In this instance then it clearly appears that although Benjamin Waller gave a receipt to Corbin Griffin on the twenty-second day of May 1798 for £ 300., yet that money was raised from the sale of Macaulay's own slaves, and consequently the receipt to Corbin Griffin is not conclusive to shew that he ought to charge that sum to Macaulay. The probability is, that as Corbin Griffin was security for the debt, and at that time, by request of Macaulay, made entries in the books of Macaulay, he was also requested to receive this money from the purchase of the slaves and pay it over to Macaulay's creditor. As to the sum of £ 250., there is more difficulty, but I think an attention to the documents will clear up the difficulty. It seems that Benjamin Waller, as attorney for Holmes & Co., gave a receipt to Corbin Griffin, bearing date the nineteenth day of March 1798, for £ 195. 9. 2., on account of a judgment on a forthcoming bond obtained against Macaulay, with Corbin Griffin and Thomas Griffin as securities; and on the back of another bond, gave a similar receipt to Corbin Griffin for the sum of £ 54. 10. 10., in full of that bond which had been given by Macaulay, with Corbin Griffin as security. These two sums make £ 250. It further appears that on that very day Alexander Macaulay executed a bond, with Corbin Griffin as security, for the same

504 sum of £ 250., to *Philip Tabb of Gloucester. Hence, a very strong presumption arises that the money paid on that day to Waller for Holmes & Co. was the money borrowed by Macaulay from Tabb, and that Corbin Griffin was the bearer of it to Waller, and took the receipt in his own name. This presumption is much strengthened by the document WAB., furnished by William Waller, in which is this entry made by his father:

'Holmes & Co. v. Macaulay,	
£ 250, settled with Mr. Tabb	
the small bond,	54 10 10
Towards the second bond, . . .	195 9 2
	<hr/>
	£ 250 00 00

March 19, 1798.'

"So far then, I think the commissioner

right in considering the two sums as paid to Waller for Holmes & Co., out of Macaulay's own money, notwithstanding the receipts to Corbin Griffin. But in the further progress of this debt of £ 250., I think the commissioner most decidedly wrong. Macaulay, it is true, borrowed this sum from Tabb to pay a debt for which Corbin Griffin was secured, and against which he was indemnified by the deed of trust. To pay Tabb, Macaulay gave a new bond, with the same Corbin Griffin as security, who paid off that bond. The commissioner himself, shews in page thirty-three of his report, (note to account F,) that Corbin Griffin, after the death of Macaulay, on the sixth day of May 1799, paid £ 150., and on the twentieth day of August 1799, paid the further sum of £ 119. 10. 2., in full of the principal and interest of that very bond given on the nineteenth day of March 1798 to Philip Tabb. Surely then, Corbin Griffin ought to have credit with Macaulay's estate for these two sums paid by him in discharge of the said bond. But the commissioner rejected these credits, and excluded

505 them from the account F, on the *ground 'that the trustees were not authorized to pay them under the trust deed.' In this matter I differ with the commissioner in opinion. The original bonds due to Holmes & Co., in which Corbin Griffin was security, were expressly embraced by the deed. The borrowing a part of the sum due on those from Tabb, and giving Corbin Griffin as security to him, could not place Griffin in a worse situation than he was before, if in fact he afterwards paid off the new bond. That fact is not doubted by the commissioner. According to every principle of justice and equity, it is of no importance whether Corbin Griffin paid off from his own money the sum of £ 250., on the nineteenth day of March 1798, or the same sum, with its interest, on the sixth day of May and twentieth day of August 1799. The account F must be corrected in this particular.

"The next question to which I have turned my attention is, what are the principal subjects with which the trustees are to be charged. The account marked B, in the commissioner's report, charges them with four principal subjects, that is, the value of the ship Charles Carter, of the brig Helen, the value and rents of the Norfolk property, and the rents of the Hanover town property. I have reflected on each of these subjects, and will briefly state the result of my reflections on each. And first, as to the Charles Carter. This ship, with all her tackle, apparel and furniture, was conveyed by the deed. It was dated on the fifteenth day of November 1797, though not recorded in York, until the nineteenth day of February 1798; the ship then lying in James river. It does not appear to have been recorded elsewhere than in York at any time. On the seventh day of January 1798, two executions were levied on the ship, by the marshal of the circuit court of the United States, in behalf of Robert Burton, and

Donald & Burton; and on the nineteenth of the same month, a libel was filed against her by Thomas Blane, on two bottomry 506 *bonds, in the Federal District court then sitting at Williamsburg. To that libel Alexander Macaulay himself was made a party respondent, and he filed his answer on the eighth day of February. He does not, in his answer, set up the claim of his own trustees, nor make any mention of the deed; but he gives the history of the bottomry bonds, and seems to admit the claim of the libellant to be a just one. But William Nelson and others, styling themselves the Dismal Swamp Land Company, did file their counter-claim, under the said deed of trust. The ground of their claim was, that the object of the deed of trust, inter alia, was to secure John Jamieson a large sum of money, which debt to Jamieson, consisted in reality, for the most part, of a debt due from said Macaulay to the said company, and so they were beneficially included in the said deed. This claim brought directly before the District court the question as to the validity of the deed, and which of the three liens was the preferable one. The District court decided in favour of the libellant, and dismissed the claim of Nelson and others, and the ship was sold in March 1798. The case was carried by appeal to the Circuit court, where the claim of Nelson seems not to have been prosecuted, and that Court reversed the decision, and decided in favour of Donald & Burton, which decree was affirmed by the Supreme court, in February 1808.

"It is sought to charge the trustees with the value of this vessel, on the ground that they neglected to prosecute the claim by appeal. It does not appear by any means certain, that if they had done so they could have succeeded. But the claim under the deed was asserted (though not by them), before the District court, and adjudged against it, and I do not know that it can be required of trustees to subject the trust fund to the expense of carrying on a litigious controversy in appellate courts, and where the result is very uncertain, the 507 *inferior court having decided against the claim. But however this may be, Macaulay was then alive; there is not the least reason to suppose that he wished the trustees to interpose this claim. Notwithstanding the deed, he acted almost until the day of his death, in transacting his own affairs, and (as the plaintiffs themselves contend,) disposed of some of the property, and discharged some portion of the debts without their interference. The proof in the cause is not sufficient to satisfy the mind of the Court, that the trustees actually accepted the trust, until after the death of the grantor, notwithstanding the remark made by the defendant Griffin, that 'the trustees used their best exertions' to prevent the sale. The Court cannot think it would be equitable to charge them with the value of this ship, seeing that they have not received one cent of the proceeds of the sale; that they did not at that time act as

trustees, and consequently, could not be chargeable with neglect; and that the grantor under whom the plaintiffs claim, and whom they represent, neither required, nor wished that they should assert any claim.

"Next as to the brig Helen: She too was conveyed by the deed, and a document returned by the commissioner, proves that she cleared out from City Point, on the twenty-fifth day of June 1798. This was before the death of Macaulay, and before the trustees accepted the trust. I have seen no proof to shew that the trustees ever received anything on account of the brig or her cargo; and none that they were guilty of gross negligence in not recovering possession of her. I am of opinion that they should not be charged with her value.

"The next question sought to be charged against the trustees, is the Norfolk property. This property is conveyed to the trustees in the following terms: 'doth grant, bargain and sell unto, &c., all those messages, tenements and lots, situate, 508 lying and being in the town *of Norfolk,' &c. The deed, by its terms, would seem to be a conveyance of the lots, &c., in fee simple. In point of fact the grantor had no fee simple property in Norfolk, and consequently could convey none. As I understand it, the following was the condition of that property: One Andrew Martin had leased, in March 1786, to Patrick Macaulay, the lot in question for the term of twelve years, at the annual rent of £ 40. and the taxes; to which lease there was a covenant, that at the end of the term, Martin might take the tenement, on paying for the improvements erected by the said Macaulay, or if he did not think proper to take them, then Macaulay, or his executors or administrators, might retain possession of the lot, paying the sum of £ 40. annual rent. In March 1796, Alexander Macaulay, as surviving partner of Patrick Macaulay & Co., conveyed these leasehold premises to John Nivison, in trust to pay the sum of £ 500., which the said Alexander owed to David Patterson, and to secure the further sum of £ 210., for which Patterson was bound as surety for said Alexander Macaulay, to one Wallace. On the seventh day of July 1798, ten days before the death of Alexander Macaulay, he executed another deed as administrator of Patrick Macaulay, to Nivison as trustee. This deed recites, that John Hamilton had become his security in two bonds of £ 250. each, with interest from September 1796, to David Patterson, and to indemnify the said Hamilton the deed conveys to the trustee his leasehold interest in the said lot, with all the accruing rents and profits, with power to sell on ten days notice, for ready money, on default of payment of the first bond. This deed, as well as the former one to Nivison, was recorded in Norfolk. What estate or right passed to the trustees Griffin and Nelson, on the day that they accepted the trust, under the deed of November 1797? They did not accept until after Macau-

lay's death. Before that period he had, in the double character of surviving
 509 *partner and of administrator of Patrick Macaulay, parted with the chattel interest belonging to his brother's estate. The legal title was in Nivison, and I do not perceive that their equity, or that of their cestuis que trust was superior to that of Nivison, and his cestuis que trust; if they could object to the Norfolk deeds that they passed Patrick Macaulay's property to pay a debt of Alexander Macaulay, the very same objection might be made by Nivison, Patterson and Hamilton, to the Yorktown deed. Nivison then having the legal title, and at least equal equity, Griffin and Nelson could only have an equity of redemption in the Norfolk property; or if Nivison should sell as the trustee under either deed of trust, they could only have a right to the surplus of the proceeds of the sale, after paying off the debt for which the said property was conveyed in trust.

"What then became of this property? It must be remembered that Macaulay died ten days after the last deed to Nivison. He had previously conveyed all of his property real and personal, to trustees; there was nothing left that was tangible, for an administrator to act on, and accordingly his estate was committed to the hands of the sheriff of York. Patterson was obliged to look to Hamilton the surety of Macaulay, for the payment of his £ 500. with the accruing interest, for it could not be got from Macaulay's estate, and Hamilton would rely on the deeds to Nivison for his indemnity. The first bond to Patterson became due on the seventh day of July 1799, and Hamilton, on paying it off, might immediately call on Nivison to sell the leasehold interest for cash, on ten days notice. It is probable that this was the course of things, and accordingly, although no deed is produced from Nivison to any purchaser, yet we find that on the twenty-second day of April 1802, John Hamilton as attorney in fact for Thomas Hamilton, conveyed this very chattel interest to James Caton & Co., for the
 510 *consideration of two thousand and twenty dollars, less than the amount of Macaulay's bonds to Patterson, for which John Hamilton had been security. This deed recites that Nivison had sold the property under the deed of trust to him, and that Thomas Hamilton had become the purchaser. By the sale from Thomas Hamilton to Caton & Co., John Hamilton most probably became indemnified. There is nothing to shew that Macaulay's debt to Patterson was overpaid by the sale to Thomas Hamilton, and if there was no surplus, Griffin and Nelson could get nothing from the Norfolk property. They had not the legal title, and their equitable claim could produce no fruit; and yet the plaintiffs claim, and the commissioner reports a large sum against them, on account of this property. I am of opinion that this claim should be totally rejected.

"The next subject, though of inferior importance, is the Hanover town prop-

erty. The lot there was owned by Macaulay, and passed by the deeds. It was the duty of the trustees, or of the one who acted, to sell this property. It was not done until October 1811, when it was sold for £ 49. 10. The defendant Griffin alleges, that he offered it for sale in 1799, but was only offered one hundred dollars for it, and allowed it to remain in the possession of William B. Christian, who then occupied it, and who had occupied it from a previous period, namely 1796. Christian had been the partner of Macaulay, and continued on the premises until his death in 1805, without paying rent. Griffin says he left Christian in possession to take care of them; and takes credit for obtaining more for them when sold, than he was offered at the previous period. The allegations of Mr. Griffin on this subject, are not proved; but it is proved that the property was very unsaleable in that rapidly decaying village. Although Mr. Brand averaged the rents at forty dollars for the first part of the term, and thirty dollars for the residue, yet
 511 he does not say that it *was easy to get a tolerable tenant for it at any time, and we know that in such a place it must have been extremely difficult. What then should be the price that Mr. Griffin should pay for his neglect in not selling this property at an early period? I do not think that he ought to be required to pay the estimated annual rent; the interest of the money for which the property sold, appears to me to be a better criterion. The charge against the trustees for the rents should be struck out, and they should be charged with interest on £ 49. 10., (the price for which it was sold,) from the end of one year after the death of Macaulay, till the day of sale.

"The next question which I shall consider is, whether the money received by Mr. Griffin from the treasury of the United States, on account of the unlawful seizure and detention of the ship Louisa, by the embargo of the French government of 1794, and for which compensation was allowed by the commissioners sitting under the Louisiana convention between France and the United States, passed or not, under the deed of the fifteenth day of November 1797, to the trustees of Macaulay. The words of the deed are, 'the said Alexander Macaulay, by these presents, doth assign and grant unto the said Thomas Griffin and Thomas Nelson, &c. all debts due to him the said Alexander Macaulay, &c., all which debts are in a schedule hereto annexed, expressed.' There was no schedule annexed to the deed. Either all of his debts of every description passed by the deed, or none whatever passed. The first part of the clause is sufficient to pass all his debts, and the subsequent clause, stating that they are expressed in a schedule, is merely an untrue affirmation, which is therefore inoperative, and ought not to be allowed to qualify and limit the general assignment of all his debts. Then the question arises, whether his claim on the French government for the illegal

512 detention *of his vessel, be a debt due to him which was assignable?

"I am saved the trouble of a laborious and unprofitable discussion of this subject, by the recent decision of *Maitland v. Newton*, 3 Leigh 714, founded on the decision of *Comegys v. Vasse*, 1 Peters' R. 193. In the former case, the debtor had assigned 'all his estate real and personal, upon trust, that the trustees shall collect all debts due, or to become due to the grantor, on account of transactions prior to the deed, shall sell the real and personal estate, and institute suits at law, or in equity, for the recovery of the debts,' &c. This deed was executed in 1809. The board of commissioners under the treaty of 1819, between Spain and the United States, awarded to the administrator of the grantor, a sum of money, on account of claims on the Spanish government, for spoiliations before the date of the deed. The Court decided that that money passed by the deed. Judge Carr said that he had no idea of a right or interest vested in a man, which would not pass under a conveyance of all his real and personal estate. Upon what ground, I would ask, is it that such a claim, as is the subject of controversy in that case, would be embraced by the terms, 'all his personal estate?' Upon what other ground than that such a claim is a debt, which although it cannot be enforced in a Court of justice, yet is something due from the government that does the wrong to the citizens of the other country who sustained the loss, and who is therefore entitled to remuneration. In that point of view, the claim of Mr. Griffin as trustee, to this money, may I think be supported. The money was properly paid to him, and he is bound to apply it to the objects specified in the trust deed, and as such to account for it."

The Chancellor then proceeded to consider the exception of Thomas Griffin, and 513 having passed upon *them, he took up the exceptions of M'Neale. Upon his first exception, he says:

"As to the exceptions of the defendant John M'Neale, executor of John Jamieson: This defendant excepts, in the first place, to account N, because the commissioner regards alone the evidence furnished by the books of Macaulay of the amount due to Jamieson, and disregards the evidence of the deed of trust as establishing the sum of £ 5000. to be due him. The Court has already expressed its belief that the sums recited in that deed were not the sums really due to the preferred creditors. The Court is strongly impressed with the belief that the sum of £ 173. 10. 7. was all that was due from Macaulay to Jamieson on the fifteenth day of May 1797, on private account. That is the balance appearing on the books of Macaulay, and a copy of the account shewing that balance is admitted by the defendant M'Neale, to have been made out by Corbin Griffin and transmitted to him; that act of Corbin Griffin affords a strong presumption that the said Griffin believed that balance to be the true one,

and M'Neale has not been able, from the books or papers of his testator, to charge Macaulay with a cent more on private account. But the Court is of opinion that the papers in these causes exhibit strong evidence to prove that Jamieson did lend to Macaulay, in the year 1796, or 1797, a large sum of money, probably £ 3000., of the funds of the Dismal Swamp Land Company, and that the deed of trust was intended to secure to Jamieson the re-payment of that sum, with interest, as well as of the private debt aforesaid, with interest. This exception, therefore, so far as it objects to the failure to bring the Dismal Swamp Land Company's debt into the account N, ought to be sustained, but so far as it makes any other objection it should be overruled."

514 *Having passed upon all the exceptions, the Chancellor recommitted the report of commissioner Baker with instructions to reform the same according to the opinion of the Court; and Thomas Griffin was directed to render accounts of his administration of Corbin Griffin's estate, and also a continuation of his account as trustee. And M'Neale was directed to render an account of all moneys loaned to or received by Alexander Macaulay from the Dismal Swamp Land Company by direction of his testator, and for which Jamieson may have been in any way responsible to said company. And the commissioner was directed to state whether there was any evidence shewing that the trustee Thomas Nelson took any active part in the execution of the trust created by the deed of November 15th, 1797; and if any how far he was chargeable.

In 1836 Thomas Griffin died, and in 1837 the suits of A. Macaulay's administrator and E. Macaulay's executor, were revived against Robert P. Waller, executor of said Thomas Griffin, and as administrator de bonis non of Corbin Griffin.

In December 1837 commissioner Baker returned another report in the cause; but he having gone out of office before the report was completed, it was objected to by the defendant on that ground, and the Court sustained the objection, and directed one of the commissioners of the Court to perform the order of the 3d of December 1833. And it was further ordered, that the defendant Robert P. Waller render before the commissioner all the accounts and statements required of his testator Thomas Griffin deceased, by the order aforesaid; that he produce before the commissioner all the books and papers of Alexander Macaulay, Corbin Griffin and Thomas Griffin, which may be in his possession or under his control, and in relation to such accounts and statements, books and papers, he submit to *be examined in solemn form 515 before the said commissioner, if he shall be required.

In obedience to this decree, commissioner Shore, in December 1838, made his report. He reported that it did not appear that the trustee Nelson took any active part in the execution of the trust created, other than

uniting with his co-trustee in a power of attorney to Corbin Griffin, to make sale of the shares of the Dismal Swamp Canal, and to sell some Norfolk property, and in advertising property for sale and in uniting in conveyances therefor. It seemed probable that all the trust funds received during his life were accounted for. And that all these funds had been received by Griffin, or directly by Jamieson.

The commissioner reported that it appeared from the books of Macaulay that he was debtor to Jerdone, September 25th, 1795, £ 347. 00. 9½., and that he was debtor to Jerdone, Holt & Douglass, £ 1139. 16. 3½. in September 1794, and to the Dismal Swamp Land Company, on the 23d of June 1797, £ 536. 1.

The commissioner reported statement A, being an account of the trustees with the estate of Alexander Macaulay, making the balance against them on the 31st of December 1803, 1659 dollars 74 cents, of which 1361 dollars 57 cents was principal. Statement B was the same account, increased by a single additional charge, making the amount due thereon at the same date, 2040 dollars 64 cents, of which 1684 dollars 37 cents was principal. In these statements interest on the amount of the sale of the Hanover town property was charged from one year after A. Macaulay's death. Statement C was an account of Thomas Griffin, surviving trustee of A. Macaulay. In this account the trustee is charged with interest upon the amount of the sale of the Hanover town property, from 17th of July 1803 until 17th October 1811, the time when it was sold.

And the commissioner excluded a credit 516 claimed by Griffin of *4100 dollars paid to Corbin Griffin's administrator, in July 1819, on account of the debt stated in the deed of 1797 to be due to him for Macaulay. This sum Thomas Griffin had received about the time he credited it in his account, from the government of the United States, on account of the ship Louisa, belonging to Alexander Macaulay, detained by the French government in the lifetime of Macaulay, and for which compensation was allowed under the treaty for the purchase of Louisiana. It was excluded on the ground that Corbin Griffin had been fully paid as early as November 23d, 1800, all that was due to him from Macaulay, either for a debt due or for money paid by Corbin Griffin as his surety. The amount due on this account was 7367 dollars 28 cents, of which 5336 dollars 91 cents is principal.

Statement E was an account taken from the books of Alexander Macaulay, shewing how much was due from Macaulay to Corbin Griffin according to these books. This statement shewed that there was due to Corbin Griffin at the date of the deed, the sum of £ 254. 15. 3¼. That there were debits for merchandise on the same books, at sundry times between the date of the deed and the death of Macaulay on the 17th of July 1798, £ 16. 8. 3., leaving due £ 238. 7. 0¾., = 794 dollars 51 cents. There was a further credit to Corbin Griffin upon the

books of Macaulay, of £ 630. 16. as of the 24th November 1798, which was excluded by the commissioner on the ground that Thomas Griffin admitted in his answer to Anderson's bill, that it was advanced to the trustees. The commissioner states that the defendants' counsel relies on the fact that the entry on the books of Macaulay, was made by Miller Brown, the clerk of Macaulay, who was then dead. Statement G is an account of the debt due from A. Macaulay to C. Griffin, according to Macaulay's books, and of the moneys paid by Griffin 517 as surety of Macaulay; and *the payments paid by the trustee to said Griffin. On this account from which the payment in July 1819 to Corbin Griffin's administrator, who was Thomas Griffin, and the sum of £ 630. 16., above mentioned, were excluded, Corbin Griffin was found indebted on the 31st December 1801, 2997 dollars 80 cents, of which 2849 dollars 61 cents was principal. By this account the debt due to Griffin, and the money paid by him as surety of Macaulay, amounted to 5026 dollars 66 cents, and the payments made to him by the trustees amounted to 7876 dollars 41 cents.

Griffin's administrator excepted to the report for failing to credit his intestate for various sums which he claimed to be due to Corbin Griffin from Macaulay. Among them was, 1st. The item of £ 630. 16., appearing by Macaulay's books to be due to Corbin Griffin. 2d. That the commissioner should have treated the claim of £ 2000., referred to in the deed of trust of November 1797, as due to Corbin Griffin from Macaulay, as really and bona fide due to him. 3d. That he should have debited the trust subject with 4100 dollars paid on 26th July 1819 by Thomas Griffin, in part satisfaction of the debt due to Corbin Griffin from Macaulay. 4th. To all the items in account G, bearing date more than five years before the death of Corbin Griffin, and which, after deducting the debits, constitute the aggregate balance of principal and interest of that account reported against him of 2997 dollars 80 cents, the defendant Waller excepted, because the same were barred by the statute of limitations; and that the statute required the Court to strike them out of the account. These items were from September 21st, 1798, to December 31st, 1800. Corbin Griffin lived until 1813, and the suit was not brought until 1819.

Anderson, administrator of Macaulay, also excepted to the report; but it is not necessary to notice his exceptions.

518 *In March 1839, Waller, as the executor of Thomas Griffin, and as the administrator of Corbin Griffin, answered the bill of Anderson as administrator of Alexander Macaulay. He says, That in regard to any payments which have been made by Thomas Griffin the trustee, to Corbin Griffin, on account of his debt secured by the deed of trust of November 1797, whether in fact due to the said Corbin or not, they cannot now be recovered back by the plaintiff, because the claim is barred by

the statute of limitations, which is relied on as if formally pleaded; and he insists that all payments made by the said Thomas Griffin the trustee, according to the provisions of the trust deed under which he acted, are valid payments, and that the estate of said Thomas Griffin cannot be required to refund them; for whose estate the defendant also claims the benefit of the act of limitations as if duly pleaded.

Waller also answered the bill of Elizabeth Macaulay, relying upon the same grounds of defence as in the case of Anderson, administrator of A. Macaulay.

On the 3d of February 1841, the Court refused a motion of the defendant to compel the plaintiffs to make the Dismal Swamp Land Company, Jerdone and others, parties defendants to their suits. And on rules severally made upon the plaintiffs and defendants, the Court, on the 8th of February, allowed the plaintiffs to prove by oral testimony in Court, the assignment by Jerdone to Elizabeth Macaulay, of the debt secured by the deed of November 1797; and allowed the defendant Waller to file in the cause the papers in the case of the Dismal Swamp Land Company against Macaulay's administrator, saving to the plaintiffs the right to object at the hearing to said papers as evidence. And it was admitted by the plaintiffs that the signature "Francis Jerdone," to his answer in said cause, was in the handwriting of said Jerdone. And thereupon the plaintiffs urging the Court

to proceed with the trial of these
519 *causes, the defendant Robert P. Wal-

ler, executor and administrator de bonis non of Thomas and Corbin Griffin, applied for a continuance of the causes until the next term, upon grounds stated in writing; but which it is not necessary to state: And the Court having refused the continuance, the said Waller, and William Major sheriff of the county of Culpeper, and as such administrator de bonis non with the will annexed of John Jamieson deceased, severally filed their petitions for a rehearing of the decrees made in these causes on the 29th of June and 2d of July 1829, and on the 3d of December 1833. The grounds assigned by Waller, are that:

1. The whole of the said decrees are erroneous so far as they recognize, admit or establish, a right in the administrator or distributees, or either of them, of A. Macaulay deceased, to call in question the validity of the deed made by the said A. Macaulay, on the 15th of November 1797, under the circumstances disclosed by the pleadings and evidence in the case in which they are plaintiffs.

2. So far as they recognize, admit or establish, a right in Elizabeth Macaulay, as assignee of one of the creditors and cestuis que trust provided for in said deed, to call in question the validity thereof.

3. So far as they reject the claims of Corbin Griffin and John Jamieson to the sums of £ 2000. and £ 5000., respectively admitted by said deed to be due to them.

4. So far as they recognize the remaining books of A. Macaulay, (though it is proved that most of his books were lost or destroyed at the two fires in York, of 1804 and 1814,) as "the books of A. Macaulay."

5. So far as they establish a charge against Thomas Griffin, trustee, &c., of 9 dollars 90 cents per annum, from July 17th, 1799, to October 17th, 1811, as and for, or in lieu of, the yearly rents and profits of the house and lot in Hanover town,
520 sold by the trustee *Thomas Griffin in the year 1811, in the face of evidence that the house and lot were not, and could not be rented out during that time, or sold before that time.

6. So far as they direct an account to be taken of the assets of Corbin Griffin's estate, when it appeared on the face of the pleadings and on the evidence, that every item of charge which arose or could arise against Corbin Griffin's estate, arose and accrued more than five years before his death, (in fact, more than twelve years.) And

7. Because it appears by the deed of 1797, that the trust funds, after satisfying the preferred creditors, were to be applied to the satisfaction of the other creditors of Macaulay, and those creditors have neither been made parties, nor has any provision been made in the said decrees, nor steps taken before the commissioner to contend said creditors before the Court, or the commissioner, and allow them to prove their several demands.

It is unnecessary to state the grounds for a rehearing assigned by the administrator of Jamieson, except that the suit was defective for want of parties; and that the decrees disaffirm the validity of the deed of November 1797, and permits the plaintiff to introduce the books of Macaulay as evidence to impeach it.

The causes were argued at the November term 1841, and came on for decision in January 1842, when the Chancellor—Robertson—after discussing the principles of law on the pleadings and proofs, and holding that the deed of the 15th of November 1797, was not conclusive as to the amount of the debts due to the preferred creditors, proceeded:

"It remains to consider what is the extent or mode of relief which this Court may properly administer? What were the debts really due to preferred creditors at the date of the deed? To what extent have they

been paid? What sums are now due
521 from the parties *before the Court?

And to whom are the balances payable? These are the enquiries to which the Court is now to direct its attention.

"First then, as to the claims of the preferred creditors. There are three reports of commissioners among the papers. That of commissioner Baker of October 1826, under the decree of Chancellor Taylor, of March 1825; a second one of the same commissioner, made in 1836, under the decree of Judge Brokenbrough, of December 1833; this being regarded informal, a third was

made and returned by commissioner Shore, in November 1838, under the order of Judge Nicholas, of July 1838, directing him to perform the decree of December 1833. Pursuing the directions of this last decree, commissioner Shore has regarded the deed of 1797 as prima facie evidence merely, and resorted to the books of Macaulay to ascertain what sum was due the preferred creditors. The debt due Corbin Griffin, instead of £ 2000., 6666 dollars 67 cents is stated, as it appears on Macaulay's ledger E, according to the commissioner's view of the entries at 794 dollars 51 cents. By another statement embracing all payments subsequent to the deed by Corbin Griffin, on account of suretyship, and all payments to him out of the trust subject, a balance is shewn against him of 2997 dollars 80 cents, with interest from the thirty-first of December 1800, on 2849 dollars 61 cents. Satisfied as I am from all the facts and circumstances in proof, that the sum mentioned in the deed was neither due to nor claimed by Corbin Griffin, I concur in Judge Brockenbrough's opinion, that the books of Macaulay under the circumstances, were proper evidence. The representative of Corbin Griffin has produced no account or memoranda whatever shewing the nature or amount of the debt, but relies solely on the deed, though in his first answer he cautiously abstains from asserting a belief that the amount nominally inserted in the

522 deed was *really due; contending himself with remarking that the deed itself acknowledging the existence of the debts therein mentioned, it was not for the trustees to enquire whether the debts were due or not, but merely to execute the trusts. The amended answer is nearly as vague and unsatisfactory. In that he says, 'there appeared on Macaulay's books a balance due Corbin Griffin of , but he does not know that more was not due; on the contrary, he has every reason to believe that the sum of £ 2000. provided for by the deed, was actually due,' and then proceeds to assign reasons entirely inconclusive, namely: first, that he cannot imagine that Macaulay would by his own deed, shew a greater amount against himself than actually existed; and 2dly, because the plaintiff himself admits that amount when he says, that to secure certain sums of money amounting nominally and really to £ 10,000., Macaulay conveyed by deed of trust, property more than ten times that amount. Thomas Griffin was the acting trustee in the deed, shewn to have had some knowledge of the affairs of Macaulay, at least as far back as 1789. He was the son and only child of Corbin Griffin; resided with him, and after his death qualified as his administrator. In his first answer, he says that Macaulay frequently told him that the persons named in the deed, Corbin Griffin, Jamieson and Jerdone, had been very friendly to him by lending him large sums of money, and becoming his sureties, and then adds: that as to Corbin Griffin, this respondent knows,

certainly, that at time of the execution of the deed of trust, the said Alexander Macaulay was indebted to him in the sum of , as fully appears by the books of the said Macaulay himself, from which a copy of the account of the said Corbin Griffin with the said Macaulay has been extracted, and is hereto annexed, marked B. Corbin Griffin is proved to have stood high in the confidence of Macaulay; and both he and

523 Thomas *Griffin must have had access to the books of Macaulay, both before and after Macaulay's death. This appears by their entries in ledger E. All the books and papers of Macaulay, as well as those of Corbin Griffin, are proved, or must be presumed, after their deaths, to have come into the hands of Thomas Griffin. If he either could not, or would not, produce any account, memoranda or evidence to ascertain the nature and amount of the debt, every principle of justice seems to require that the books of Macaulay himself should be resorted to as the best guide, though perhaps not an unerring one, to conduct us to the truth. What is the balance shewn by those books, is itself a matter of contest. The apparent balance is considerably more than stated by the commissioner. I dissent with the commissioner, and consider the apparent balance as that for which Corbin Griffin's estate should have credit. The account as appearing upon ledger E, excluding all entries made subsequently to Macaulay's death, sustains the commissioner's statement. It consists of numerous debits against Corbin Griffin, commencing January 7th, 1793, and ending April 1798, for merchandize, the eight last of which, from October to April 1798, inclusive, are proved to be in the handwriting of Thomas Griffin. All the residue as well as the credit of £ 694. 8. 9¼., posted under date of January 1, 1793, seem to be in the handwriting of Macaulay's regular clerk, Miller Brown. Besides the credit just mentioned, there is another of £ 630. 1. 6., posted immediately before the first, under the date of twenty-fourth November 1798. The commissioner allowed the first only £ 694. 8. 9¼., and deducting the aggregate debits down to April 1798, £ 4556. 1. 9., made the balance in favour of Corbin Griffin, £ 238. 7. 0¼., or 794 dollars 51 cents, as stated in his report. The second credit seems to have been disallowed, either because it was posted

524 after the death of Macaulay, or because supposed to be in *the handwriting of one of the Griffins, or for the reason stated by commissioner Baker. Thomas Griffin, in his examination before commissioner Baker, says in answer to the 35th interrogatory, that it is in the handwriting of Miller Brown. This is probably the fact, though Shield's deposition would seem to ascribe the entry to Corbin Griffin. The journal and day book of that year are lost or destroyed. Whether the items composing it, and which may have been various, (the entry as posted is 'sundries,') bore date before or after Macaulay's death,

July 1798, they may have been for money advanced under the trust deed to Macaulay, or to pay debts for which Corbin Griffin was bound as surety, and consequently a just charge against the trust fund. If in the handwriting of Brown, the clerk of both Macaulay and of the trustees, the entry ought certainly to be received as correct; even if in the handwriting of Corbin Griffin, who seems also to have been authorized, both by Macaulay and his trustees, to make entries, the entry ought not to be discredited on the supposition that he abused the trust reposed in him. Commissioner Baker in his first report, assigns a different reason for rejecting this credit, namely: the supposed admission of Thomas Griffin, in his answer, that the money was advanced by Corbin Griffin to the trustees after Macaulay's death, and their failure to credit it in their account. If true, this might be a reason for charging them, but not for refusing the credit to Corbin Griffin, whose funds may have been so advanced and applied. But this alleged admission is stated as a matter of belief only, qualified by the remark, that he can give no information of the particulars of the entry, and a positive disclaimer, on oath, in answer to the 35th interrogatory, of any knowledge of the transaction. Admission of a personal representative to bind his testator's or intestate's estate, ought to be unqualified and positive.

But I feel constrained to say, without
525 relying *on the evidence recently thrown into these causes by Thomas Griffin's executor, tending to convict him of utter incapacity for business, that the defect of his memory and the inaccuracy and inconsistency of his statements, to say the least of them, are too often manifested in these causes, to allow much weight to any admission of his affecting the estate or character of another. The credit in question cannot be refused without reflecting harshly upon the integrity of Corbin Griffin, as well perhaps as affecting considerably the pecuniary interests of his estate. If denied, it throws upon him the imputation of making a false entry to swell his claim against the estate of a deceased friend; and moreover, unless the £ 2000. mentioned in the deed was really due to him, fixes upon him the guilt of receiving largely more than the just amount of his claim. I am strongly impressed with the belief, that Corbin Griffin at the time of his death, owed nothing to the estate of Macaulay, but that his account was finally closed at the date of his last receipt, twenty-third November 1800, on an estimate of his debt, assuming the apparent balance in his favour in ledger E, and adding thereto his payments as surety for Macaulay. There are strong circumstances independently of the high character of Corbin Griffin for integrity, or rather consistently with that character, to sustain this view. Corbin Griffin died in 1813. The last payment he appears ever to have received from the trustees of Macaulay, was made on the twenty-third of November 1800. Up to that time all payments to him, for

which his receipts are produced, amounted on a rough estimate (without adding interest,) to 7,876 00

His payments on account of suretyship, (without interest added,) 4,129 00

Balance due him by ledger E, as stated by commissioner Shore, 794 51

4,923 51

526 *Shewing an excess overpaid, by this statement, of 2,952 49

Allow the rejected credit, £ 630. 1. 6., 2,106 00

And there is an excess only of \$852 49

But this balance will be still farther reduced by allowing interest on the credit, £ 630. 1. 6., and probably entirely extinguished by allowing interest on the credit of £ 694. 8. 9¼., posted under the date of 1st January 1793, stating an interest account according to mercantile usage, or the method generally adopted in such cases by the commissioner of the Court. To present another view, take the balance by commissioner Shore against Macaulay, on the 23d November

1800,. 2,849 61
Deduct credit of £ 630. 1. 6., 2,100 25

Leaves, \$ 749 36
Deduct further interest on the 2100 dollars,

(£ 630. 1. 6.,) and on £ 694. 8. 9., and the balance will probably be extinguished or turned in Corbin Griffin's favour, according to the date assumed for commencing the interest. His receipt for the last payment made him, 23d November 1800, has manifestly been erased and altered in several places. Among other alterations, the words 'in part' have been substituted for some others, not now distinguishable. The solution offered, that the words erased might have been 'on account,' and the change made to avoid the repetition of the same word, which occurs immediately after 'of my account,' does not seem to accord with the appearance of the paper; nor is it probable that so suspicious an erasure and alteration would have been hazarded merely for the sake of euphony.

527 *'Again, very shortly after that date, namely, in December 1801, payments were made to Jamieson, apparently in cash, to the amount of 1156 dollars 66 cents, and in property, to the amount of 6500 dollars, embracing very nearly the whole trust subject. This is said, by Thomas Griffin, to have been done with the assent of Corbin Griffin; but is it probable, that Corbin Griffin, acquainted as he was with the condition of Macaulay's affairs, would have given such assent, unless his prior claims had been satisfied? Is it credible, if he really claimed the £ 2000. mentioned in the deed, more especially, if, upon

the basis of that claim and others, there was, as is made to appear by one of the statements of Thomas Griffin, at the date of the receipt of November 1800, and after deducting the payment therein mentioned, a balance due him of upwards of (£ 1840.) 6000 dollars? At that time the recovery of the claim of Macaulay's estate for French spoliations in 1794, could not have been anticipated. It does not seem to have been known to Thomas Griffin, until 1813, and was not received until 1819. But for its fortunate recovery, this supposed balance due Corbin Griffin in 1800, would have remained, as at his death thirteen years after, forever unextinguished. His assent to the payments of Jamieson, over whom he had preference, would have been, under the circumstances, a gratuitous surrender of the entire amount. The conduct of Thomas Griffin himself, the contradictory statements in which he has involved himself, by attempting to establish a larger balance in favour of his father's estate, at the date of the receipt just mentioned, are circumstances too significant to be overlooked. As early as August 1799, in a letter to Jamieson, he expresses his hope that the trustees will be enabled to close the accounts between Macaulay's estate and his father's soon. In his first answer to the bill of

Anderson administrator, &c., filed in 528 1820, he admits that *upon a settlement of the trust transactions, there will be found a balance in his hands, yet undisposed of, of ; which he says, 'is claimed by the Dismal Swamp Land Company, as well as by Mrs. Macaulay, both of which parties have forbidden this respondent to pay the same to the other. This respondent has therefore hitherto omitted to discharge the same, and prays the decree of the Court in the premises.' In his answer to Mrs. Macaulay's bill, there is a similar admission. With his first answer he filed an account, (A,) in which the trustees are credited, under date of 26th July 1819, as follows: By cash paid T. Griffin, balance due estate of C. Griffin, as his administrator, £951. 13. 9. This exhibit he withdrew from the papers, and in lieu of it filed with his amended answer in 1825, another account, in which the credit under the same date is thus altered: By cash paid T. Griffin, administrator of Corbin Griffin, £1230, making a difference in the credit of £278. 6. 3., and in effect changing the character of the credit to a payment on account, or in part, instead of a payment in full, without suggesting any reason for the change, or even noticing it. On a rule, in March 1829, to produce the original exhibit (A) and other papers withdrawn by him, he returned it with an affidavit, that he verily believed it was in the exact condition in which it was when he withdrew it; yet, comparing it with an official copy, it appears to have undergone very material alterations; the item of credit of the 26th July 1819 having been altogether suppressed or omitted, together with some other items. In the same affidavit he says that the exhibit filed with

the amended answer, with some slight differences, and some explanations, is the same with the original exhibit, (A,) as far as the first goes; yet, as already stated, the substituted account augments the credit in July 1819, 270 odd pounds, and changes the form and meaning of the entry in the original exhibit, (A,) a payment 529 *of the balance due his father's estate in July 1819. Satisfied with the sum of £951. 13. 9., and admitting in his first answer, a balance of the trust funds in his hands, subject to the claims of the Dismal Swamp Land Company or Mrs. Macaulay, he exhibits a statement, (C,) founded on the alleged balance in 1800, and shewing, after crediting the amount in the substituted account of £1230., in July 1819, a balance at the last date due Corbin Griffin, of £2740. 2. 9. The entry in the substituted account of £1230., has been altered, as well as the same sum in the account (C) just mentioned, and the date of his own receipt to himself for that sum, is changed from 26th July 1819 to 26th July 1820. The whole sum recovered on account of French spoliations was but little upwards of 5000 dollars; very insufficient to pay the balance pretended to be due in 1800; yet there are several depositions or affidavits, those of Page, Wilson, Butler, &c., going very strongly to prove that just previous to its receipt he procured the Dismal Swamp Land Company to join him, as sureties in a bond, to enable him to receive it, on the suggestion that the whole, or a considerable portion at least, would properly belong to them, under the provision of the deed nominally securing Jamieson, and that he afterwards declined paying them, allowing that he had paid about 2500 dollars to his father's estate, while one of his accounts shewed a payment of £951., (3344 dollars 33 cents), and the other of £1230., (4100 dollars.) These affidavits are excepted to; but the exceptions made for the first time, in October 1841, seem to be too late; the affidavits appearing to have been before commissioner Baker in 1826, and as to two of them, Wilson's and Brown's, the objection urged, of interest, does not apply, since they held shares only in a fiduciary or representative character.

530 *'Before leaving the subject of Corbin Griffin's claims, I should not omit to notice the credit claimed for his estate, by his administrator, founded on the receipt of Benjamin Waller, for £195. 9. 2. and a credit on the back of a forthcoming bond; both of which are given for payments, by Corbin Griffin, on 19th March 1798. These sums, amounting, together, to £250. seem to have been, on that day, borrowed of Philip Tabb, and a bond given for the amount by Macaulay, with Corbin Griffin, as surety. The bond was afterwards paid by Corbin Griffin, £150. 10. 2. on 6th May, and £119. 10. 2. 20th August 1799. The administrator, Thomas Griffin, unjustly, it seems, claimed a credit, both for the sum paid with the money borrowed, and that paid to Tabb, on the bond; and

the commissioner, as erroneously refused to credit either. But Corbin Griffin is not shewn to have claimed both; nor do I presume that he committed, or meditated injustice, by taking the receipts in the first instance, in his own name. It is true, the money borrowed would appear to be Macaulay's, as he was the principal in the bond to Tabb. But it was borrowed to pay off a debt, for which Corbin Griffin was surety, and he also became a security in the new bond, which he afterwards paid. He might have taken the receipt in his own name, and claimed the credits at once, with the full expectation, as Macaulay was much embarrassed, if not insolvent, that he would be compelled to take it up, indeed, with the understanding of all parties, that he would do so; or he might have feared, that the change of the debt might endanger his security, under the deed; a danger, shewn not to be wholly ideal, since, in point of fact, the commissioner has taken that view, rejecting the credit in the first instance, because the money was Macaulay's, and in the second, because the new bond was not provided for by the deed. All that, as an

honest man, it would have been incumbent on Corbin Griffin to do, if *he claimed the credit on the first payment, was to protect Macaulay against the new bond, which he did, and not claim credit for the second payment, which there is no reason to believe he ever intended. Judge Brockenbrough corrected the error of the commissioner, by directing the credit to be given once; and as to the effect, the result is the same, whether it be credited as of the first date, or of the second. Justice requires me further to say, that I see no reason to draw unfavourable conclusions against Corbin Griffin, from the fact of his taking a receipt in his own name, for the £300. paid Waller, May 1798, and for which his estate has been denied a credit, on the ground, that this sum was the price of Macaulay's slaves, sold to pay that debt. The receipt might have been literally and honestly according to the fact. Corbin Griffin might have paid the amount in anticipation of the sale, or if the sale was on credit, in anticipation of the payment, and with no view or purpose of making a fraudulent charge. It does not appear, that he ever set up a claim founded on that receipt against the trust fund.

"As to the debt secured by the deed to Jamieson, all concerned seem to have concurred in repudiating the deed, as evidence, either of its true character or amount. The sum specified in the deed, as due to him, is £5000. (16,666 dollars 67 cents). In December 1801, he received from the trustees, two payments, amounting to 1156 dollars 66 cents, probably in money, and during the same month, in addition, a half share in the Dismal Swamp Land Company, valued at 2500 dollars, and 4000 acres of land, purchased at the price of 4000 dollars, all trust funds, amounting to 7656 dollars 66 cents. In his receipt to the trustees, for the half share, and land, dated 17th December 1801, and

again, in an acknowledgment under seal, dated 11th February 1804, he admitted the purchase of this property to be for the benefit of the Dismal Swamp Land Company, *and by deeds dated 20th July 1809, conveyed it to them; reciting, that the purchase was intended, after satisfying an individual debt due to himself, to pay a considerable debt due them; and also, that the debts due to himself and Corbin Griffin, individually, had been fully satisfied. These deeds were duly recorded. Corbin Griffin was named among the grantees. Neither he, nor the company of which he was a member, appear ever to have disclaimed the deed; on the contrary, the company, in their bill filed in 1823, which is made an exhibit in these causes, allege that they have never been disturbed in their enjoyment of the property. They allege also, that Thomas Griffin was a manager, and for the two years preceding their bill, the president of the company. The presumption is, that both Corbin and Thomas Griffin, have received their proportion of this property; could they have done so without conceding the right of Jamieson, so to dispose of the trust subject; and would Corbin Griffin have done so, unless his prior individual claims had in truth been satisfied?

"In 1811, a settlement was made between the company and M'Neale, executor of Jamieson, in which the payments to Jamieson, of 1156 dollars 66 cents, together with money received by him from Grimes in 1804, arising from profits of the land, were charged to his estate, and credits given for money paid Mrs. Macaulay, (her dower interest for dividends, and for his claim against Macaulay,) thus stated: 'By cash due Colonel Jamieson, from the trust on Macaulay's estate, with interest, 687 dollars 50 cents.' On the account thus stated, a balance appears against Jamieson's estate, of upwards of 1000 dollars, which the company released, by an agreement, under sale, dated at the time of the settlement, (28th May 1811,) and referring to it. The copy of this agreement filed, is verified by the signature of 'Corbin Griffin, one of the managers,' with whom the settlement was made. Now of the £5000.

*mentioned in the deed, all that was apparently ever claimed by the company, or admitted by Jamieson, was £3000., their money, as was alleged, lent by him, on their account, to Macaulay. If the deed had been regarded as fixing the real sum due, it follows, that the residue, £2000., was due to Jamieson. Had he claimed that amount instead of a balance of more than a thousand dollars, against him, on the account just mentioned, there would have appeared a much heavier balance in his favour, against the trust fund. But it appears from the entry in that account, that his claim, with interest added, against the trust on Macaulay's estate, was only 687 dollars 50 cents. The precise period to or from which the interest was computed, is not given; but computing interest on the bal-

ance appearing by Macaulay's ledger E, due from Macaulay's estate, to Jamieson, £173. 10. 3½., 578 dollars 40 cents, either from May 1797, when it seems to have been due, or from the date of the deed, November 1797, and the close approximation of the sum to that in the settled account, renders it well nigh certain, in connection with other facts in the case, that Jamieson's claim was adjusted, not according to the deed, but according to Macaulay's books. According to the deed, Jamieson's estate would have been entitled to 6666 dollars 67 cents, in 1797. His executor settles the debt as amounting in 1804, to 687 dollars 56 cents, and in his answer to the Dismal Swamp Land Company, states that the account of his testator was taken from the books of Macaulay, by Dr. Corbin Griffin; he relies on the settlement just mentioned, and affirms, that it does not appear from any thing he has been able to discover, that his testator has ever received from the sale of the trust funds, on his own account, more than his said debt of £173. 10. 7., with the interest due thereon, nor does it appear that the said trust fund has been made chargeable by his testator with any other or

534 greater sums than his *said debt, and the said sum of £3000. with the interest due, &c.

"Judge Brockenbrough laid some stress upon the circumstance that the sums provided for by the deed, were all in round numbers: And I must acknowledge, notwithstanding the severity of the strictures upon the suggestion, that this circumstance is not without its influence on my mind, connected with the array of facts and circumstances forced upon its attention by the course of the argument, or my own examination. It is passing strange, to say the least, that debts due to three different individuals, composed evidently of various items, should, with interest added to the same date, eventuate in round thousands precisely, and two of them (deducting the claim of the Dismal Swamp Land Company from the aggregate secured to Jamieson,) in the same sum, £2000. each. But throwing this out of view: The circumstances under which the deed was executed; the cotemporaneous exposition of the parties, evidenced by their acts and admissions; the fact that Corbin Griffin received no payment after the date of his receipt of 23d November 1800; the appearance of that receipt; his acquiescence in, and ratification of, payments from that time to creditors (over whom he was entitled to priority), of almost, if not entirely, the whole trust fund then existing, or expected to be realized, amounting to upwards of 7500 dollars; when, if the deed really recited his debt, he was himself entitled to much the larger part of that sum: The repeated acknowledgments of Jamieson, in his receipt to the trustees; his sealed obligation of February 1804, and his deeds of July 1809; and the subsequent settlement of his executor, M'Neale, with the Dismal Swamp Land Company, in 1811, by which Jamieson's

debt was estimated at something upwards of 500 dollars, in place of £5000.: The failure of all the preferred creditors, their representatives, and the trustees, the

535 latter having possession of *Macaulay's books, to produce any book, settlement, memorandum, account or evidence, shewing the origin, nature or amount of the debts to be different from that exhibited by the books of Macaulay: The withdrawal and alteration of some of the exhibits filed in these causes; the mutilation of others; and the confused entries made and obliterated, or cancelled, after Macaulay's death, in his ledger E, the only one of his books—except a tattered day book, apparently of 1788, recently produced—which the flames, or the negligence of Thomas Griffin, has suffered to escape;—all tend to impress upon me, without being conscious of a disposition to draw overstrained inferences, or indulge in undue suspicion or harsh epithets, a settled conviction that the deed of 15th November 1797, was not designed, nor understood by the parties, to ascertain the sums due the several preferred creditors, and that the contradictory account and statements of the defendant Griffin, by no means conduce to disclose, if they were not fabricated to conceal, the truth of the transactions to which they relate.

"The claim of Jerdone, the last of the preferred creditors, assigned to his sister, Mrs. Macaulay, the original plaintiff in the second of these causes, appears to rest on a common ground with that of the two first, as respects the evidence of its amount, notwithstanding the expression of a belief by Anderson, in his bill, that the £3000. secured to Jerdone by the deed, and perhaps a greater sum, was really due to him. It is not necessary now to state minutely the reasons for my opinion. It rests in part upon the circumstances already commented on, and partly on the evidence more directly bearing upon that claim. No party in these causes, except Anderson, the representative of Macaulay, seems to have any right or interest in this question; that claim being confessedly postponed to those both of Jamieson and Corbin Griffin. The general

536 creditors under the deed, or of the estate *of Macaulay—or even his distributees, if no such creditors appear—may have an interest; that interest it is the duty of the administrator to protect. But no such creditor or distributee asserting a claim, and no party before the Court being injured, this Court perhaps can object to no disposition of any remaining fund, should there be such a fund, after satisfying the parties claiming under the deed, as may be asked by Anderson, who unites in himself the character of executor of the assignee of Jerdone, and administrator of Macaulay, upon his responsibility, in case of any future claim of creditors or distributees. This subject will be hereafter provided for.

"Considering that the account of Corbin Griffin, with the trustees, was finally and

fairly closed on the 23d November 1800, and that if, in the absence of the statement according to which payments or adjustments were made of his claim, a balance should appear against his estate, after the lapse of nearly 19 years, a settlement apparently fair and final with the authorized trustees, should not be set aside, there seems to be no necessity to delay these suits by directing a new account upon the principles now stated, with a view to ascertain how the balance would stand. The decree to be rendered may at once assume that there is no balance either way, since the Court is satisfied that this is the proper conclusion, and the means are wanting upon which a precise adjustment could now be made.

"But as to Jamieson, he himself conceded what is indeed abundantly proved, that he had received a very large sum over and above what was due to him individually. The excess, he admits, was received in a fiduciary character, and the whole, or nearly the whole, was turned over by him to the Dismal Swamp Land Company, to whom he admitted it belonged. Without deciding whether his estate may not be responsible eventually, it rests primarily upon the
537 company who actually received *and enjoyed this excess, to account for it. They are not before the Court, although they appear to be prosecuting a claim in this Court against the trustees of Macaulay, or rather their representatives, and others, claiming a balance to be still due to them under the provision of the deed in favour of Jamieson. The record in that suit is made an exhibit in these causes. For the present, all that can be done, or seems proper, is to direct an alternative statement to be made by a commissioner, crediting Jamieson's estate with the amount appearing on Macaulay's books, (by which he and his executor seem to have abided,) and with any just payment by him to Mrs. Macaulay, and charging him with all money or property received from the trust subject, and after applying these payments so as to extinguish his claim, balance his account by a transfer of the excess to the debit of the Dismal Swamp Land Company, in their account with the trustees, hereafter to be adjusted.

"The next enquiry is, for what amount are the estates of the trustees, jointly or severally, responsible. Nelson is shewn to have taken some part in the execution of the trust; but his acts seem to have been chiefly, if not exclusively, intended merely to give effect to those of his co-trustee. It does not appear that he received any part of the funds, money arising from sales, or otherwise. Besides this, the account rendered by Thomas Griffin to Anderson in 1817, of the trust transactions, is rendered in his own name as acting trustee, and all commissions credited to himself. In those exhibited with the original and amended answers, although rendered in the name of both the trustees, the commissions on the whole amount of the receipts are stated as T. Griffin's, and in the last, specially stated as on the amount, £ 7219. 9. 10., received and

disbursed by him as trustee, &c. Here again, without finally deciding that Thomas Nelson's estate may not be eventually
538 *liable for the acts performed jointly or severally by him, or upon further proofs to contribution in respect to such acts, the primary responsibility attaches, I think, most clearly to Thomas Griffin for whatever balance may be due on account of the trust. It remains to ascertain what that balance is. Commissioner Shore's report, made under the decree and opinion of Judge Brockenbrough, pronounced in December 1833, presents three statements of the trust transactions:

"1. Statement A, shewing a balance due from the trustees jointly, on the 31st December 1803, principal and interest, of 1659 dollars 74 cents.

"2. Statement B, a balance, same date, against the same, 2040 dollars 64 cents.

"3. Statement C, a balance against T. Griffin, surviving trustee, 31st December 1824, 7367 dollars 28 cents.

"After attentively examining the numerous exceptions of all the parties to the original report of commissioner Baker, the comments of Judge Brockenbrough upon them, and the reformed report of commissioner Shore, I am of opinion that these statements ought to be sustained, and that the two last statements exhibit the balance for which Thomas Griffin, the surviving trustee, should be held liable."

The Chancellor then proceeds to consider other exceptions to the report, which it is unnecessary to notice.

The decree of the Court is as follows:

"This day came the parties, by their counsel, in these causes, which were fully heard together on the eighth day of November last, and time then taken by the Court to consider of its judgment to be given in the same, and the Court having maturely considered the records and the arguments of counsel, is of opinion: First, that the deed of trust executed by Alexander Macaulay to Thomas Griffin and Thomas Nelson, trustees, on the fifteenth day of November one thousand seven hundred and ninety-seven, does not furnish conclusive
539 evidence *of the extent of the debts thereby intended to be secured to the three preferred creditors, Corbin Griffin, John Jamieson and Francis Jerdone, but that it is competent for the parties to shew, by other evidence, that the said debts were of less amount than the sums specified in the said deed. Secondly, that under the circumstances, the books of Alexander Macaulay are admissible evidence against Corbin Griffin and John Jamieson, and their representatives, in ascertaining and fixing the several amounts due to them from the said Alexander Macaulay, and intended to be secured by the said deed. Thirdly, that all claims or demands of the said Corbin Griffin against the said trust fund, under and by virtue of the said deed, and intended to be secured thereby, were finally closed and fully satisfied by the last payment to him, evidenced by the receipt pur-

porting to be dated the twenty-third day of November, one thousand eight hundred, so that there is no balance due either to or from the said Corbin Griffin's estate on account of the said trust matters. Fourthly, that the book of Alexander Macaulay, (ledger E, folio one hundred and six,) exhibited the true amount of his indebtedness to John Jamieson, on individual or private account at the date of the said deed, and consequently that his individual claim under the trust deed has been greatly overpaid, but as it appears that the greater part, if not the whole of the excess, after satisfying his individual debt, was paid over by the said Jamieson to the Dismal Swamp Land Company, on account of a claim alleged to be due to them for moneys of the said company advanced by Jamieson to Alexander Macaulay, and as the said Dismal Swamp Land Company are prosecuting a suit in this Court for the establishment of their said claim, and the recovery of a balance still claimed to be due to the said company on account of the moneys so advanced, it is

not proper at this time to decree the
540 payment of such balance as may *be due on account of such over payments to the said Jamieson, but that branch of these causes should be reserved for the future action of this Court. Fifthly, that as Thomas Griffin appears to have been the principal acting trustee, and the acts of Thomas Nelson seem to have been intended merely to give effect to those of his, the said Griffin, who received and disbursed the trust funds, the primary responsibility for whatever balance that may be due on account of the trust, attaches to the said Thomas Griffin, and should be decreed against his estate in the first instance, as well the balance due on the joint account of the said trustees as that due on account of the surviving trustees; without however, now deciding that the said Thomas Nelson's estate may not be eventually liable for the acts performed jointly or severally by him, or upon further proof to contribution, in respect to such acts. For these and the reasons more fully set forth and contained in a written opinion this day pronounced in these causes, which opinion is ordered to be filed with the papers and made a part of the record in these causes, but is not to be spread at large on the order book, the Court rejecting and overruling all exceptions and petitions, and setting aside all reports and statements of the commissioners, and all orders and decrees heretofore made in these causes, so far as the said exceptions, petitions, statements, orders and decrees may conflict with the said opinion and this decree, and affirming and sustaining the residue, would now proceed to dispose finally of the trust funds remaining due from the trustees, Thomas Griffin and Thomas Nelson, jointly, according to statements A and B of commissioner Shore's report, and from Thomas Griffin, as surviving trustee, according to statement C of commissioner Shore's report, but that it appears by evidence in these causes, that the Dismal

Swamp Land Company are now prosecuting
a suit in this Court to subject the said
541 trust funds to the payment *of an alleged claim or demand said to be secured, or intended to be secured by the said trust deed, in consequence of which said suit, the Court is of opinion that the said trust fund should be decreed to be paid into bank, to await the decision of the said Dismal Swamp Land Company's suit, or such further action of the Court in these causes as may hereafter be deemed proper. And the plaintiffs being willing for the present, to take such a decree against the defendant Robert P. Waller, as executor of Thomas Griffin, deceased, de bonis testatoris, with liberty, should such a decree prove unavailing, to apply to this Court for further relief in the premises against the said defendant, Robert P. Waller, executor as aforesaid: The Court therefore, doth adjudge, order and decree, that the said defendant, Robert P. Waller, executor of Thomas Griffin, deceased, out of the assets of his said testator, in his hands to be administered, if so much thereof he hath, and if not, then so much thereof as he may have, pay into the Exchange Bank of Virginia, at Richmond, to the credit of this Court, in these causes, and subject to the future order thereof, the sum of two thousand and forty dollars and sixty-four cents, with interest on one thousand six hundred and eighty-four dollars and thirty-seven cents, part thereof, to be computed at the rate of six per centum per annum, from the thirty-first day of December one thousand eight hundred and three, until paid, being the balance due by the said statements A and B of commissioner Shore's report, from the joint trustees, Thomas Griffin and Thomas Nelson; also, the further sum of seven thousand three hundred and sixty-seven dollars and twenty-eight cents, with the like interest on five thousand three hundred and thirty-six dollars and ninety-one cents, part thereof, from the thirty-first day of December one thousand eight hundred and twenty-four, until paid, being the balance due by the said statement C of commissioner Shore's report, from the
542 said *Thomas Griffin, as surviving trustee; which said several sums of money, with interest as aforesaid, or so much thereof as he may have, the said Robert P. Waller executor as aforesaid, is ordered to pay as aforesaid, on or before the first day of April next, having been served with a copy of this decree, at least sixty days prior to that day, or that he then shew cause to the contrary. But nothing in the said opinion or this decree contained, is to be held in any manner as deciding the validity of the alleged sale by the trustees, Thomas Griffin and Thomas Nelson, of the half share of Dismal Swamp Land Company stock and the individual moiety of eight thousand acres of land, conveyed by the said trust deed of the fifteenth day of November one thousand seven hundred and ninety-seven, or as settling or in any manner affecting any question arising in the said suit of the Dismal Swamp Land Com-

pany, herein before referred to as depending in this Court. And the Court doth further adjudge, order and decree, that the bills of the plaintiffs respectively be dismissed as to the defendant Robert P. Waller, in his character of administrator de bonis non of Corbin Griffin deceased."

From this decree Waller as executor of Thomas Griffin and administrator de bonis non of Corbin Griffin, applied to this Court for an appeal, which was allowed.

After the above decree was made, the Dismal Swamp Land Company obtained leave of the Court to file a supplemental bill in their case; and it was filed at July rules in 1841. In this bill they say that in October 1828 they were informed by their counsel that there was another suit pending in the Court, brought by Macaulay's administrator against Griffin, claiming an account of the trust fund, and in which an account had been rendered setting forth Mr. Griffin's claim to the money; and that in that case the justice of his claim was litigated. That

543 in this state of the case it was *determined to bring the case of Macaulay's administrator v. Griffin, first to a hearing. If Griffin was entitled to the money, the creditors would have nothing to dispute about. If that point was decided against Griffin, then the rights of the respective creditors would come up for consideration.

They state the joint proceedings in the three causes in 1829; the setting aside of that decree and the opinion and decree of Judge Brockenbrough in 1833; giving extracts from his opinion upon the exceptions of Jamieson's executor to the commissioner's report. They complain that account of moneys belonging to them, received by Macaulay from Jamieson, were directed in causes in which they were no parties. They say that they had been apprised of these proceedings for the first time at the previous April term, when they employed counsel and asked leave to file this supplemental bill.

They charge that there is a considerable debt due from Alexander Macaulay to them; and that it had been clearly shewn that the deed of November 1797 was intended to secure the payment of that debt. They refer to the deeds of Jamieson of 1809, conveying to the company the moiety of the tract of 8000 acres of land and the half share of the stock of the company, and to the admission therein contained, that his debt, and also the debt to Corbin Griffin, had been paid; and they allege that Corbin Griffin, as one of the members of the Dismal Swamp Land Company, was one of the grantees in these deeds. That he had been as much in the enjoyment of the property thus conveyed to them, and of the profits thereof, as the other grantees; and being one of the managers of the company, he knew that the fact of his payment was stated in the deeds; and he also knew the truth of the statement.

They charged that Thomas Griffin knew that Corbin Griffin's claim had been

544 satisfied long before the act of *Con-

gress of the 20th of February 1819, appropriating 5209 dollars 20 cents, for the value of the ship Louisa and cargo, and his failure to pay to the company the money received under that act, especially after the promises he had made them, was an act which could not be justified.

They charge that Anderson, as administrator of Alexander Macaulay, had obtained a decree against the executor of William B. Christian for 10,504 dollars 63 cents, with interest from the 31st of December 1829, and that he had received the whole amount. And they insisted they had a right to have this money applied to the payment of their debt; the said Christian having been indebted to Macaulay at the time he made his deed of the 15th November 1797, by which Macaulay assigned for the purposes of the trust, all debts due to him. And making Anderson as administrator of Alexander Macaulay, and as executor of Elizabeth Macaulay, Robert P. Waller as executor of Thomas Griffin and administrator de bonis non of Corbin Griffin, Frances Berkeley administratrix of Thomas Nelson, and William Major sheriff of Culpeper county, and as such administrator de bonis non of John Jamieson, parties defendants to their bill, they asked that an account might be taken of the debt due from Alexander Macaulay to the complainants, and also accounts of all property, moneys and effects, out of which that debt ought to be paid; that they might have a decree against the party properly liable for the debt, or for payment out of the property liable for it; and for general relief.

Waller as the executor of Thomas Griffin answered, saying he had no personal knowledge of the transactions spoken of in the bill; and referred to the answer of his testator. He also answered as administrator de bonis non of Corbin Griffin. He said that though no decree was asked against his intestate's estate, either in the original

545 or supplemental bill, he felt it his *duty to put in issue the allegation that Corbin Griffin's claim on the estate of Alexander Macaulay had been paid before the 20th July 1809. He called for better proof of the fact than the recital in Jamieson's deed of that date. That Corbin Griffin was not estopped by the recital in that deed from denying the fact. He did not sign the deed, and as he was then a very old man, he probably never knew of the recital in the deed, if he ever knew that such a deed was made. And he pleaded the statute of limitations in bar of the complainant's claim.

The administrator of Jamieson professed to know nothing personally of the matters stated in the bill; and he referred to and relied upon the answer of M'Neale, executor of Jamieson, to the original bill.

Anderson answered as administrator of Alexander Macaulay and as executor of Elizabeth Macaulay. He admitted the statements as to the previous joint action of the Court in the causes. He insisted that the opinion expressed by Judge Brocken-

brough, respecting the probable indebtedness of Macaulay to Jamieson for money of the complainants lent by Jamieson to Macaulay, was not sustained by any sufficient evidence in the said suits. That the suit of the company was not then ready for a decision for want of proper parties; and no decision could have bound the company, and therefore no opinion of the Judge could bind any other party. He denied that Jamieson ever was treasurer or cashier of the company, or had control of the money of the company; or ever was authorized to settle the accounts of the company with their debtors, and take security for the amount due from them; and especially to take such security in his own name.

He complained that though he was a member of the Dismal Swamp Land Company, and asked to be allowed to examine their records, he had been refused. He

546 *said that it was true Judge Brocken-

brough directed M'Neale, the executor of Jamieson, to render an account of all moneys loaned to or received by Macaulay from the Dismal Swamp Land Company by the direction of Jamieson, and for which Jamieson may have been in any way responsible to the company; but that M'Neale had never attempted to render this account; nor did he ever attempt to shew that there was any thing due from Macaulay to Jamieson on that account. And the reason why he could not render the account was that in truth no such money had ever been lent by Jamieson to Macaulay, or received by him under authority derived from Jamieson. He insisted that what M'Neale said in his answer on the subject was not evidence against Macaulay's representative. He did not pretend to have received his information from Macaulay, but referred to a letter of John Brown of Richmond, who was one of the company. That no bond, note, receipt, or other evidence is referred to, to prove that the loan was made; and there was no proof, if a loan was ever made by Jamieson, it was made to Macaulay.

He insisted that the advice of their counsel was no sufficient excuse for the delay of the plaintiffs in preparing their case. That no obstacles had been thrown in the way of their progress, their bill had been answered by all the parties in 1824 and 1825; and if they had applied to the Court after July 1829, when the order of the previous June had been set aside by their consent, they would either have had an account directed or their bill dismissed; which latter result the defendant believed they expected. That all the books, papers and accounts, as well as all the property of Alexander Macaulay, as early as the latter part of the summer of 1798, on his death passed into the hands of Thomas Griffin and Thomas Nelson, the trustees in the deed of November 1797.

547 That after the defendant's *marriage with the daughter of Macaulay he was denied access to the said books and papers by T. Griffin, and denied access also to the books, papers and accounts of the Dismal Swamp Land Company. And in this state

of things, well known to Thomas Griffin, the surviving trustee, and the president of the company, their suit had been permitted by them to lie dormant for a long course of years, that the defendant at great expense of money and labour might bring a reluctant trustee to account, and shew the amount actually due from him; and that then the complainants might come in and sweep away the whole by means of a very vague, indefinite, contingent and stale claim; not as yet supported by evidence sufficient to shew any debt to be due from Macaulay to the complainants. And he relied on the statute of limitations, and also upon the lapse of time and the staleness of the demand of the complainants, in bar of their claim.

The defendant further objected that the complainants were not authorized to sue for the claim they had set up, because if there was such a debt due, it was due before the complainants were incorporated; and should be sued for in the name of the survivor of the old company or his representative. He denied further that the trustees had ever sold the moiety of the 8000 acres of land and the half share of the company to Jamieson. He said that they knew they had no right to pay to Jamieson, out of the proceeds of the trust estate, more than the sum of £173. 10. 7., and its interest; and that they had no right to pay any part of the proceeds of sales to the Dismal Swamp Land Company, as there was nothing due to them from Macaulay at least under the trust deed. They therefore never conveyed the said land and stock to the said Jamieson or the company.

As to the claim to the amount recovered by the defendant from William B. 548 Christian's executor, he relied on *all the grounds before taken by him in his former answer, and on the grounds of defence taken hereinbefore.

The papers filed by the plaintiffs shewed that Alexander Macaulay had received in the years 1795, 1796 and 1797, of the moneys of the Dismal Swamp Land Company, some thirteen thousand dollars; but as he was a director of the company, and there is evidence in the record that he acted in the management of the affairs of the company, it does not certainly appear what part of this money he received to be dispensed for the company, or what part he received as a loan. There is, however, an account filed made out by Thomas Griffin when he was president of the Dismal Swamp Land Company, which charges Macaulay with these moneys, amounting to 13,395 dollars 69 cents, and credits him with the price of the land and half share of the stock of the company conveyed to them by Jamieson. And there is also evidence of a settlement between the company and M'Neale, the executor of Jamieson, by which they take this land and stock in full of all claims they have upon him for moneys of the company received by him.

On the 29th of October 1841 the plaintiff filed in the cause a copy of the record in the

shew that the company about July 1796, had upwards of £3000. they were desirous of putting at interest, and the disposal whereof seems to have been given to Jamieson, and is of opinion, that the loan of it must have been made at least 12 months anterior to the deed of trust. He states that Jamieson was a careless accountant, kept no books, and has left no account of the transactions between himself and Macaulay, and the

552 defendant *has no means of saying what was the debt due from the latter to the former, but from an account taken from the books of Macaulay, and furnished by Corbin Griffin, it appears to have been £173. 10. 7., on the 15th May 1797. This defendant adverts to the sales made to his testator, by the trustees of Macaulay in 1801, for an undivided moiety of 8000 acres of land, and a half share of company stock, and payments of money to and receipts by Jamieson from the trustees, and 2000 dollars from Grimes, &c.; and states the conveyance by Jamieson in 1809, of the 4000 acres of land to the company, and the said half share of stock, without any other consideration, as he believes, than the £3000. and interest, lent by him to Macaulay (for the company). Finally, he relies on a settlement with the company and discharge in May 1811. This cause was brought to a hearing, together with two other causes pending in this Court, namely, Anderson, administrator, &c. v. Griffin, &c., and Macaulay (Mrs.) v. the same, and in June 1829, an order was made in the two last causes recommitting certain accounts to another commissioner. The order of commitment was set aside in November 1832. In December 1833, Judge Brockenbrough delivered an opinion in the two causes just mentioned. This cause appearing to have been left at rest, in consequence of the advice as it seems by a supplemental bill recently filed, of the plaintiffs' counsel, who thought it proper as the suit of Macaulay's administrator would call for a settlement of the trust subject and decide upon the trustee's claim to keep the money, on the ground of his father's claim (C. Griffin) to wait until that point should be settled. The plaintiffs have again put their cause in motion by filing in July 1841, a supplemental and amended bill, and by taking sundry depositions returned September 1841; answers have been filed by Macaulay's administrator, by T. and C. Griffin's representatives, and by Jamieson's administrator.

553 *It is not necessary at this time to set forth their answers in detail. The plaintiffs now ask a decree, at least for an account, and if their prayer be granted, this account is now for the first time to be settled, after the lapse of 45 years from the time of the death of the supposed debtor, 46 years after the date of the deed under which the plaintiffs claim as secret incumbrancers, and a still longer period from the date of the transactions on which their alleged claim is founded; after the death of all the original parties to the deed, including both trustees. It is an account now to be made

up, after Macaulay's representatives have, not only by death of parties and witnesses, lost the benefit of testimony which might have thrown light upon these very obscure transactions, but has been deprived by the act of God, or the fraud or neglect of those who took possession of his books and papers, of all the aid they might have derived from that source, and this not only without the production of any bond or note executed by the supposed debtor evidencing the amount of debt, but without production or exhibition even of an account or statement by the plaintiffs themselves during the whole progress of this long litigation, or of any evidence establishing their demand, except the inferences deducible from the deed and statements of Jamieson and his executor, and the evidence introduced recently in the cause (in 1841). The excuse offered in the supplemental bill does not appear to me to justify the course which the plaintiffs have pursued. Their claim was an adversary claim, both to that of Corbin Griffin and of Macaulay's administrator. To the former, not upon the ground of priority, it is true, but upon the ground of satisfaction, and they were not justified in laying by while the controversy was carried on by Macaulay's administrator, with a view to sweep the fund in case the latter should succeed in establishing the liability of Griffin the

554 trustee, especially as this course subjected *the estate of Macaulay to all the disadvantages of meeting their claim arising from lapse of time, a period now as already said, of 40 odd years from the date of the transactions. Nor would any decree in the case of Macaulay's administrator v. Griffin, &c., have been evidence in favour of these plaintiffs against Griffin, and it was the more incumbent upon these plaintiffs to bring their case speedily, or at least with ordinary diligence, to a hearing, not only because of the antiquity of their claim, its unascertained amount, and the secret nature of the trust; but because they themselves alleged in their bill, that he trustee Griffin had been guilty of gross negligence and misapplication of the trust subject. As to the trust itself, there is a strong objection to the attempt at any time, and especially after a long time has elapsed, to a parol proof of a secret trust. I do not think the admissions of Jamieson or his executor, are proper or sufficient evidence under the circumstances, on which this Court should set it up. I am strongly inclined to the opinion that something, possibly the whole amount claimed by the plaintiffs, was intended to be embraced in the provision for securing Jamieson £5000. But this impression is not, I think, the result of adequate legal proofs. It may be difficult to believe that Jamieson would admit a debt nominally due himself to be due to another, if it were not so; but that does not make the admission—not taken in the form of a deposition—evidence against the grantor. Besides, there is evidence too strong for my mind to resist that the deed did not correctly set forth the sums due

the several incumbrancers. As to the amount secured to Corbin Griffin, Thomas Griffin seems to rest his defence for paying it upon the sole ground that the deed acknowledged it. Jamieson's debt is hardly pretended to have exceeded the sum mentioned in Macaulay's book—something upwards of £170—though stated as £5000.

And Jerdone expresses a belief that 555 something, *he does not know how much, was due to him, as part owner of a tract of land with another, from which Macaulay received timber and produce. The debt secured to him by the deed, separately, was put at £3000.

"All these sums were put down in round numbers; and while the fact may very possibly be accounted for without imputing fraud to Macaulay, and indeed it is difficult to impute fraud to him without implicating in the charge all the cestuis que trust; yet, as already remarked, my mind cannot resist the conclusion, that the sums were in a great degree nominal.

"It is further to be remarked, that the company, through the agency of the trustees and Jamieson, have already received a very considerable part of the property conveyed by Macaulay; property sold apparently at a great sacrifice; bought in by Jamieson, and suffered by the plaintiffs to remain in his hands unconveyed, notwithstanding the trifling amount of his claim, for eight or nine years after the purchase.

This property consisted of 4000 acres of land, sold at 1 dollar per acre,	4,000
And a half share of stock, (in 1811, M'Neale sold Jamieson's half share at 5000 dollars, see C. Griffin's letter with defendants' depositions,)	2,500
It seems that Jamieson also, about the same time, received from the trustees,	1,156

Making, \$7,656

While his own private debt was £173. 10. 7.

"Finally. Without going into other litigated questions, touching the right of the present plaintiffs, as an incorporated body, to succeed to the rights of the old unincorporated company, or adverting to the want of sufficient evidence to establish the items of the account accompanying the depositions returned in 1841, I am *of 556 opinion that this old litigation ought to be brought to a close, and that less injustice is likely to arise from the dismissal of the bill, than from any decree founded upon the evidence now to be obtained. The delay of the plaintiffs does not seem to me to be justified by the reasons assigned. The necessity of a settlement of their accounts with Macaulay's estate was apparent from the terms of their bill, to entitle them to any relief. The Court has indicated the necessity of such an account, even while the plaintiffs seem to have withdrawn themselves from the controversy, by directing Jamieson's executor to render an account of the amount due from Macaulay to Jamieson, as treasurer of the Dismal

Swamp Land Company. The plaintiffs complain of this direction, as interfering with their claim in suits to which they were not parties, and of which proceedings they had no notice. But they did know of the pendency of these suits; and made the proceedings in them a reason for omitting to proceed with their own. Had they been active, the Court would most probably, at an early period, have directed the account they now ask, and which it does not now seem, can be directed with justice to the representatives of Macaulay. Without deciding that the admission of Jamieson, even though not in the form of a deposition, is incompetent or insufficient evidence that the debt, or a part of it secured to him, was actually due to the plaintiffs, or that the plaintiffs might not, as against Griffin, have claimed an account of his trust transactions, had the amount of their debt been clearly stated in the deed, or proved to have been liquidated and ascertained at the date of the deed, or at the period of Macaulay's death; and without deciding that the vouchers and evidence recently filed are insufficient to establish a claim to the amount thereof, or to any part, against Macaulay, (although the debt, if established by them, is very different from that supposed by

Jamieson's executor, who represents 557 Macaulay *as a borrower of a specific sum of about £3000. in the hands of the company for investment in 1797, whereas the vouchers in question are for various sums received at different times, and from different persons;) passing over these objections, the prevailing argument with the Court for refusing the accounts is, that unliquidated as it has been suffered to remain now for a period of between 40 and 50 years, no adjustment of it upon safe and proper principles is to be expected, and that the delay is justly ascribable to the plaintiffs. While the Court does not, upon the pleadings and evidence, feel justified in this suit in disturbing the plaintiffs in the enjoyment of what they have received and been permitted to retain of the estate of Macaulay, it feels equally restrained from affording them, under the circumstances, the decree they now ask for further accounts;—leaving the parties upon the ground on which they stood, and seemingly acquiesced in, from the sale to Jamieson in 1801, or at least from the conveyance to the Dismal Swamp Land Company in 1809, up to the institution of the present suit, a period in one view, of 14 years, and in the other, of two and twenty."

In pursuance of this opinion the Court dismissed the bill with costs. Whereupon the plaintiffs applied to this Court for an appeal, which was allowed.

The three causes came on to be heard together in this Court.

Patton and Cooke, for the appellant Wal-ler executor of Griffin.

It is now fifty-three years since the deed which gave rise to this controversy was executed. That deed was executed in No-

vember 1797, and Macaulay died in July 1798. In one year after his death the trustees had proceeded to execute the trust, and to sell all the property conveyed, except an interest in the Dismal Swamp
558 *Land Company, and some Dismal Swamp land; and these were sold in 1801.

By 1801 Corbin Griffin had received, beside the amount he had paid as surety for Macaulay, a sum greater by upwards of 2000 dollars, than the amount which the appellees say was his real debt. And by 1804 Jamieson had received 2500 dollars more than the amount to which the appellees may say he was entitled.

From 1804 until 1819 there was no sale or transaction in execution of the trust, except the sale of a house and lot in Hanover town, and the payment of a small debt for which C. Griffin was the security. And there were the two fires in the town of York, one in 1804, and the other in 1814, in which the books and papers of Macaulay were scattered, and many of them irretrievably lost.

At the date of his deed Macaulay was overwhelmed with debts, all of which have been lost to the creditors. And in 1815, after his estate had been again and again committed to sheriffs because of its supposed insolvency, Anderson qualified as administrator de bonis non. In 1819 the claim upon the French government for the capture and detention of the *Louisa* was discovered, and the amount, upwards of 5000 dollars, was paid to Thomas Griffin, the trustee.

The deed of 1797 provided for the payment to Corbin Griffin of a debt of £2000, and although Macaulay lived for eight months after the execution of that deed; although there were many creditors whose debts were lost; although Mrs. Macaulay's bed was sold under this deed for the payment of this debt, yet neither Macaulay in his lifetime, nor these desperate creditors, nor Mrs. Macaulay herself, nor her daughter and her first husband Peyton Southall, were ever heard to doubt the validity and justice of Corbin Griffin's claim, until Anderson, who had married Mrs. South-

559 all, filed his bill *as administrator of Macaulay, seeking to impeach the debt due to Griffin, and to set up that of £3000. to Jerdone. His bill was filed in 1819. That of the Dismal Swamp Land Company was commenced in 1820; but for some error in the institution of the suit it was temporarily abandoned, and was recommenced in 1823. As to the consolidation of the causes, the case of *Claiborne v. Gross*, 7 Leigh 331, shews it cannot be done.

The bill of Anderson as administrator of Macaulay against Thomas Griffin as trustee under the deed of 1797, ought to have been dismissed for want of proper parties, on the final hearing; the objection for want of parties having been made and insisted on in the progress of the cause. These necessary parties were Jerdone, or Mrs. Macaulay claiming as his assignee, who was named cestui que trust in the deed, and the Dismal

Swamp Land Company, which was known to be a beneficiary under the provision for Jamieson; and as Jamieson's debt was assailed, it was peculiarly proper that they should have been parties to defend their interests. It is true that the causes were heard together in 1829; but afterwards even this ceremony was dispensed with. Moreover Griffin stood as the holder of alleged trust funds; and he had a right to insist that all the beneficiaries, especially those to whom payments had been made, and whose debts were impeached, should be made parties. Indeed the decree of the Court shews that the Judge below thought that justice could not be done so as to protect Griffin until the case of the Dismal Swamp Land Company was settled. Besides this there was a trust for the creditors generally; as to whom there is not even a suggestion that they have been paid; and yet no reference is had to them in the pleadings or in the decree of the Court. We understand the rule to be imperative that all creditors specifically provided for shall be made parties; and especially when their claims are disputed. *Sheppard v. Starke*, 3 Munf. 29; **Jamieson's adm'r v. Deshields*, 3 Gratt. 4; *Finch's Prec.* 207; *Clark v. Long*, 4 Rand. 451. But the bill should have been dismissed on another ground, as a matter of course, when it appeared that the debt of an acknowledged creditor, Jerdone, for more than sufficient to absorb the whole trust fund, was unsatisfied; and that creditor no party to the cause. *Ricks v. Commonwealth*, 1 Gratt. 416; 2 Rob. Pr. 263; *Ward v. Van Bokkelen*, 2 Paige's R. 289.

We come next to enquire whether the deed of 1797 is a valid and bona fide deed so far as the debt of Corbin Griffin is concerned. We say that neither Macaulay's administrator, nor Jerdone or his assignee, nor Jamieson, nor the Dismal Swamp Land Company, had a right to question the amount of Corbin Griffin's debt in 1797. No bill to impeach a bond or deed can be entertained except for fraud, accident or mistake. No fraud, mistake, secret trust or error is charged in either bill as to the debt of Corbin Griffin. The only fraud charged is the fraud imputed by Macaulay's administrator, Anderson, to Macaulay in making the deed to delay, hinder and defraud creditors. It is not alleged there was any mistake in the grantor or ignorance on his part, nor fraud on the part of the grantee, in fact nothing is alleged which can justify the Court in going behind the deed. *Thompson v. Jackson*, 3 Rand. 504; *Slee v. Bloom*, 20 John. R. 669, 685; *Chambers v. Goldwin*, 9 Ves. R. 254; *Kinsman v. Barker*, 14 Ves. R. 578. If errors are relied on they ought to be specified. If the amount mentioned in the deed was put in to cover the balances when ascertained, or advances to be thereafter made, such fact could not be shewn without an allegation in the bill to that effect. *Taylor v. Haylin*, 2 Bro. Ch. Cas. 310; *S. C.* 1 Cox's Cas. 435. It must be alleged, and it must be proved, that there was

error, or mistake, or fraud, and it must be shewn why the bond was given for 561 £2000., if so much was *not due.

Johnson v. Curtis, 3 Bro. Ch. Cas. 266. There is not a shadow of proof of any mistake in the settlement of their accounts. The probability is that the transaction was a loan of £2000. at one time to relieve Macaulay from his embarrassments.

No case, English or American, can be found to justify the bill in this case. It is true that cases may be shewn of guardian and ward, and trustee and cestuis que trust; but the principles governing these cases do not apply. The cases are exceptions to the general rule. Lewis v. Morgan, 3 Anstr. R. 769. Certainly the deed must operate as strongly in favour of the grantee to establish the debt admitted therein to be due to him, as would a settled account. And it is settled that the acknowledgment of a debt as one item may be recovered under a count for an account stated. Knowles v. Michel, 13 East's R. 249; Highmore v. Primrose, 5 Maule & Sel. 65. There ought not to have been any account ordered going behind the deed as to Corbin Griffin's debt. And in fact the order made in 1825 does not embrace any such account. The just construction of the order is, that the £2000. was to be taken as an item of credit to Corbin Griffin, which was to be diminished by payments made, moneys received of the trustees, &c.

Corbin Griffin died in 1813, some six years before any bill was filed to impeach his debt of £2000. The plaintiff and those having a right to sue were under no disability, and therefore the great lapse of time between the date of the deed and its impeachment is strong, if not conclusive, to shew that the parties interested knew that the debt was just. It is true the trustee was bound to account for any balance in his hands after paying the debt. But after such a lapse of time the acts of the trustee would be regarded by a Court of equity with the greatest indulgence, instead of being subjected to the rigid scrutiny justified 562 in recent transactions. *But Corbin

Griffin was no trustee, but a creditor, whose debt is assailed by his grantor and another cestui que trust. The lapse of time is therefore a bar. Carr v. Chapman, 5 Leigh 164; Lacon v. Briggs, 3 Atk. R. 105; Beckford v. Wade, 17 Ves. R. 97; Gregory v. Gregory, Cooper's Ch. Cas. 201; Hovenden v. Ld. Annesley, 2 Sch. & Lef. 607; Elmendorf v. Taylor, 10 Wheat. R. 168. If a bond or promissory note is called for as evidence of the debt due from Macaulay to Corbin Griffin, the Court may properly presume that it has been executed and is now lost. 1 Ch. R. 40. Now these cases are cases of trusts; and the rule is much stronger as between mere creditor and debtor, where there is no fiduciary relations between the parties. Ray v. Bogart, 2 John. Cas. 432; Coleman v. Lyne, 4 Rand. 454; Bolling v. Bolling, 5 Munf. 334; 1 Story's Equ. Jur. § 523, 529; Atkinson v. Robinson, 9 Leigh 393; Caruthers v. Trustees of Lexington,

12 Leigh 610; Stearns v. Page, 7 How. Sup. Ct. R. 819; Prevost v. Gratz, 6 Wheat. R. 481.

We insist that no grantor in a deed or obligor in a bond can be permitted to impeach it on the ground that the deed or bond is without consideration, or that the real amount due is less than it calls for. It is true that a general recital in a deed does not estop the grantor, but the recital of a particular fact does. Huntington v. Havens, 5 John. Ch. R. 23; Stoughton v. Lynch, 2 John. Ch. R. 209; Rainsford v. Smith, 2 Dyer's R. 196 a. Then is there not in the deed of November 1797, a distinct recital of the debt of £2000.? And in the granting part of the deed and the declaration of trusts, is not the debt clearly recited and affirmed? Powell v. White, 11 Leigh 309.

If a grantor in a deed has been imposed upon, or if by mistake in a settlement of accounts, the deed is made for too 563 much, or it is made for a nominal *sum to cover what shall afterwards be found due, then on proper allegations in the bill, the true state of things may be proved, notwithstanding the deed. But no such thing is alleged here. Apart from a fraudulent design on the part of the grantor, there is no hypothesis consistent with the facts, or which can be plausibly maintained, except the real existence of the debt as recited in the deed. Harvey v. Alexander, 1 Rand. 219. This and the cases like it shew that it is competent for a grantee to shew that there were other considerations than those stated in the deed. But they do not shew that a grantor may dispute or diminish the amount recited in the deed to be due. 7 John. Ch. R. 340; Schermerhorn v. Vanderheyden, 1 John. R. 139; Clarkson v. Hanway, 2 P. Wms. 203; Peacock v. Monk, 1 Ves. Sr. 128; Filmer v. Gott, 4 Bro. Par. Cas. 230. All these cases shew that the grantor cannot avoid his obligation or deed by alleging that so much was not due as is called for by it. Why a mere voluntary bond may be enforced by the obligee. 1 Fonb. Equ. ch. 5, § 1, p. 254, note a; Boughton v. Boughton, 1 Atk. R. 625. If suit had been brought for the £2000. by Corbin Griffin, can any one doubt that he might have recovered a judgment for the amount. This doctrine is fully developed in the case of Ellison v. Ellison, 6 Ves. R. 656, and is discussed with great ability in Bunn v. Winthrop, 1 John. Ch. R. 329. And we refer also to Jackson v. Ashton, 11 Peters' R. 229; Knox v. Smith, 4 How. Sup. Ct. R. 298.

A grantor or a volunteer under him cannot impeach his deed on the ground that it was made to delay, hinder or defraud creditors. The bill in this case whilst it does not in express terms, does impliedly, charge that the deed was made to bring the creditors to terms. The allegations do in effect, amount to a charge that the deed was made to hinder, delay and embarrass the creditors of Macaulay. Could there have 564 been an honest *intent on the part of

the grantor in making this deed, if the fact be true, which it is the effort of the plaintiff below to prove? It is impossible. We refer to *Austin v. Winston*, 1 Hen. & Munf. 32; a strong case in support of the general principle; but making an exception where there is imposition, or oppression on the part of the creditor grantee. *Starke v. Littlepage*, 4 Rand. 368; *Jones v. Comer*, 5 Leigh 350; *Bird v. James*, 8 Leigh 510; *Owen v. Sharp*, 12 Leigh 427; *Reichart v. Castator*, 5 Binn. R. 109; *Jackson v. Garnsey*, 16 John. R. 189.

Again, no party to a deed claiming under it can impeach it. The Dismal Swamp Land Company do not controvert the debt of Griffin; but Mrs. Macaulay assignee of Jerdone does. She has no right to be here, except by virtue of this deed. She therefore cannot impeach it; Corbin Griffin could not prove his debt to be more than £2000., nor can she shew it to be less. *Collins v. Janey*, 3 Leigh 389. The only evidence by which Griffin's debt can be reduced are Macaulay's books. And by the same books it appears that there is nothing due to her.

The books of Macaulay were not admissible as evidence for the purposes for which they were introduced. It is said that Corbin Griffin had access to and made entries in these books. Of what importance to Corbin Griffin was it that Macaulay's books did not credit him for the £2000., when he had a deed of trust from Macaulay to secure it? Of what value are such books, when it is shewn that Macaulay had received at least 13,000 dollars of money belonging to the Dismal Swamp Land Company, and yet the books shew nothing of it? There is nothing in the books as to the item of £250. now acknowledged or proved to be a proper credit to Corbin Griffin. There is no proof that Corbin Griffin ever made any entries in the books in the lifetime of Macaulay. It is true that

565 Thomas Griffin makes an *admission to that effect in his answer; at least admits of such entries in the ledger; but Thomas Griffin evidently founds his admission on the books alone. Now these entries were of course made in the ledger after the items were charged in the journals. Corbin Griffin made these entries after the death of Macaulay. He then, it is true, added up the accounts, made entries, &c., with a view to the collection of the accounts then appearing to be due.

Stanard and R. T. Daniel, for Macaulay's administrator.

We say that neither the Dismal Swamp Land Company nor Corbin Griffin's administrator have shewn any right to the fund in the hands of the trustee Thomas Griffin. What is the bill of Macaulay's administrator but a bill by this grantor against the trustee and others for an account of the trust fund, and an execution of the trust according to its true meaning? Such a bill will lie, even though it contains an express allegation that the deed was made to delay and hinder creditors. The case of *Austin*

v. Winston certainly cannot be relied on by the appellants. And the case of *Starke v. Littlepage* was a case at law in which it was held that the deed, though fraudulent as to creditors, was good between the parties.

But we go further and say that an express trust will be executed, though the deed was made to delay, hinder and defraud creditors. *Bird v. James*, 8 Leigh 510. In this case both parties were held bound, the one to his grant of the slaves, and the other to his payment of the bond given for the pretended purchase money. So *Owen v. Sharp*, 12 Leigh 427, establishes that the parties to an express trust will both be compelled to execute it. And in *Turner v. Campbell*, 3 Gratt. 77, though there was no trust expressed on the face of the deed, yet as the

trustee admitted the trust and dis-
566 claimed *all beneficial interest, this Court entertained a bill for the settlement and execution of the trust. And to the same effect is *Lewin on Trusts*, 24 Law Libr. 84.

But does the bill in fact allege any fraud, or does it make any statement from which fraud is to be inferred? The fraud which prevents a party's seeking the aid of a Court of equity is moral, not constructive fraud. *M'Cullough v. Somerville*, 8 Leigh 415. Here the deed is made a part of the bill; does any fraud appear on its face? There is certainly nothing there appearing to delay or hinder creditors. Does the expression of a belief that the round sums of £2000., &c., were not due at the time the deed was executed, amount to a charge of fraud? There is no charge of an intent to delay. And there was no secret trust reserved for the benefit of the grantor. Indeed no objection of this kind was made until 1841. On the contrary Griffin went on to account, and is found asking for a decree.

Having seen that our bill can be maintained, we come next to enquire into the claims of the cestuis que trust under the deed. And we say that the deed does not conclude the grantor as to the amount of the debts secured thereby. On this question we refer to *Johnson v. Little*, 14 John. R. 212; *Duval v. Bibb*, 4 Hen. & Munf. 113; *Wilson v. Shelton*, 9 Leigh 342; *Radcliff v. High*, 2 Rob. R. 271; 1 *Greenleaf's Evi.*, § 26, note 1, § 285; *Haigh v. Brook*, 37 Eng. C. L. R. 108. A recital to estop a party to the deed, must be certain to every intent. Does the deed necessarily import that the round sums of £2000., of £3000. and £5000. were fully due in addition to the liabilities of the cestuis que trust as sureties? By no means. These sums were intended to cover both. Thomas Griffin does not pretend there is due to Corbin Griffin £2000. besides the amount appearing to be due by Macaulay's books. Corbin Griffin never in his lifetime

treated this £2000. as a certain, fixed,
567 settled debt. On the contrary *all the acts of Corbin and Thomas Griffin are disclaimers of any such pretension. Is there any rule of law or equity which re-

quires this Court to shut its eyes and ears to these disclaimers. Look at the conduct of Corbin Griffin and the trustees after the death of Macaulay. From the period of his death in 1798 down to November 1800 all the payments from the trust fund were made to Corbin Griffin. After that date down to 1813, the time of his death, no further payments are made to him. In December 1801 the payments to Jamieson commenced, and were made with the knowledge of Corbin Griffin. By the arrangements made in 1801 with the full knowledge of Corbin Griffin, nearly the whole remnant of the trust fund in hand and the property left, was transferred and conveyed to Jamieson, and by him to the Dismal Swamp Land Company. At this time the claim upon the French government was wholly unknown; and Christian's debt was considered and admitted by Thomas Griffin, the trustee, not to be a part of the trust fund. So that there remained of that trust fund some small debts and property not amounting all together to 1000 dollars, which was all that was left to pay Corbin Griffin's debt, though according to the pretensions now set up for him, his demand against the trust fund was for more than 3000 dollars. And in 1811 as one of the managers of the Dismal Swamp Land Company he personally settled the account of Jamieson and the company, with the trust fund, thus bringing home to him knowledge, if he did not have it before, of the manner in which the fund had been disposed of. But we will not pursue this question further. The record seems with facts all leading irresistibly to the same conclusion that Corbin Griffin had been fully paid off in November 1800; and that it was so understood by himself and the trustee.

568 *As to the lapse of time, and the right of Anderson the administrator of Macaulay, at the late period of filing his bill, to go into the questions we have been discussing, we have to say that lapse of time was never relied on until 1838. Thomas Griffin set up no such defence in his answer. On the contrary if not in terms, he does impliedly assent to an account. And thus the case is brought within the principle of *Mason v. Dunn*, 5 Gratt. 384. But if the defence of lapse of time had been made by Thomas Griffin in his original answer, it would have been of no avail when relied on under the circumstances of this case, by a trustee who has never before rendered an account.

Let us now look into the case of the Dismal Swamp Land Company. Their bill was filed in 1823. They claim under the provisions of the deed of 1797 made for the benefit of Jamieson. What right has the Dismal Swamp Land Company, which was not incorporated until 1814, to ask for the execution of a trust made for the benefit of an unincorporated association in 1797? Even upon the supposition that the latter could claim under Jamieson's name, it must be shewn that the present corporation has succeeded to the rights of the association or

partnership. This question is distinctly raised in the answer of Anderson. Does the acts of incorporation transfer the debts due to the association to the company incorporated by them? There is nothing on the face of the charter to make the transfer. If the act had incorporated exactly the same individuals who constituted the association, the act would not of itself have transferred their debts. *Leffingwell v. Elliott*, 8 Pick. R. 455; *Scots Charitable Society v. Shaw*, 8 Mass. R. 532; *Head & Amory v. Providence Ins. Co.*, 2 Cranch 127. But in fact the individuals are not identical. *Bellows v. Hallowell and Augusta Bank*, 2 Mason's C. Ct. R. 31.

569 *But if these rights are vested in any corporation they are vested in the Dismal Swamp Land Company; and not in the president and managers of the Dismal Swamp Land Company. The act of 1820 speaks of it by the former name, and this act repeals the act of 1814. A corporate company can only sue by its corporate name, unless especially authorized to sue by some other name. *The President & College of Physicians v. Talbois*, 1 Ld. Ray. 153; *Porter v. Nekervis*, 4 Rand. 359; *Mason v. Farmers Bank*, 12 Leigh 84; *Bank of Virginia v. Craig*, 6 Leigh 399. This last case shews that the same principles are as rigidly adhered to in equity as at law. If the suit was brought originally in 1823 by a wrong name, the error cannot be cured by an amended bill in 1841 in the right name.

Let us look to the deed under which, if at all, the company must sustain its claim. What, according to a fair construction of the deed, was the debt due to Jamieson, in whose name the benefits of the trust are conveyed to the company. The real object of the deed was to secure to Jamieson what was then due to him, or might become due to him on account of responsibilities incurred in behalf of Macaulay, either to the Dismal Swamp Land Company or any other person. The company in their bill evidently take this view of the subject. When then they released Jamieson from all responsibility in 1811, can they still insist on recovering any further against the fund which is only responsible to them because of Jamieson's responsibility; and for whose responsibility alone it was the purpose of the deed to provide an indemnity. Indeed after getting this security provided by Jamieson in 1811, nothing further is heard of this claim of the company until 1823. If they had a right to anything further from the trust fund, why was not that claim asserted at an earlier day? This claim arising in 1797 is never asserted until 1823.

Never until that period had the 570 *representatives of Macaulay or his creditors an opportunity to contest the claim or its amount. Neither Corbin Griffin or Jamieson had any interest in contesting this claim, as they were to be first paid; and it was in fact the interest of Thomas Griffin as a member of the company that the claims should be sustained.

Upon what principle is it that dealings between Jamieson and the company are to affect the rights of Macaulay's representatives? Even in the case of an assignment the admissions of an assignor, no matter when made, cannot be brought to bear in favour of his assignee. But if Jamieson's admissions can be used do they prove any specific amount; or the extent of the claim of the Dismal Swamp Land Company? A "considerable debt" may be 1000 dollars or 5000 dollars. In contemplation of law an English sixpence is "a large sum of money."

In the case of the Commonwealth v. Ricks, 1 Gratt. 416, the admissions of a trustee in favour of the cestuis que trust were discarded by this Court. The admissions of Thomas Griffin, therefore, made at a time when as a cestui que trust he was interested in establishing this claim cannot be used against Macaulay's representative. The bill of 1823 does not pretend to fix the debt due, but asks for an account. That is, it does not claim the difference between the debt due to Jamieson and the £5000. The trust in favour of the Dismal Swamp Land Company, if to be set up at all, is to be set up as a parol trust in contradiction of the express terms of the deed. And it was the duty of those claiming the benefit of the trust to have filed their bill at an early day, in order that the parties interested in opposition to the trust might have an opportunity to contest it while the facts were recent and the parties cognizant of the transaction were here to explain it. But the bill was not in fact filed until 1823,

after the death of Macaulay and
571 Jamieson: Mrs. Macaulay the assignee of Jerdone was not made a party until 1841, nor were the items composing this large claim brought into the record until the same year. Even after the suit was brought the company were guilty of gross laches in its conduct. Though an answer was promptly filed calling for the items of the account, the proof of their debt and the right of the plaintiffs to assert their demand, no order was made in the cause until 1827; another order was made in 1829 which was set aside in 1832; and this was the last order made or act done in the case until 1841; when leave was given to amend the bill and to make Mrs. Macaulay assignee of Jerdone a party. From 1832 to 1841 there is strong evidence to shew that the parties regarded the suit as abandoned. As to Mrs. Macaulay no suit can be said to have been commenced until 1841; and yet as far back as 1820 the company knew that Mrs. Macaulay was the assignee of the debt. Now this Court has held that laches in the conduct of a suit may be made the ground of rejecting a claim. Hayes v. Goode, 7 Leigh 452; Caruthers v. Trustees of Lexington, 12 Leigh 610. And the Court must be satisfied that it can extend the relief sought without the hazard of doing injustice to the defendant. And what sort of an account is filed at last? Some of the items, the Court will see upon the face of

the matter are not due. Several other items it will be seen are such as if the account had been presented at a proper time, might in all probability have been explained away. Macaulay was an acting manager of the company at the time the money was received, and it must therefore be uncertain whether he received the money as manager and expended it for the uses of the company, or whether all or a part, and if a part, how much was borrowed by him or applied to his own use. It will be seen too that in 1798 the company in the case of the libel of the ship Charles Carter stated their claim as being at least 9000 dollars;
572 *but now, upon these same evidences of debt, it is spoken of as having then been upwards of 13,000 dollars.

The claim upon the French government was not a part of the trust fund. It is true that Judge Brockenbrough regards it as passing by the deed, and relies on Maitland v. Newton, 3 Leigh 714; and Comegys v. Vasse, 1 Peters' R. 193, as authority for his opinion. By the deed Macaulay assigns "all debts due to him." Was this a debt due at the date of the deed? The two cases cited do not sustain the Judge. It was under the broad terms, "all estate and interest real and personal," that the fund in the first case was held to pass. The case in 1 Peters was decided under the broad provisions of the bankrupt law; and even in that case it was contended with great force that a claim like this did not pass.

It is objected that there were not proper parties to the bill of Mrs. Macaulay and Alexander Macaulay's administrator. On this point we refer to Mitford's Pleadings 233. As to Jerdone he had assigned his interest absolutely, and therefore was no necessary party. 2 Rob. Pr. 272. As to the Dismal Swamp Land Company they do not appear by the deed to be interested, nor does it appear that Mrs. Macaulay knew in 1819 that they claimed to be prior incumbrancers.

And why should Anderson have made Jerdone a party to his bill? Jerdone has never to this day questioned the validity or amount of the incumbrances prior to his; and in fact has assigned his debt absolutely to Mrs. Macaulay. As to the Dismal Swamp Land Company if it cannot recover in its own suit, there can be no necessity for making it a party in this. Besides, Jamieson's ex'or was a party, and the fact that the company might call Jamieson to account did not make it a necessary party. Mayo v. Murchie, 3 Munf. 358, 401. Jamieson was the party representing the debt, and he not only might but did represent the company. Indeed the company re-
573 fused *in 1820 to go into any settlement with Anderson because suits were pending by which all the questions would be settled: thus submitting to the representation of their interest by Jamieson. But this objection comes from Thomas Griffin. The company have never asked to be made a party. On the contrary, the case of the company was allowed to sleep

for years whilst the other two cases were progressing and until the appeal was taken to this Court. As to Griffin the order of the 2d July 1829 was made by his consent in all these causes, and after that consent order no objection for want of parties can be properly heard. *Mayo v. Murchie*, 3 Munf. 358, 401.

This question about parties was never raised until 1841, sixteen years after the order of consolidation made on the motion of Griffin, in the two first of these suits, and twelve years after the consent decree made in all the causes; when it was raised by Waller executor of Thomas Griffin. So far as the motion was to make Anderson a party to Mrs. Macaulay's suit and vice versa, the rule of consolidation made at the instance of Thomas Griffin himself is an answer to it.

It is said that the decree was erroneous in not requiring an enquiry before the commissioner as to the creditors of Macaulay. The general creditors provided for in the deed must have been creditors before the 15th of June 1797. Is it to be supposed that now in 1850 there is any danger of their appearance in any way that could affect the interests involved in these suits.

The proposition that a party cannot claim under and against a deed does not apply to a case like this. There is no claiming against the deed by the appellees, but it is only asked that the deed shall be made to speak and to operate according to its true intent and the purpose and objects of the grantor. The case of *Tate v. Liggatt & Mathews*, 2 Leigh 84, does not apply to this

case. Here is not a conveyance of an equity of redemption *but of all the estate. 2 Story's Equ. Jur. § 1092.

The doctrine on this subject is explained in *Clark v. Guise*, 2 Ves. sr. 617. Suppose that the prior debts had been paid. would not the subsequent incumbrancers or creditors be entitled to the whole subject. They would be entitled to the whole subject because the whole estate and not the equity of redemption was conveyed. In *Tate v. Liggatt & Mathews*, 2 Leigh 84, and *Spengler v. Snapp*, 5 Leigh 478, the creditor bought or took his conveyance of only the equity, and if the prior debts had been paid he could still have had only what he purchased, to wit, his equity of redemption.

As to Christian's debt. Could the Dismal Swamp Land Company have sued Christian alone? And is it any better when they join the trustees? Is not the bill multifarious? *Mitford's Pl.* 159. No collusion is charged against the trustees and Christian. How again can they join Anderson as to this subject? There is a joinder of subjects and parties which the rules of equity do not permit.

The statute of limitations is a protection to Anderson as to this debt of Christian. He had recovered and held the debt adversely to the trust for more than five years. Nor did this debt pass by the deed. *Collins v. Janey*, 3 Leigh 389.

Robertson and Morson, for the Dismal Swamp Land Company.

The justice of the demand of the Dismal Swamp Land Company was admitted by Macaulay in his lifetime, by Thomas Griffin the trustee, and by Jamieson; and until 1824, there never was a question of the justice of their claim. In the lifetime of Macaulay, and with his knowledge, the company asserted their claim under the deed of 1797, by their answer in the libel

suit in relation to the ship *Charles Carter*. Thomas *Griffin made off the account of the company from the same vouchers now in the record, making that account precisely what is now claimed; and Jamieson, by his receipts dated in 1804, and by his deeds in 1809, in the most solemn form, admitted that the £5000. secured to him by the deed of 1797, was intended to cover a large debt due to the company; and these admissions are competent evidence of the fact. 34 Eng. C. L. 35; *Starkie on Evi.* part 2, p. 291. Judge Brockenbrough in his opinion in 1832, recognized it as a just debt; and Judge Robertson, whilst he dismissed their bill in 1841, on the ground of their laches, admitted that their claim was originally just: And indeed the evidence in the record is abundant to establish the fact.

It is however objected that the Dismal Swamp Land Company cannot claim as cestuis que trust, under the deed of 1797, because not named in it. This question was submitted to the late Chief Justice Marshall in 1799, when he was at the bar, and his opinion was in favour of the company. But surely we need not argue at this day their right to claim through Jamieson.

It is argued on the other side, that the release by the company to Jamieson, is a bar to the prosecution of the claim against Macaulay's estate. But a discharge of Jamieson the surety, does not discharge Macaulay the principal. Here is no express undertaking by an obligation, to which the principal and surety are parties. The responsibility of Jamieson is merely of a collateral or accessory character. But in fact no such release of Jamieson is given as is supposed.

Have the company lost any of their original rights by laches? Thomas Griffin the trustee, cannot and does not deny their right to call on him for an account of the trust fund. They claim under a direct trust, and in such a case the trustee cannot defend

himself by setting up the laches of the cestuis que trust. 2 Rob. *Pr. 256, 257, where the distinction is taken between direct and implied trusts.

But in fact the company has not been guilty of any laches. There were but three years between the date when the trustee promised to account to the company for the trust subject and the commencement of their suit in 1820; and certainly no charge of laches can be predicated on that delay. Nor was the conduct of the suit such as to justify the charge. The failure to bring the suit to an end, was in part imputable to Anderson, if any body, and not to the company.

It is also made a question whether the

Dismal Swamp Land Company as a corporation can sue for the debt due to the individuals before their incorporation. At law there might be something in this objection. If the suit was at law, perhaps it would be necessary to sue in the name of the members of the partnership for the benefit of the corporation. The case cited from 5 Mass. R. goes to this extent and no further; and the case from Alabama is to the same effect. In a Court of equity the rule is different. The exclusive beneficial owner has a right to sue. If therefore the corporation has the beneficial ownership of the debt, the corporation alone is the proper party to sue. Anderson has recognised the right of the corporation to the rights and property of the old company. Why did he call upon them to account with him, if they had not succeeded to the rights of the old partnership.

Again: The possession of all the deeds, muniments of title, &c. by the corporation, is circumstantial to shew the succession by the present company; Anderson has impliedly admitted it; Griffin the trustee has again and again recognised their rights. But if any doubt exists on this subject, proper bonds might be required for refunding to the proper claimants, or for indemnifying the trustee. The Court has frequently required bonds in cases of analogous character.

577 *But it is said, if the company had any right to sue they have sued in the wrong name. They ought, it is said, to have sued in the name of the Dismal Swamp Land Company, and not of the President and Managers of the Dismal Swamp Land Company. But in fact they may sue in either name. It is said the act of 1820 repealed the charter of 1814. In both acts the company is styled the Dismal Swamp Land Company; and in both the "president and managers" are authorized to sue. 2 Bac. Abr. title Corporation, letter C, p. 256; Angel & Ames on Corporations, § 62, 510, 514. But if there has been any mistake in this respect, it could only be taken advantage of by plea in abatement, and there is no such plea in the cause. Angel & Ames on Corporations, § 582-586; Mason v. Farmers Bank, 12 Leigh 84.

Upon what principle is it that the debt recovered by Anderson from William B. Christian's estate is not a part of the trust subject? The debt was created before the date of the deed of November 1797; and all debts were transferred by the deed. The case of Collins v. Janey, 3 Leigh 389, has been referred to by counsel on the other side to shew that the claim did not pass by the deed. In that case the debts transferred were "the debts now due." Here the deed transfers "all the debts."

But it is said Anderson is protected by the statute of limitations. This however cannot avail him. The suit by the Dismal Swamp Land Company has been pending ever since 1823. Anderson is a party to it, and has had full notice of the claim of the company to this debt.

It is argued also, that the claim upon the

French government does not belong to the trust fund; that it is no debt; that it is a mere claim for damages arising out of a tortious act. It is enough to refer, 578 in reply, to Dunlop v. Keith, 1 Leigh 430; 2 Rob. Pr. 200, 201; Williamson v. Bowie, 6 Munf. 176.

As to the debt of Corbin Griffin, we may well leave it upon the argument of the counsel of Macaulay's administrator, without detaining the Court to add anything to it.

As to Mrs. Macaulay's claim as assignee of Jerdone, it is not necessary to say much, as if the company recovers, there will be nothing left for her. If the company cannot claim under the deed, how can Mrs. Macaulay. Jerdone admits he has no debt due to him individually; but claims under the trust for a debt due the firm of Douglass & Co., of which he was a member.

As to the claim of Anderson as administrator of Macaulay, he of course cannot touch the fund until all the creditors of Macaulay are satisfied.

Finally the decree in the first causes was erroneous, if for no other cause, because the three causes were not heard together. If the omission to make the Dismal Swamp Land Company a party could be cured, it could only be by bringing on the causes to be heard together; and we ask that in this Court they may be so heard, and that one decree may be entered in all of them.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that as it appears that Thomas Griffin was the acting trustee under the deed of trust executed by Alexander Macaulay, on the fifteenth day of November 1797, to Thomas Griffin and Thomas Nelson; that he received the proceeds arising from the trust fund, and disbursed the same so far as they have been accounted for; that although the said Thomas Nelson joined in the execution of the trust by uniting in the sales made necessary to accomplish the purposes of the trust, there is nothing to impute to him any fraud in any of the transactions 579 connected therewith; *and as it is not shewn that there is any part of the trust funds in his hands, the parties interested in said trust fund, and the representatives of said Macaulay, have made out no case for charging him for any of his acts as trustee, separately or jointly with his co-trustee, Thomas Griffin. The Court is therefore of opinion, that the bills should have been dismissed as to the representatives of said Thomas Nelson.

The Court is further of opinion, that there is no error in so much of the decrees appealed from as decided that the said deed of trust does not furnish conclusive evidence of the extent of the debts thereby intended to be secured to the three preferred creditors, Corbin Griffin, John Jamieson and Francis Jerdone, and that it was competent for the parties to shew by other evidence that the said debts were of less amount than the sums specified in said deed.

The Court is further of opinion, that there was no error in so much of said decrees as decided that all claims or demands of said Corbin Griffin against the said trust fund, under and by virtue of the said deed, and intended to be secured thereby, were finally closed and fully satisfied by the last payment to him, evidenced by the receipt purporting to be dated the twenty-third day of November 1800; so that there is no balance due either to or from said Corbin Griffin's estate, on account of the said trust matters.

The Court is further of opinion, that there was error in overruling the exception of the executor of said Thomas Griffin deceased, to the charges against him, contained in commissioner Shore's report, for thirty-nine dollars and sixty cents, and eighty-one dollars and sixty-seven cents, interest on forty-nine pounds ten shillings, the sale of the Hanover town property,—the Court being of opinion, that the trustee was not responsible for interest on the estimated value of said property, or for the rents thereof, it appearing that no

580 rents were in *fact received, and it not being shewn that the trustee was in any default in not making sale of the property at an earlier period. Deducting said charges of thirty-nine dollars and sixty cents and eighty-one dollars and sixty-seven cents, and correcting commissioner Shore's report, statements A, B and C, in this respect, the true balance due upon said statements A and B would be two thousand and one dollars and four cents, with interest on one thousand six hundred and eighty-four dollars and thirty-seven cents, part thereof, from the thirty-first day of December 1803, until paid, and the true balance due on statement C will be the sum of seven thousand two hundred and eighty-five dollars and sixty-one cents, with interest on five thousand three hundred and thirty-six dollars and ninety-one cents, part thereof, from the thirty-first day of December 1824, until paid;—which sums, with the interest thereon as aforesaid, constitute the true amount of the trust fund remaining due from the acting trustee, Thomas Griffin, and for which his estate is responsible to the parties entitled thereto. And all exceptions, petitions, statements, orders and decrees conflicting with this opinion in regard to the amount of the trust fund remaining due from the acting trustee, are overruled, and those conforming thereto are sustained and affirmed.

The Court is further of opinion, that under the circumstances appearing in this case, the amount due to John Jamieson, on his individual account, must be taken to be one hundred and seventy-three pounds ten shillings and four pence half-penny, amounting, with the interest thereon, to the sum of six hundred and eighty-seven dollars and fifty cents, as appeared upon the settlement made with the Dismal Swamp Land Company. The said Jamieson, by his deeds to said company dated the twentieth day of July 1809, having acknowledged that the trust in the deed of Alexander Macaulay to Thomas Griffin and

581 Thomas Nelson had *been completely executed as to the claim of said Jamieson as an individual, and the representative of said Jamieson not having produced any evidence shewing anything more to be due to his testator as an individual, the sum so appearing on the statement aforesaid, made the basis of the settlement with the Dismal Swamp Land Company, must be taken as the true amount of the debt due to said Jamieson, and intended to be secured by the said deed of trust; and all exceptions of the executor of said Jamieson in conflict with this opinion, in regard to the amount of said debt, are overruled.

For the excess over said sum of six hundred and eighty-seven dollars and fifty cents, paid to said Jamieson out of the proceeds of the trust fund, after crediting him with the sum paid to Mrs. Macaulay for her dower interest, his estate would be responsible, but for the settlement with and release by the Dismal Swamp Land Company.

And the Court is further of opinion, that it satisfactorily appears that the provision in said deed for the benefit of John Jamieson was intended to secure the individual debt of said Jamieson, and also the debt due by said Alexander Macaulay to the Dismal Swamp Land Company, an association of which said Jamieson was a member. The interest of the company in said deed was asserted shortly after its execution, and in the lifetime of the grantor, and in his own name, in connection with the other members of the association, he being also a member, by the claim preferred in the Federal court in the case of the libel against the ship Charles Carter and said Macaulay. The right of the company was recognized by the said Jamieson and the trustees, and the creditor first preferred; payments ceased to be made to the preferred creditor, Corbin Griffin, after the year 1800, and soon thereafter purchases were made by said Jamieson of valuable property belonging to the trust subject, which property was

582 purchased for the Dismal *Swamp Land Company on account of the claim so as aforesaid recognized to be due to the company; and the property being afterwards conveyed to the company, has been held, so far as the record discloses, without controversy ever since. After such repeated recognitions by all connected with the transactions, and the acquiescence by all interested in controverting their right to claim under the deed, it is too late to raise the objection now.

Nor can laches be imputed to the company so as to defeat their right to recover. Their right to claim under the deed having been acknowledged as aforesaid, payments to and acquisitions of property by them, in satisfaction of their claim, having been acquiesced in, there was no necessity for, nor would there have been any propriety in the institution of proceedings to assert a right under the deed, after such acts of recognition and acquiescence, and when the same had never been controverted. The

trustee, the party directly accountable, has not denied, and could not deny, his liability to account for his manner of administering this direct trust, and when the cestuis que trust were apprised of the receipt of a large sum by him, and of his refusal to pay the proceeds over, suit was instituted within a reasonable time thereafter.

The delay which occurred after the institution of the suit, is accounted for in part, by the temporary loss of papers, the improper conduct of the other claimant in setting aside the order recommitting the causes, after the three causes had been heard together, and the order had been made recommitting the three suits to settle the accounts between the parties. Nor is there anything in the evidence on which the claim of the company depends, which renders an account improper. The vouchers filed by them, furnish prima facie evidence of the amount due, and under the circumstances, should be so received. subject

583 to the right of the contesting *parties to shew that the funds belonging to the company and received by Alexander Macaulay were paid over or applied by him to the use of the company.

The Court is further of opinion, that it sufficiently appears that the claim originally belonging to the association has been turned over to and is in fact the property of the incorporated company, and said incorporation being now the real owner of the debt, it was competent to sue for and recover the same in the corporate name, in a Court of equity:—more especially as the trustee and the representative of said Jamieson are parties to the suit, and the latter has not controverted the right of the company, in its corporate name, to recover the fund intended to be secured by the deed by the provision in favour of his testator.

The Court is further of opinion, that there is nothing in the pleadings or proofs to justify an enquiry into the regularity of the sales of the one half share in said company, and the moiety of the tract of eight thousand acres, purchased at the trustees' sale by said Jamieson, and by him conveyed to the company by his deeds of the twentieth day of July 1809. In adjusting the amount due to the said company, it should be charged with the price paid for said property, and also with the amount of the trust fund received by said Jamieson, over and above the sum of six hundred and eighty-seven dollars and fifty cents, the individual debt due said Jamieson, and the sums paid to Mrs. Macaulay for her dower interest, the excess being the balance for which said Jamieson would have been responsible, but for the release and acquittal of the company, given on the twenty-eighth day of May 1811; but the trust fund, notwithstanding such release, is to be credited as against the claim of the company, with the sum for which said Jamieson would have been responsible. And for the amount which upon an account to be taken upon

584 the principles aforesaid, may appear to be due to the company, *with interest, the said company is entitled

to be first satisfied out of the trust funds ascertained to be due from the estate of Thomas Griffin, surviving trustee, as aforesaid.

And as to the claim of said Francis Jerdone, the Court is of opinion, that there is no satisfactory evidence shewing what, if anything, was due to him. The answer of said Jerdone, which under the circumstances, is proper evidence against the volunteer, claiming by virtue of a gift and transfer from him, states that there was no debt due to him individually from the estate of Macaulay; and there is no evidence whatever in the record of the debt which he had been informed was due to himself and William Douglass.

The Court is further of opinion, that the debt due from William B. Christian was embraced by the deed of the fifteenth day of November 1797, and passed to the trustees for the benefit of the creditors therein named, or provided for, and if the fund ascertained to be in the hands of the trustee should be insufficient to discharge their claims, or prove unavailing, they will be entitled to a decree against the administrator of said Alexander Macaulay, for the amount of the debt collected from Christian's estate, or so much thereof as may be sufficient to discharge their claims.

And the Court is further of opinion, that if none of the general creditors secured by the deed of the fifteenth day of November 1797 should appear, make themselves parties, and establish their claims within a reasonable time, to be prescribed by the Court, the residue of the trust fund, ascertained to be due by this decree from the estate of Thomas Griffin, should any remain after satisfying the amount ascertained to be due to the Dismal Swamp Land Company, should be paid over to the administrator of said Macaulay.

The Court is therefore of opinion, that the decrees aforesaid, so far as they conflict with the principles *above declared, are erroneous; therefore it is decreed and ordered, that the same in those particulars be reversed and annulled, and the residue thereof be affirmed; and also that the appellees, who are executors and administrators, out of the estates of their testators and intestates in their hands respectively to be administered, and the other appellees in their own right, do pay unto the appellants respectively their costs by them expended in the prosecution of their appeals aforesaid here. And it is ordered, that the causes be remanded to the Circuit court of chancery for Henrico county, with instructions to direct an account of the claim of the Dismal Swamp Land Company upon the principles herein indicated, and for all necessary steps in the mean time, to enforce the payment, and for the security of the trust fund, until the causes are matured for a final hearing, and for further proceedings in order to a final decree according to the principles of this opinion and decree.

Which are ordered to be certified to the said Circuit court.

REPORTS OF CASES

DECIDED BY

THE GENERAL COURT

OF

VIRGINIA,

AT

JUNE AND DECEMBER TERMS 1850,

AND

JUNE TERM 1851.

JUNE TERM 1850.

JUDGES PRESENT.

Smith,

Field,

Leigh,

Lomax,

Thompson.

589 *Nichols' and Janes' Case.

June Term, 1850.

Lewd and Lascivious Cohabitation—Indictment—Allegations as to Time.*—In an indictment for lewd and lascivious cohabitation, the offence is charged from a day prior to the day when the statute went into effect, but as continuing to a day after the commencement of the act. The indictment is good.

At the April term 1849 of the Circuit court of Scott county, James Nichols, sr., and Rena Janes, were indicted for that they being white persons, on the 1st
590 *day of May 1848, and from thence up to the 8th day of April 1849, at the county &c., did without being married to each other, lewdly and lasciviously associate and cohabit together.

The parties demurred to the indictment, upon the ground, as it seems, though the causes of demurrer are not set out, that the statute upon which the indictment was founded, did not go into operation until the 31st of May 1848. The demurrer was overruled by the Court; and thereupon the parties pleaded not guilty, on which issue was joined.

On the trial of the cause the Court excluded from the jury all evidence of acts charged in the indictment, previous to the 1st of June 1848, at which time the law under which they were prosecuted took effect. And there was a verdict against each of the parties for a fine of fifty dollars; and a judgment accordingly. Whereupon the defendants applied to this Court

***Lewd and Lascivious Cohabitation—Indictment—Allegations as to Time.**—See principal case distinguished in *Sledd v. Com.*, 19 Gratt. 818. See generally, monographic *note* on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

Same—Same—Joinder of Defendants.—An indictment for lewd and lascivious cohabitation may be either *joint* or *separate*. *Scott v. Com.*, 77 Va. 346, citing the principal case; *Com. v. Isaacs & West*, 5 Rand. 634; *Com. v. Jones*, 2 Gratt. 555. See the principal case also cited in *State v. Foster*, 21 W. Va. 774. See generally, monographic *note* on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

for a writ of error, assigning for error that the demurrer to the indictment had been overruled.

By the Court. The writ of error is denied.

591 *Commonwealth v. Cregor.

June Term, 1850.

1. **Adultery and Fornication—Number of Witnesses Necessary to Convict—Repeal of Statute.**—The act 1 Rev. Code, ch. 141, § 6, p. 555, which makes the oath of two credible witnesses necessary to a conviction in a case of adultery and fornication, is repealed by ch. 27, § 2, p. 164, of the Criminal Code, Sess. Acts of 1847-48.

2. **Same—Same.**—One credible witness is now sufficient to authorize a conviction for adultery or fornication.

Elizabeth Cregor was indicted for adultery with James Cole, in the Circuit court of Wythe county, at the April term of the Court for 1849. On the trial, the jury rendered the following verdict: "We find upon the evidence of one credible witness that the defendant is a married woman: That within twelve months previous to the finding this indictment, she habitually bedded with James Cole in the indictment mentioned, as man and wife, the said Cole not being her husband. If upon the foregoing facts so found upon the evidence of but one witness, the law be for the Commonwealth, we find the defendant guilty, and assess her fine to twenty dollars; but if the law be for the defendant, we find her not guilty."

Upon the finding of this verdict, the Circuit court, with the consent of the defendant, adjourned to this Court the following questions:

1st. Is so much of the sixth section of the act, entitled "An act for the effectual suppression of vice, and punishing the disturbers of religious worship and Sabbath breaking," 1 Rev. Code, page 555, as makes the oaths of two credible witnesses necessary to a conviction, in cases of adultery and fornication, repealed by the 2d section of the 27th chapter of the Criminal Code, Sess. Acts 1847-48, page 164?

2d. What judgment ought to be entered on the special verdict?

592 *LEIGH, J., delivered the opinion of the Court.

The Court is of opinion and doth decide, first, that so much of the 6th section of the act for the effectual suppression of vice and punishing the disturbers of religious worship and Sabbath breakers, 1 Rev. Code, p. 555, as makes the oath of two credible witnesses necessary to a conviction in cases of adultery and fornication, is repealed by the 2d section of the 27th chapter of the Criminal Code, Sess. Acts 1847-48, page 164. And secondly, that judgment ought to be rendered on the special verdict in favour of the Commonwealth for the fine assessed by the jury. Which is ordered to be certified, &c.

Morgan v. The Commonwealth.

June Term, 1850.

Indictments—Sale of Ardent Spirits—Charging Offence in Disjunctive.*—In an indictment for retailing ardent spirits without a license, to be drank where sold, it is not error to use the word "or" in speaking of the various kinds of spirituous liquors charged to have been sold.

At the March term for 1848, of the Circuit court of Chesterfield county, Peter K. Morgan was indicted, for that he, on the 15th of February 1848, at the county &c., without a license, did sell by retail, to be drank in his house, rum, wine, brandy or other spirituous liquors, to be drank where sold, &c.

The defendant demurred to the indictment, on the ground that the charges were laid in the disjunctive: But the Court overruled the demurrer. The defendant then pleaded "not guilty," and on the trial demurred to the evidence; and the Commonwealth joined in the demurrer. Whereupon the jury found a verdict of guilty, subject to the demurrer to evidence.

593 *The evidence consisted of the tes-

***Indictments—Sale of Ardent Spirits—Charging Offence in the Disjunctive.**—Several cases cite and reaffirm the proposition of the principal case, that it is not error to charge the offence of selling spirituous liquors, wines, etc., without a license, in the disjunctive instead of the conjunctive, by using the word "or" in lieu of "and" in describing the various kinds of liquors and drinks charged in the indictment to have been sold without a license. See *Thomas v. Com.*, 90 Va. 93, 17 S. E. Rep. 788; *Cunningham v. State*, 5 W. Va. 509; *State v. Charlton*, 11 W. Va. 336-7. But, in this last case, the court said: "It (*i. e.*, the decision of the principal case) ought not to be regarded as overthrowing the general rule, that an indictment ought not to state the case disjunctively, when it is thereby left uncertain, what is really intended to be relied on as the accusation. And while *Morgan's Case* must govern us whenever a case like it arises, yet we cannot safely extend it to cases which differ from it and fall within this general rule." See, further, monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674; monographic note on "Intoxicating Liquors" appended to *Thon v. Com.*, 31 Gratt. 887.

timony of a single witness, who deposed, that on the 15th of February 1848, he and John Perry drank spirits at the house of the defendant; which said spirits were called for by Perry, and by him paid for; the purchase having been made of, and the payment made to, the defendant.

The Court gave judgment upon the demurrer to evidence, against the defendant, for a fine of 30 dollars and the costs. Whereupon he applied to this Court for a writ of error, which was allowed.

Day, for the appellant.

The Attorney General, for the Commonwealth.

By the Court. The judgment is affirmed.

Smith v. The Commonwealth.

June Term, 1850.

1. **Criminal Law—Advising Slave to Abscond.*—Case at Bar.**—A conviction for advising &c. one slave to abscond, is not a bar to a prosecution for advising &c. another slave to abscond; though the advising &c. was to both at one time, and by the same words and acts.

2. **Jurors—Opinion Formed—Competency.†**—The entertaining a decided opinion of the prisoner's guilt, formed on the testimony as published in the newspapers, is not a valid objection to a juror, if he thinks he can discard his opinion, and that it would not influence his judgment; and that he could give the prisoner a fair trial according to the law and the evidence submitted to the jury.

3. **Same—Objection—Case at Bar.**—The prisoner was charged with having advised &c. two slaves to abscond at the same time, a venireman summoned on the first trial was stricken from the panel by the prisoner. This is not a valid objection to him as a juror on the second trial.

Samuel A. Smith was indicted at the October term for 1849, of the Circuit court for the county of Henrico *and city of Richmond, for advertising and aiding a certain slave named Sawney, the property of Caroline M. Christian, to abscond from his mistress.

The prisoner being arraigned, filed a plea of autrefois convict, to which the attorney for the Commonwealth demurred, and the Court sustained the demurrer. The ground of the plea was that the prisoner had been tried at the same term of the Court, for advising, enticing and persuading a certain slave name Alfred, the property of William G. Overton, to abscond from his master. And also for aiding the same slave to

***Criminal Law—Advising Slave to Abscond—Autrefois Acquit and Convict.**—See monographic note on "Autrefois, Acquit and Convict" appended to *Page v. Com.*, 26 Gratt. 943.

†Jurors—Opinion Formed—Competency.—On this subject, see the principal case cited in *Jackson v. Com.*, 23 Gratt. 931, 933, and note; *Lyles v. Com.*, 88 Va. 397, 13 S. E. Rep. 802; *State v. Baker*, 33 W. Va. 324, 328, 10 S. E. Rep. 641, 643. See also, foot-note to *Wormeley v. Com.*, 10 Gratt. 658.

escape. That the offence was the same; not two offences of the same kind, but one offence of advising, &c., and aiding both slaves at the same time, by the same means, to escape. And that he had been convicted on the first trial, and sentenced to four years imprisonment in the penitentiary.

The demurrer to the plea having been sustained, the prisoner pleaded "not guilty;" and a juror, Samuel Ayres, was called, who, upon his voir dire, stated "that he had read the evidence against the prisoner as it had been reported in the newspapers; was not certain he had read all the evidence so reported; but from what he had read, he had made up a decided opinion that the prisoner was guilty, which still rested upon his mind, and was still fresh and decided. But if sworn as a juror in this case he should feel bound, as far as possible, to discard his present opinions; and he felt satisfied that he could discard them, and that they would have no influence upon his mind; and that he could give the prisoner a fair trial, without any unfavourable effect from what he had read, according to the law and testimony which might be brought before the jury." The prisoner objected to the juror as incompetent, but the Court overruled the objection, and the prisoner by his counsel excepted.

595 *Another juror, B. F. Cochran, was called, who stated "that he had been called as a venireman upon the trial of the prisoner, during the present term, under an indictment for advising and aiding a slave Alfred, the property of William G. Overton, to abscond, at the same time when he is charged with having advised and aided the slave Sawney, named in the indictment in this case as the property of Caroline M. Christian, to abscond. That he, the said Cochran, was among those received on the panel for the trial of the prisoner, under the said former indictment, and was stricken from the said panel by the prisoner." He also stated "that he had read a part of the evidence reported in the newspapers, but had formed no decided opinion in relation to the prisoner's case." The prisoner objected to the juror as incompetent, but the Court overruled the objection, and the prisoner again excepted.

A third venireman, G. W. Royster, was called, and stated "that he had read a part of the evidence as published in the newspapers; and had made up a decided opinion from what he had read; and that the recollection of that impression was still fresh upon his mind. And that he would, if evidence to the same effect should be given in Court, and none other was introduced on the trial, find the prisoner guilty. But that he is satisfied that he could decide as fairly upon the case as though he had never read or heard a word about it. And that what he had read or heard would have no influence upon his mind." The prisoner objected to him as a juror; but the Court overruled the objection, and the prisoner again excepted.

On the trial of the case the witnesses on both sides having spoken of a former trial of the prisoner in the same Court, a few days before, under an indictment for advising and aiding a certain slave named Alfred, the property of William G. Overton, to abscond, and the *record of the trial, conviction and judgment in that case being produced in evidence by the prisoner, which record is the same referred to in the prisoner's plea of autrefois convict, the prisoner moved the Court to instruct the jury, that "if they should believe from the evidence and pleadings in this cause, that the offence for which the prisoner was put on his trial, depended on the same act, and was supported in proof by the same evidence, on which the offence charged against him in the indictment for a felony in the case of Alfred, the property of William G. Overton, rested, and the verdict of guilty in that case was procured, then they should find in this case a verdict of acquittal."

The Court declined to give the instruction in the terms asked by the prisoner, but informed the jury that the Court had already decided in this cause, that the record aforesaid, of the trial, conviction and sentence of the prisoner for the offence of advising and aiding the slave Alfred, the property of William G. Overton, to abscond, could not be received or regarded as sustaining a plea in bar offered by the prisoner, of a former conviction of the offence charged by the indictment in the present case, for aiding and advising the slave Sawney, the property of Caroline M. Christian, to abscond. And instructed the jury that whilst they had the power to acquit the prisoner, if they were satisfied upon the evidence, that the offence charged in the present case was the same offence for which he had been already convicted; yet, that under the pleadings in this cause, notwithstanding much of the evidence in this case may be the same given on the former trial, yet they cannot consider the prisoner as having been previously tried and convicted for the advising and aiding the slave Sawney to abscond, as charged in the indictment in this case, by proof either of witnesses or by the record that he was convicted of a different offence; namely, *of advising and aiding Alfred, the slave of William G. Overton, although this last offence may have been committed in the same manner, and at the same time and place, as may have been alleged and proved in the present case, in reference to the slave Sawney. To which opinion of the Court the prisoner excepted.

The jury found the prisoner guilty, and fixed the term of his imprisonment in the penitentiary, at two years; and the Court sentenced him accordingly: The term of two years to commence upon the expiration of his imprisonment under another sentence pronounced against him at the same term upon the conviction of the prisoner for another felony. Whereupon, the prisoner ap-

plied to this Court for a writ of error, which was awarded.

Gilmer, for the prisoner.

The Attorney General, for the Commonwealth.

By the Court. The judgment is affirmed.

Hicks v. The Commonwealth.

June Term, 1850.

Criminal Law—Concealed Weapons—Evidence.—A jury may well find a habitual or general wearing of concealed weapons, from evidence that the defendant was seen once wearing concealed weapons under circumstances which satisfies them it was his general practice.

At the October term 1847, of the Circuit court of Albemarle county, William R. Hicks, a constable of the county, was indicted for habitually and generally carrying about his person concealed weapons.

On the trial the Commonwealth introduced two witnesses, one of whom proved
598 that on meeting Hicks *in the public road, in order to induce the witness, who was a youth, to surrender to him the horse of his father, which he was riding, and on which Hicks wished to levy an execution, he drew out a pistol and dirk, which had been before concealed about his person. The other witness, though he did not see the defendant have weapons about his person, stated facts from which it might be supposed that the defendant did have weapons concealed about his person at the time of which he spoke.

This being all the evidence, the defendant moved the Court to instruct the jury, that the evidence was insufficient to warrant a verdict of conviction under the law prohibiting the carrying of concealed weapons, passed the 2d day of February 1838. But the Court refused to give the instruction; and told the jury that the law had not prescribed any particular number of times or occasions on which a party must be seen wearing concealed weapons, to constitute the offence of habitually or generally keeping or carrying about his person concealed weapons, and to make a party guilty of a violation of the law; but it was for them to consider whether the evidence was sufficient to constitute a case for conviction. And that under certain circumstances, a jury might well find a habitual or general wearing of concealed weapons, from evidence that he was seen even once wearing of concealed weapons, and much more so, if the evidence in this case should satisfy them of his having been seen wearing them on two different occasions, under circumstances which satisfied them it was his general practice. To the opinion of the Court refusing the instruction asked, and to the instruction given, the defendant excepted.

The jury found the defendant guilty, and assessed his fine at fifty dollars; and the

Court rendered a judgment upon the verdict; whereupon the defendant applied
599 *to this Court for a writ of error, which was allowed.

By the Court. The judgment is affirmed.

Smith and Lomax, J's, dissented.

Armstead's Case.

June Term, 1850.

Criminal Practice—Recalling Witness after Argument.*—The attorney for the Commonwealth allowed to recall a witness, and ask him a question, after the attorney had made his opening argument, and one of the counsel for the prisoner had spoken in his defence.

John A. H. W. R. Armstead was indicted in the Circuit court of Henrico and the city of Richmond for larceny, in stealing a horse and buggy, the property of Thomas Duke. On the trial, after the Commonwealth had concluded its evidence tending to prove the horse and buggy in question had been hired by the prisoner of Thomas Duke on the 3d of March 1849, in Richmond, and afterwards disposed of by him at Powhatan courthouse, on the 5th of March; and also other evidence tending to shew the felonious intent of the prisoner; and after the attorney for the Commonwealth had closed his opening argument, and one of the prisoner's counsel had made his argument for the defence, the attorney for the Commonwealth moved the Court to allow him to recall a witness, Thomas Duke, who had been before examined, and to ask him a question not before put; the attorney stating that he did not have the record of the examination in the Hustings court, and therefore was not informed of what had
600 been deposed to by the witnesses in that Court. The prisoner's *counsel objected to the motion, but the Court allowed the witness to be recalled, and asked, "If the prisoner on Saturday evening, the 3d March 1849, when he hired the horse and buggy in question, gave him his name?" The answer to which was, "He said his name was J. Scott." To this question and answer the prisoner's counsel objected as irregular and inadmissible, and excepted to the opinion of the Court admitting them.

The jury found the prisoner guilty; and fixed the term of his imprisonment in the penitentiary at five years; and the Court sentenced him accordingly. Whereupon he applied to this Court for a writ of error.

By the Court. The writ of error is denied.

*See principal case cited in *Schonberger v. Com.*, 86 Va. 492, 10 S. E. Rep. 718.

The trial court may, in the exercise of a sound discretion, admit evidence after argument. See *foot-note* to *McDowell v. Crawford*, 11 Gratt. 378; *Livingston's Case*, 7 Gratt. 658, and *foot-note*.

Commonwealth v. Harris and Hickman.

June Term, 1850.

1. **Criminal Law—Sale of Ardent Spirits—Joint Indictment.***—Two persons may be jointly indicted or proceeded against, by information, for retailing ardent spirits without license.
2. **Same—Same—Same—Separate Fine.**†—Upon their conviction there should be a separate fine against each of thirty dollars.

At the June term 1849, of the Hustings court of Danville, the grand jury presented James B. Harris and John Hickman for selling ardent spirits to be drank where sold, without a license, to Hugh Ramey. Upon this presentment an information was filed, to which the defendants pleaded jointly "not guilty;" and were tried together, when the jury found them guilty in manner and form as was alleged in the information.

When the jury brought in their verdict, the defendants moved the Court to arrest the judgment on the grounds,

601 *1st. That the information charges the offence jointly against the defendants for committing jointly one offence.

2d. That the verdict of the jury is joint against the two defendants; and the judgment of the Court, if entered up, must impose a fine upon them jointly for one offence.

But the Court overruled the motion, and gave a judgment against each of the defendants for thirty dollars, the fine imposed by the statute, for the use of the Literary fund, and the costs.

The defendants applied to the Judge of the Circuit court of Pittsylvania for a writ of error to this judgment, which was awarded. And when the cause came on to be heard, the Court with the assent of the defendants, adjourned to this Court the questions:

1st. Can two persons be jointly indicted, or proceeded against by information, for retailing ardent spirits?

2d. Is the judgment of the Hustings court of Danville right in rendering, on the finding of the jury, a several fine against each of the plaintiffs in error, for thirty dollars each; or should the Court have rendered judgment against them jointly for the sum of thirty dollars and the costs?

3d. What judgment ought the Court to pronounce in this cause?

***Criminal Law—Sale of Ardent Spirits—Joint Indictment.**—Two persons—even husband and wife—may be jointly indicted for retailing ardent spirits without license. *Com. v. Hamor*, 8 Gratt. 698.

†**Same—Same—Same—Separate Fine.**—But, although there is a joint indictment, if convicted, the fine should be assessed separately, and judgment rendered against each defendant. *Com. v. Hamor*, 8 Gratt. 698; *Com. v. Ray*, 1 Va. Cas. 262, and *foot-note*; *Gill v. State*, 39 W. Va. 488, 20 S. E. Rep. 572.

‡See monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674; monographic note on "Intoxicating Liquors" appended to *Thon v. Com.*, 31 Gratt. 887.

LOMAX, J., delivered the opinion of the Court.

Upon the first question adjourned, this Court is unanimously of opinion, that two or more persons may be jointly indicted for retailing ardent spirits without a license.

Upon the second question, a majority of the Court is of opinion, that the judgment of the Hustings court of Danville for several fines of thirty dollars against each of the plaintiffs in error, is correct.

602 *Upon the third question adjourned, a majority of the Court is of opinion, that judgment should be rendered in the Circuit court affirming the judgment of the Hustings court of Danville.

Bacon v. The Commonwealth.

June Term, 1850.

Criminal Law—Denial of Owner's Right of Property in Slaves—Statute—What Commonwealth Must Show.—

On a prosecution under the act of 1847-48, ch. 10, § 24,* for punishing every free person who by speaking or writing shall maintain that owners have no right of property in their slaves, it is incumbent on the Commonwealth to shew, in the alleged speaking, that the defendant denied the right of owners to property in their slaves; and also to shew that that denial was maintained by him. The language must plainly express the denial, or in its plain meaning necessarily imply it.

At the April term for 1849, of the Circuit court of Grayson county, Jarvis C. Bacon, a free person, was indicted for that on the 26th of March 1849, he did by speaking, maintain that owners have not right of property in their slaves. On the trial the jury found him guilty, and assessed his fine at 49 dollars 62½ cents. Whereupon he moved the Court for a new trial.

Upon this motion the Court below certified the facts proved upon the trial as follows: That the defendant, who is a minister of the gospel, on Sunday before Christmas 1848, in the county of Grayson, preached a sermon from the text in the New Testament: "Ye are the salt of the earth," or "Ye are the light of the world." That he proceeded to point out the duty of Christians, and in

the conclusion of his discourse, after 603 citing a *passage of scripture which related to the overthrow of the tables of the money changers in the temple, said that those persons, (alluding to the money changers,) were pronounced by our Saviour, thieves and robbers; and then observed that there were thieves and robbers in the church at this day. In illustration of this view, the defendant said: "If I was to go to my neighbour's crib and steal his corn, you would call me a thief, but that it was worse

*The act says: "Any free person who, by speaking or writing, shall maintain that owners have not right of property in their slaves, shall be punished by confinement in the jail, not more than twelve months, and by fine not exceeding five hundred dollars."

to take a human being and keep him all his life, and give him nothing for his labour, except once in a while a whipping or a few stripes." Defendant did not mention the name of slave owners or masters of slaves at any time during his discourse; but witness stated that he understood these remarks to refer to slaveholders. These were all the facts proved; and thereupon the Court adjourned to this Court the question:

Ought this Court to grant a new trial in this cause?

The case was argued in writing by Fulton and Buckingham for the defendant.

The indictment in this case is founded upon the 24th section of the 10th chapter of the Criminal Code of Virginia, which provides that "any free person who, by speaking or writing, shall maintain that owners have not right of property in their slaves, shall be punished by confinement in the jail not more than twelve months, and by fine not exceeding five hundred dollars," &c.

The evidence in support of the indictment shews that the defendant, who was a minister of the gospel, on a certain occasion delivered a sermon from one or the other of two texts of scripture. "Ye are the salt of the earth," or "Ye are the light of the world;" in which he proceeded to point out the duty of Christians, and in the conclusion of his discourse, after citing a passage of scripture which related to the

604 overthrow of the tables of the money changers in the temple, said *that

they were pronounced by our Saviour, "thieves and robbers," and then observed that there were "thieves and robbers in the church at this day," and in illustration of this said that if he were to go to his neighbour's crib and steal his corn he would be called a thief, but that it was worse to take a human being and keep him all his life and give him nothing for his labour, except once in a while a whipping or a few stripes. The defendant did not mention the name of slave owners or masters of slaves at any time during his discourse. It was the mere inference of a single witness from the remarks just quoted, that he referred to the relation of master and slave. In speaking of the "right of property," in the section referred to, the Legislature clearly meant a legal right—a right derived from civil compact, by which every citizen of the State acquires, holds and disposes of property. Beyond this point the Legislature could not go, without transcending the limits prescribed by the constitution of the State, which declares that they shall pass no "law abridging the freedom of speech." "Nor shall any man be enforced, restrained, molested or burthened in his body or goods, or otherwise suffer on account of his religious opinions or belief, but all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and the same shall in no wise affect, diminish or enlarge their civil capacities."

In the doctrines and discipline of the Methodist Episcopal Church, the question

is asked, "What shall be done for the extirpation of the evil of slavery?"

The answer is: "We declare that we are as much as ever convinced of the great evil of slavery; therefore no slaveholder shall be eligible to any official station in our church hereafter, when the laws of the State in which he lives will admit of emancipation, and permit the liberated slave to enjoy freedom," &c.

605 *Dr. Adam Clark, in his commentary on the 5th verse of the 6th chapter of Ephesians says: "In heathen countries slavery was in some sort excusable; among christians it is an enormity and a crime, for which perdition has scarcely an adequate state of punishment."

These works are every where to be found in the State of Virginia; they are read by all, and the sentiments expressed in the above extracts approved by many.

Would any man, who, by speaking or writing, should maintain the correctness of these sentiments, incur the penalty imposed by the section in question? It is believed he would not. Many believe slavery to be inconsistent with the doctrines taught by scripture; and to attempt to maintain the proposition, either by speaking or writing, would be no violation of the statute. Whether such a position be tenable or not, does not matter here, the right to discuss it is guarantied by the constitution; a right which no earthly tribunal can take away or abridge.

The defendant in this case was addressing his remarks to the members of the church; he did not allude to or assail any law of the State, or attempt to impugn any right conferred by law upon the citizens, but was attempting to prove the sinfulness of members of the church keeping human beings at labour during their lives, and giving them nothing in return but stripes. In this he probably alluded to the relation of master and slave, but a man may argue that slavery is a sin, or a crime against the laws of God, without thereby violating the laws of man. The legal right to property is sometimes acquired by operation of law, which justice would withhold. In such case it might be well maintained that the man who avails himself of his legal advantage, is guilty of a great moral wrong; and this too without condemning the law or denying the right under it. That there is a distinction between legal and moral rights

and legal and moral wrongs, (if the expression *may be permitted) no 606 argument is necessary to prove. How far the citizen may go in maintaining his opinions respecting religion or the duty of Christians is a question with which the Legislature, it is presumed, has nothing to do. The defendant, as has been said, was addressing the members of his church, and the language used by him on that occasion was intended in the same sense of the text of scripture referred to by him respecting the money changers in the temple. The meaning there was not that the money

changers had actually stolen any thing from the temple, but the words were intended in a wholly different sense. So with the defendant, who believed slavery to be sinful, and inconsistent with true religion, and that professors of religion who held human beings in bondage, were violating the laws of God, declared that there were thieves and robbers in the church at the present day, as well as in the days of our Saviour on earth, and with a view no doubt of giving force to the expression, made use of the comparison spoken of by the witness. If it be true that the citizen has the right to discuss and maintain by argument his own opinions as to the moral right to hold human beings in bondage, then no expression which he might use, however strong it might be in attempting to prove the wrong, could subject him to punishment under human laws. To constitute crime, the intent must be manifest. In this case there is no evidence shewing an intention to violate the statute. The defendant did not allude to the institution of slavery, or the legal right by which they are held as property. To subject him to punishment upon the evidence in the cause would, it is humbly conceived, take from the citizen the safeguard afforded him by the constitution of the State. It is fair to presume that as the defendant did not deny the legal right of owners to property in their slaves, he admitted or conceded that right to exist by virtue of the law of the land, and that

607 his remarks from *the proof must be applied to the evil of slavery in the church.

LOMAX, J., delivered the opinion of the Court.

Any statute tending to restrain the exercise of the freedom of speech, or supposed to have such tendency, should be strictly construed by the Courts. This should more especially be the case when the exercise of that freedom has for its object matters of religious doctrine and discipline. The acts of the Legislature should receive their construction in harmonious deference to the principles of the constitution relating to the freedom of speech and of religious faith. The Legislature has enacted (Sess. Acts 1847-8, ch. 10, § 24,) that "any free person who, by speaking or writing, shall maintain that owners have not right of property in their slaves, shall be punishable by confinement in the jail, not more than twelve months, and by fine not exceeding five hundred dollars." It is charged in the indictment that the defendant, on the 26th of March 1849, did, by speaking, maintain that owners have not right of property in their slaves. The words spoken are not, as in strictness perhaps they should have been, set out in the indictment, neither in their tenor nor in their substance. The proof is that the occasion of the alleged speaking was at a religious meeting, on Sunday before Christmas 1848, when the defendant, who is a minister of the gospel, preached a sermon from the text in the New Testa-

ment: "Ye are the salt of the earth," or "Ye are the light of the world," in which he proceeded to point out the duty of Christians. The occasion was in itself innocent, and unless it be clearly shewn that its sanctity was abused to purposes plainly illegal, the preacher who ministered should not be subjected to criminal animadversion. We may not unreasonably suppose, from such a text as that which was selected, the

discourse was directed mainly to the

608 professing Christian *members of that church, of which the defendant was the minister, to whatever denomination it may have belonged. In holding up the spirituality of their creed for their consideration, and the corresponding spirituality of life and conversation for their instruction and edification, he might well be allowed to admonish them to abstain from many indulgences, without questioning, in a secular point of view, the lawfulness of such indulgences. As was said by St. Paul in regard to his spiritual duties, "All things are lawful for me, but all things are not expedient; all things are lawful for me, but all things edify not." To dissuade a member of a Christian flock from merchandizing in slaves, or taking and keeping human beings in slavery, may be done by a pastor, without any denial of the right of owners to property in their slaves. A spiritual law, apart from human law, might be inculcated by him upon their consciences for their peculiar government, according to their creed, without exciting, or intending to excite, any spirit of rebellion against the law of the land; which, according to Christian doctrine, all are bound to obey. With the fullest sense of the sanctions with which the rights of owners to property in their slaves have been clothed by the law of the State, and the law of nations, and the law of the scriptures, and with the most profound submission to these sanctions, he might innocently urge an abstinence from the enjoyment of these rights, as not being expedient, or as inconsistent with the professions of a peculiar religious faith.

It is incumbent upon the Commonwealth to shew, in the alleged speaking, that the defendant denied the right of owners to property in their slaves; and also, to shew that that denial was maintained by him; which would seem to imply the consideration of an effort made, by adducing facts, or proofs or arguments, to verify that denial. The defendant's language must

609 *plainly express that denial, or, in its plain meaning, necessarily imply it. Its import of the offensive proposition, owners have no right of property in their slaves, must be clear and without any ambiguity of construction, leading to a meaning that is wholly innocent. The evidence is, that in the discourse which the defendant preached upon the text before cited, after proceeding to point out the duty of Christians, towards the conclusion of his discourse, the defendant cited a passage of scripture, which related to the overthrow

of the tables of the money changers in the temple; and said, those persons (alluding to the money changers,) were pronounced by our Saviour, thieves and robbers; and there are thieves and robbers in the church at this day. If I were to go to my neighbour's crib and steal his corn, you would call me a thief; but that it was worse to take a human being and keep him all his life, and give him nothing for his labour, except once in a while a whipping or a few stripes. And this remark was understood by the witness, to refer to slaveholders; though the words slaves or slaveowners were not used by the defendant in his discourse.

If it was the design of the defendant in this discourse, to dispute or deny any rights of property, there was no fitness for such a purpose in the incident cited by him. In that transaction our Saviour was vindicating no rights of property; nor was he accusing or judging the offenders, in any secular sense, for any transgression of civil or social rights. It was not for any crime against the judicial law that he reproved them; but for the spiritual sin of desecrating His father's house—the house of prayer, and by their unholy and sacrilegious pursuit of gain in the temple, converting it into the den of thieves. The right of property of the money changers and those who bought and sold in the temple, was not animadverted upon or questioned.

610 The language *was strongly figurative. It could not literally be understood that the temple had sunk into a den by reason of its desecration, nor could the money changers and those who bought and sold, with a title unimpeached in the money and the goods, be literally understood to be thieves, in the sense of those who had stolen property, because of the sinful cupidity, in the indulgence of which they may have shewn a strong resemblance to thieves. It was their spiritual guilt and not any secular criminality He was reproving. Thieves were spoken of, upon the occasion, in a sense similar to that when upon another occasion, He said, "he that entereth not by the door into the sheep-fold, but climbeth up in some other way, is a thief and a robber." There seems therefore, no warrant found in the passage cited by the defendant from the scripture, for interpreting his denunciation of thieves and robbers in the church at this day, in any other sense than as sinners, not as malefactors against any social or civil rights of property. So understood, the words thieves and robbers could cast no hue of criminal import upon the rest of the defendant's expressions. But, supposing that the words thieves and robbers were used by the defendant in the ordinary sense of larcenous violators of the rights of property, it would be extremely difficult to find a construction of this obscure and incoherent fragment of the defendant's discourse, as presented by the testimony, that would make it tantamount to the offensive proposition, distinctively expressed in the statute, that owners have

not right of property in their slaves; and which the law requires should be proved to have been clearly maintained by the alleged speaking. The matter which, it would seem, the defendant proposed to maintain was, that there were thieves and robbers in the church at this day. With that proposition, whether understood in a spiritual or worldly sense, the penalties of the law have no concern. All that followed the

611 *enunciation of that proposition, seems to have been adduced as proofs and arguments, or as the witness tells us an illustration, (such as they were,) to maintain that main proposition, without any effort to maintain the matters themselves which were so adduced. "If I were to go to my neighbour's crib and steal his corn," says the defendant, "you would call me a thief." That may be very true. But taken in the hypothetical manner in which it was spoken, without any direct connection with or pertinent application to the matter in hand, it is not easy to perceive its bearing, as an argument or illustration to maintain the point proposed, that there were thieves and robbers in the church at this day. In connection and in dependence upon this vague and apparently incoherent assertion as to the crime of stealing corn from a neighbour's crib; and by way of comparison with it, he proceeds to assert, without any argument or proof to maintain, that "it is worse (than thus stealing corn,) to take a human being and keep him all his life, and give him nothing for his labour, except once in a while a whipping or a few stripes." We will not pause to enquire whether this remark must necessarily, in legal construction, have reference to slaves and slaveowners. The witness so understood it. In this casuistry, in the comparison of hypothetical guilt, why was this taking and keeping, as described, worse than stealing the corn? Furtively, to take and keep a slave, as in the case of the corn, is legally and morally admitted to be worse. So inhumanly to take and keep a slave in the manner described, without any recompense, of suitable comforts or necessities, for his labour, except once in a while a whipping, &c., might, to the feelings of a humane casuist, be worse in the scale of guilt, than stealing corn; or worse than murder, or arson, or other crime against the person or property of another. In either of these views, this remark made to maintain the proposition that there were

612 thieves and robbers *in the church, &c., would be entirely innocent. If there be any ambiguity in its meaning, why should a Court, guided by the spirit of the constitution, which favours the freedom of speech and of religious faith, reject in this criminal prosecution, this innocent construction, and fasten upon another, that makes such speaking a crime? To arrive at that criminal meaning, it will be necessary for the Court, by construction to supply other words as spoken or intended by the defendant, which he did not speak or necessarily intimate. We must make him

say, that to take and keep a human being (or say slave,) is worse than stealing corn, such taking and keeping being equally without right of property in the slaveowner, as in the thief who has stolen the corn.

This case comes before this Court upon a question adjourned by the Circuit court upon a motion for a new trial, after a verdict of conviction. There has been no ratification or concurrence of the Judge who presided at the trial in that verdict. This Court therefore, upon this question occupies the seat of that Judge, upon the motion pending before him. Upon the matters so adjourned, this Court is of opinion that the proofs set forth in the record are not sufficient for the conviction of the accused in this case; and consequently that the motion for a new trial should be allowed.

613 *Grayson v. The Commonwealth.

(Absent FIELD,* J.)

June Term, 1850.

Criminal Law—New Trial—After Two Concurring Verdicts.†—A new trial granted to a prisoner convicted of murder in the first degree, after two concurring verdicts, approved by the judge who presided at the trials; the evidence being wholly insufficient to sustain the verdict and judgment.

This is the sequel of the case reported in 6th Grattan, p. 712. The prisoner was again tried at the June term of the Circuit court of Culpeper county for 1850, when he was again found guilty of murder in the first degree, and sentenced to be hung.

The prisoner moved the Court to set aside the verdict and judgment, on the ground that the verdict was contrary to the evidence; but the Court overruled the motion. Whereupon the prisoner excepted, and ap-

plied to this Court for a writ of error, which was awarded.

The facts spread upon the record are in most respects the same as those which appeared on the former trial; and they are stated fully in the report of the case in 6th Grattan. The only differences in the statement of the evidence are, first, as to the time when the young men left the store on the evening previous to the murder. It was stated on the last trial that two of them remained about fifteen minutes after the others went away; and when they left it was the darkest time of the night, the moon shining brightly all night. Second. The evidence as to the appearance of the prisoner at Huffman's cabin, and his going out with another negro and a white boy, to hunt his spade and shovel, is wholly omitted. Third. It is proved that the spade and shovel were not, at 12 o'clock, on the

day after the murder, in the spot where 614 they were found at 9 o'clock *that night; that spot having been examined by some of the persons who were searching for them. Fourth. The pistol of the deceased, which was taken the night of the murder, was found in July or August 1849, when the prisoner was in close custody, near the house of George Jeffries, on the side of the path leading from his road gate to the house, in a place where it could not have remained long without discovery.

Fifth. During the inquest, after the prisoner's appeal to William Wood, he further said that a negro man named Tom, belonging to Woodford Settle, went with him to the store and saw him get the spade and shovel; and if Tom was brought he would prove it; but the said Tom came and denied it, said that he did not see him get the spade and shovel; that he went with him to the store, but did not go in; that being in a hurry to have a plough sharpened at William Wood's blacksmith shop, he standing outside of the store, called to the prisoner to make haste, that he was afraid the blacksmith would be gone to bed; to which the prisoner replied, "You go on, I will come on presently;" and that this statement was not contradicted by the prisoner. Sixth. The judge certified that he considered the boy Huffman a credible witness, though he thought him mistaken in supposing he saw both the spade and shovel when sent by William Wood to see them at his house. Seventh. After the inquest had been taken and signed, the prisoner was directed to be committed to jail, when it was proposed—the certificate of facts says—by a gentleman present, as a means of finding out where the spade and shovel were to be found, that the prisoner should have his hands put into a vice, and by torture compelled to confess. His hands were put into a vice and the force of the screw applied; but he persisted in the statement that he had before made, that he was drunk, had lost his spade and shovel, and did not know where they were.

615 *The case was argued in this Court by Bouldin and Cabell, for the pris-

*He had tried the cause in the Circuit court.

†**New Trial—Verdict Contrary to Weight of Evidence.**

—The principal case and Grayson v. Com., 6 Gratt. 712 (of which the principal case is the sequel), are cited several times as prominent among those cases in which verdicts of juries have been set aside by the appellate court because of the insufficiency of the evidence. Johnson v. Com., 20 Gratt. 817; Leath v. Com., 32 Gratt. 881; Martin v. Thayer, 37 W. Va. 50, 16 S. E. Rep. 406; *foot-note* to Smith v. Com., 21 Gratt. 809.

Evidence Conflicting—Refusal to Certify Facts.—To the point, that, when the evidence is conflicting, the court may refuse to certify the facts proved, see the principal case cited in Powell v. Tarry, 77 Va. 200. See also, *foot-note* to Caldwell v. Craig, 31 Gratt. 132; monographic note on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

Criminal Law—Circumstantial Evidence.—On the subject of circumstantial evidence in criminal cases, see the principal case, and Grayson's Case, 6 Gratt. 712, cited in Cluverius v. Com., 81 Va. 858; Anderson v. Com., 83 Va. 320, 2 S. E. Rep. 281; Brown v. Com., 87 Va. 220, 12 S. E. Rep. 472; Brown v. Com., 89 Va. 379, 16 S. E. Rep. 250. See also, on this subject, *foot-note* to Johnson v. Com., 20 Gratt. 796; *foot-note* to Dean v. Com., 33 Gratt. 912.

oner, and the Attorney General, for the Commonwealth.

LEIGH, J., delivered the opinion of the Court.

The plaintiff in error, at the spring term in the year 1849, of the Superior Court of law and chancery for the county of Culpeper, was indicted for the murder of David W. Miller, and upon his trial was found by the jury guilty of murder in the first degree. He then moved the Court to grant him a new trial, but his motion was overruled, and judgment rendered against him upon the verdict. This Court at the last term reversed the judgment, and directed that another trial of the case should be had. This trial has been had, and the same verdict and judgment have been rendered against the accused; and he has again applied to this Court to reverse this last judgment. The ground upon which he makes this application is, that the evidence introduced on the trial was wholly insufficient to prove that he was guilty of the murder, or in any manner connected with it. The evidence is set forth in the exception taken to the opinion of the Court refusing to award a new trial.

This Court is fully aware of the weight which ought to be given to two concurring verdicts, approved by the Judge who presided at the trials; and if in our opinions the evidence made even a probable case of guilt, we would be unwilling to disturb the judgment. But at the last term this Court was of opinion, unanimously, that the evidence introduced on the first trial was plainly insufficient to connect the accused with the murder. The evidence on the second trial is somewhat different from the evidence on the first trial, but this difference is favourable to the accused; and after examining the testimony anew, we are again
616 unanimously of opinion, *that it is wholly insufficient to sustain the verdict and judgment.

We do not deem it necessary to make a minute examination of all the evidence, because we think it plain that the circumstances relied on to prove the guilt of the accused are slight or are sufficiently explained. These circumstances, or rather the circumstances tending most strongly to prove the guilt of the accused are, that he was at the residence of the deceased, the place where the murder was committed, at, or just before, or just after dark of the night when the crime was perpetrated; that a shovel and spade were carried by the accused during the same night from the residence of the deceased; that the wounds inflicted on the deceased were made with some blunt instrument; that the shovel carried from the residence of the deceased had upon it, when it was found the night after the murder, spots of blood, and that the accused said the morning after the murder, "that he did not know where the spade and shovel were."

We cannot consider the fact that the accused was at the residence of the deceased

about dark of the night of the murder as furnishing any evidence of guilt; since he was there for a proper purpose, namely, to redeem his spade and shovel, which had been taken possession of and detained by the partner of the deceased, to secure the payment of a debt or debts due by the accused. Besides, the accused remained on this occasion at the residence of the deceased but for a short period, as it is proved clearly that he was at the house of another person, half a mile distant, very early in the same night, and the whole evidence too, makes it altogether improbable that the murder was committed at so early an hour of the night. Nor do we think that the fact, that the spade and shovel were carried from

the residence of the deceased during
617 the night, furnish any *stronger evidence of guilt that the fact above mentioned, as it is proved by an uncontradicted and credible witness that the accused carried with him both the spade and shovel, when he left the residence of the deceased at or about dark. The judge who presided at the trial, was of opinion that this witness was under some mistake, and that the spade was not then carried off. This opinion was founded on the fact, that the spade carried off was not the spade of the accused, but another spade belonging to the store, and upon the fact that the accused had not enough money to redeem both the spade and the shovel. There is certainly some evidence, namely, the condition mentioned in Parr's order, and the fact that the deceased received that order as a payment, from which it may be inferred that the deceased delivered the spade as well as the shovel to the accused, and as the spades were so much alike, we cannot regard, under the circumstances, the fact that the spade belonging to the store instead of the one belonging to the accused, was carried off, as important. However this may be, we do not think the circumstances which weighed with the presiding Judge, sufficient to justify us in disregarding the testimony of the witness. The strongest circumstance against the accused, is the appearance of drops of blood upon the shovel which he carried from the residence of the deceased. This circumstance would have been entitled to much weight, if it had appeared that the accused had retained the possession of the shovel throughout the night, especially if the spots of blood had appeared to have been recently made. But we think it sufficiently proved, that the accused had not the possession of the shovel throughout the night. The Commonwealth gave in evidence the declarations of the accused made the morning after the murder was committed, and these declarations were "that he (the
618 accused) was drunk the night before; *that he lost both spade and shovel in going from Wood's to Huffman's; and that he did not then know where they were." Declarations of persons accused are not much to be relied on; but in this case the truth of the declarations was persisted in under peculiar circumstances;—

under severe torture, which we are sorry to say the bystanders, under the great excitement of the moment, forgetful of the mild spirit of our law, thought themselves at liberty to inflict. Besides, the declaration is so far supported, that it appears that at the time the declaration was made, both spade and shovel were in the possession of some other person. For both were found, two hours after dark of the night after the murder, in a place where they certainly were not at 12 o'clock of the preceding day, and of course they must have been placed where they were found by some other person, as during the whole period the accused was in close custody. There is too, other testimony which connects some other person with the murder. A pistol was carried from the residence of the deceased the night of the murder. This pistol was found at a place where it had been recently put, long after the accused was in close confinement, and it must therefore have been in the possession of some other person. The conduct of the accused is calculated, in some measure, to disprove the charge against him. He came to the place of the murder the morning after it had been committed, wearing the clothes which he had on the preceding night, and these had no stains of blood upon them. It is not at all probable that the accused changed his clothes during the night, and it is still less probable that the murderer escaped without marks of blood upon his clothes. For marks of blood were found on the floor of the room, on the counter and desk, sprinkled on the goods on the shelves, on the ground near the scene, and on a fence distant a few yards. Upon the whole case, we
619 are of opinion *that the testimony is not only not sufficient to prove the guilt of the accused, but that it is hardly sufficient to raise a suspicion against him. The judgment must therefore be reversed and a new trial awarded.

Curran's Case.

June Term, 1850.

1. Criminal Law—Jurors—Opinion Formed—Objection—Waiver.*—A juror's having expressed himself, before the jury was empaneled, as determined to punish a prisoner if taken on the jury, not from any malice towards him, but from an opinion of

NOTE BY THE REPORTER.—After the decision of the Court granting to the prisoner another trial, an armed mob in the daytime, took him from the jail and hung him: And thus to punish a man whom they suspected of murder, they committed murder themselves.

***Criminal Law—Jurors—Objection to—Waiver.**—On this question, see the principal case cited in *Bristow v. Com.*, 15 Gratt. 646; and *note*; *Dilworth v. Com.*, 12 Gratt. 692, 698; *Simmons v. McConnell*, 86 Va. 500, 10 S. E. Rep. 338; *Thompson v. Updegraff*, 3 W. Va. 644; *State v. McDonald*, 9 W. Va. 465; *Sweeney v. Baker*, 13 W. Va. 158; *State v. Greer*, 22 W. Va. 824; *State v. Hobbs*, 37 W. Va. 336, 17 S. E. Rep. 385.

his conduct, is no ground for setting aside the verdict and granting a new trial.

2. **Same—Arson in Daytime—Sufficiency of Indictment.**—An indictment for arson, according to the form at common law, is sufficient in a case of arson in the daytime.
3. **Same—Arson—Indictment—Laying Offence.**—To convict of the offence of burning at night, it seems, the indictment must charge the burning in the night.
4. **Same—Arson in Daytime—Sufficiency of Indictment.**—Though the offence of burning in the daytime may be charged in the common law form, yet it is more appropriate to charge the burning in the daytime.
5. **Same—Arson at Common Law.—QUÆRE:** If the common law offence of arson is abolished.
6. **Same—Joint Indictment—Election to Try Separately.**—Upon a joint indictment against several, the Commonwealth may elect to try them separately.
7. **Same—Arson—Indictments—Verdict—Certainty of.**—The indictment charges the setting fire to and burning the dwelling house of E. on the 11th of February 1850. The verdict is, guilty of arson in the daytime, on the 11th of February 1850. The verdict is sufficiently certain.

At the June term 1850 of the Circuit court for the county of Augusta, the grand jury found an indictment for arson against Martin Curran and eight others. The indictment charged that they feloniously, wilfully and maliciously did set fire to
620 and burn down a certain *dwelling house of one Charles East, contrary to the form of the statute, &c.

Curran was tried separately, and the jury found him guilty of arson in the day time; and fixed the term of his confinement in the penitentiary at three years. After the verdict he applied to the Court by petition in writing for a new trial, on the ground that one of the jury, Joseph T. Mitchell, had formed and expressed an opinion unfavourable to the prisoner before he was called as a juror; of which fact the prisoner was ignorant until after the rendition and recordation of the verdict.

The petition of the prisoner was sworn to by him, and was accompanied by the affidavits of Williams H. Grooms and H. St. J. Davis. Grooms stated that whilst the Court was empanelling the jury in the case of Chandler, tried for murder in the same Court, immediately preceding the trial of the prisoner, the affiant was standing by

+**Criminal Procedure—Joint Indictment—Separate Trial.**—In *Com. v. Lewis*, 25 Gratt. 941, it is said: "Now, by statute, persons indicted jointly for felony, may elect to be tried jointly or severally, on certain terms prescribed by the statute. Code, ch. 202, §§ 13, 14 and 15. But this statutory right of election given to the accused is subject to the right of the commonwealth, which still exists, to try the accused severally, notwithstanding they may elect to be tried jointly. *Curran's Case*, 7 Gratt. 619, 627." See also, citing the principal case, *Barnes v. Com.*, 92 Va. 802, 23 S. E. Rep. 784. See, in accord, *McWhirt v. Com.*, 3 Gratt. 594; *Kemp v. Com.*, 18 Gratt. 981. See Code 1887, § 4029.

Joseph T. Mitchell in the courthouse, and heard Mitchell say that he had been summoned upon the venire in the Irish cases, and if he was taken upon the jury he would give them goss, or give them hell, or some other expression of that kind; the exact words the affiant does not remember, but the substance was, he would punish them.

Davis states, that during the trial of Chandler for murder at the present term of the Court, he had been in attendance upon the trial, and that as he left the courthouse he saw Joseph T. Mitchell, one of the jurors who tried the case of Curran, standing upon the porch in front of the courthouse, in company with several others, and as affiant passed said Mitchell and his company, he heard Mitchell say he had been summoned upon the venire in the Irish cases, and affiant says he thinks Mitchell remarked in substance, in reply to some question asked him, that something ought to be or would be done with the Irish.

621 *These witnesses being present in Court were examined orally before the Court, and made the same statement as that contained in their affidavits. The counsel for the prisoner then stated that they were prepared to prove that Mitchell, after the discharge of the jury, had stated that he as a juror was for sending the prisoner to the penitentiary for ten years; and that he would have been for a longer term if the law would have allowed it; but no witness was introduced to prove such declaration.

Mitchell was himself examined, and stated that he had made up no opinion of the guilt or innocence of the prisoner, nor had he expressed any before he sat on his jury. That he did not know the prisoner personally up to the time he was sworn as a juror, nor indeed any of the Irish prisoners who were then in custody. That he had no prepossession whatever for or against the prisoner; and gave him a fair trial on the law and the evidence, as he understood them. That he heard the evidence in the case of Chandler, which was tried just before that of the prisoner; and that he expressed his opinion freely that said Chandler was guilty, and if he was on the jury he would convict him. These opinions were expressed during the progress of Chandler's trial, and must have been misunderstood and misapplied by Grooms and Davis to the Irish; as he expressed no opinion as to them.

And this being all the evidence, the Court refused to grant the new trial; and the prisoner excepted.

The prisoner then moved the Court in arrest of judgment, for errors apparent on the face of the record, viz: That the offence for which he was tried was not set forth in the indictment with sufficient certainty to enable the Court to give judgment thereon according to the very right of the case; it not being stated or averred whether the prosecution is for burning a dwelling

622 house in the night time under the act of Assembly, *entitled, "An act to

reduce into one the several acts concerning crimes and punishments and proceedings in criminal cases," passed March 14th, 1848, ch. 4, § 1: or for burning a dwelling house in the day time, under the same act, ch. 4, § 2. But the Court overruled the motion and proceeded to give judgment; and the prisoner again excepted.

The prisoner applied to this Court for a writ of error, and assigned five different causes of error in his petition. All of which are noticed in the opinion of the Court.

THOMPSON, J. The first ground of error assigned in the prisoner's petition for the writ, is the refusal of the Circuit court to set aside the verdict and award him a new trial. The motion was founded upon exceptions taken after verdict to the competency of one of the venire, Joseph T. Mitchell; the grounds of incompetency, as disclosed by the first bill of exceptions, being the expression of an opinion by the jurorman unfavourable to the accused, which would have been good ground for challenge to the favour had it been known to him, and of which he was unapprised until after the trial. The declarations imputed to the jurorman are deposed to by two witnesses. He was called and examined, and upon his oath affirmed, as he had done before he was elected and sworn, his perfect impartiality; denied all prejudice or bias, and denied the declarations imputed to him in reference to the case of the prisoner. His affidavit renders it highly probable, to say the least, that the two witnesses were mistaken in referring what the jurorman admits he did say, to the case of the prisoner, instead of Chandler, who was on his trial for murder. But had the affidavits of the two witnesses remained wholly uncontradicted and unexplained, they certainly furnish no ground for a new trial. It would be supererogatory to argue the question. It is conclu-

623 sively settled by authority *to be found in the former adjudications of this Court. Smith's Case, 2 Va. Cases 6; Poore's Case, Id. 474; Kennedy's Case, Id. 510; Brown's Case, Id. 516; Hughes' Case, 5 Rand. 655; Jones' Case, 1 Leigh 598; and Hailstock's Case, 2 Gratt. 564. In all of these cases there was graver cause for impeachment of the partiality and indifference of the juror, than in this, and in all, this court held the new trial was properly denied.

The second error alleged, which raises the question of the sufficiency of the indictment upon motion in arrest of judgment after verdict, is the most important and plausible of the series, and in truth the only one deemed worthy of much consideration. The prisoner, with eight others, was indicted for feloniously, wilfully and maliciously setting fire to and burning down a certain dwelling house of one Charles East. The indictment pursues the common law form of indictment for arson, omitting to state whether the burning was in the night or the day time, merely alleging that it oc-

curred on the 11th day of February 1850. The jury found him guilty of arson in the day time, on the 11th day of February 1850, and ascertained the period of his confinement in the jail and penitentiary house of the State to be three years. It is objected that this indictment is fatally defective for vagueness and uncertainty in omitting to state whether the burning was in the night or the day time. It is said the common law offence of arson is wholly abrogated and repealed by the revised criminal statute, to be found in the Sessions Acts of 1847-8, p. 99, ch. 4; and that by the 1st and 2d sections of that act two distinct statutory offences are created in relation to the burning of a dwelling house; the first the offence of burning in the night time; the second, the offence of burning in the day time; the first punishable with death, unless the jury shall find that at the time of committing the offence there was no person in the dwelling *house; and if they should so find, then the punishment should be confinement in the penitentiary for not less than 5 nor more than 10 years; the second punishable by confinement in the penitentiary for not less than 3 nor more than 10 years. It is then argued that as common law arson, which was irrespective of the time of day or night, was repealed; and in lieu of it, two distinct statutory offences created, which had regard to the time of the burning, the time, whether by day or by night, became an element in and of the essence of the offence; and that it became as necessary to charge the time, whether it be night or day, as to charge in burglary that the breaking and entry was by night. In the view which I have taken of this question, I do not consider it important to moot the point whether our statute has wholly abrogated the common law, and in its stead substituted new statutory offences; or whether the statute creates no new offence, but like our statute on the subject of felonious homicide, (which only graduates the common law offence, and measures the amount of the punishment by the degree of the offence,) makes the grade of the common law offence of arson, and the punishment to be inflicted, depend upon the time and circumstances of its commission. Thus at common law the felonious, wilful and malicious burning of a dwelling house was of equal malignity and enormity whether by day or night; by our statute, a felony, whether by day or night; but more enormous in legal contemplation, and more penal, if done by night than day. It is conceded that the change in the common law made by our statute graduating felonious homicide has made no change in the frame of the indictment—indeed it has been held that a change is not only unnecessary, but would be improper. In view of this apparent if not real analogy between the two cases of homicide and arson, it might with much plausibility be, as it has been contended, that no
 625 change in the frame of the *indictment for the burning of a dwelling house,

whether under the 1st or 2d section, was made necessary by the new statute. That by analogy to the proceeding upon an indictment for murder, upon a common law indictment for arson the jury should be charged to find whether committed by day or by night; and whether any person was in the house at the time of committing the offence, and find a verdict graduating the offence and the punishment according to the statute. Such a practice, if admissible, would certainly be convenient, rendering a single count sufficient, where otherwise, in the event of a doubt about the time of the burning, double counts would be necessary; and I do not perceive there is more objection to it upon the score of possible injury or surprise to the accused, than in the case of homicide. But it must be admitted that there is this difference between the cases of homicide and arson, and to that extent the analogy fails. The common law indictment for murder was adapted to the highest grade of murder under our statute—killing with malice prepense; hence upon the principle of the greater including the less, there was no necessity of change occasioned by the statute. Whereas, the common law indictment for arson was equally applicable to a burning whether by day or by night, to the greater and the lesser offences under the statute; and hence is the necessity of a change to meet the exigencies and requirements of the statute: and the only question is as to the extent of the change. To convict of the highest offence—a burning in the night under the first section, I concede that the indictment must charge the burning in the night, as in burglary. Here the analogy is complete between breaking in the night and burning in the night; but to convict of the minor offence—burning in the day—I hold that it is not indispensably necessary to charge expressly a burning by day; because
 626 the burning *of a dwelling house feloniously, wilfully and maliciously, is a crime both at common law and under the statute; at common law equally penal whether burnt by day or night; and by the statute more penal if burnt by night than by day. The burning must ex necessitate rei either be in the night or day. The act of felonious burning being charged, omitting to state that it was done in that part of the day called night, which would constitute it the greater offence, is in legal contemplation and intendment, tantamount and equivalent to a charge of the minor offence—a burning in the day time. Therefore I must regard this indictment as sufficient, under the 2d section of the statute, to warrant a conviction for burning in the day time. I cannot perceive how such a decision can by possibility operate any surprise or injury to the party accused. He is charged with an act committed in some portion of a day of 24 hours. If done in one portion of that day it is a capital offence; if done in another portion of the day it is a lesser offence. These are the only alternatives. A failure to lay the

act in that period of the day which would import a charge of the higher offence, by inevitable intendment, imports a charge of the minor offence. By sustaining such an indictment there seems to me to be no possibility of injury or surprise. On the contrary whilst the accused can never be prejudiced by it, he might be benefited by a conviction for the lesser, when he had been guilty of the higher offence.

But whilst I consider the indictment sufficient upon demurrer or motion to quash before verdict; and more especially after verdict, upon motion in arrest of judgment, I must admit it would have been better, more in accordance with the spirit of, because more conducive to that high degree of certainty so desirable in, criminal pleadings, had it charged the time of the burning expressly in the day time, thereby leaving no room for intendment or implication,

however inevitable. It seems to me
627 advisable *in all cases of doubt as to the time of the burning, whether in the night or the day time, to frame the indictment with two counts, so as to adapt it to the proof of either.

I am of opinion, that the objection upon which the third error assigned is based, is neither sound nor plausible. It alleges "that it was error to try the prisoner separately, it not appearing that he elected to be so tried."

By the common law, until it was changed by a recent act for the summoning of venires and empanelling juries in criminal cases, the Commonwealth and not the prisoner, in case of joint indictments, had the right of election subject to the control and discretion of the Court, whether to arraign and try prisoners or defendants jointly indicted, separately or jointly. By the law now in force, (see Revised Criminal Statute, Sessions Acts 1847-8, p. 149, sections 11 and 12,) each defendant has a right to a separate trial, if he so elect. Indeed, they must necessarily be tried separately where the offence is felony, unless they elect a joint trial and agree in their challenges. But even if they should so elect, the attorney for the Commonwealth or the Court may nevertheless elect to have a separate trial; so that whilst any and every joint defendant is entitled to a separate trial if he so elect, against the will of the Court, or the attorney for the Commonwealth, joint defendants cannot be tried jointly without the concurrent election of themselves, on the one hand, and the attorney for the Commonwealth or the Court on the other. But were the law even such, as the objection takes for granted, that it was the right of the prisoner to be tried jointly or separately at his election, there is nothing in the record to shew that he made his election to be tried jointly, and that the right (if it had existed,) was denied him. And no such fact appearing on the record by bill of exceptions or otherwise, none such can
628 be presumed to *have existed. On the contrary, the presumption must be that he elected a separate trial, as he was

so tried without any objection spread upon the record.

Of the same character, and as groundless as the last, is the objection taken in the 4th assignment of errors; "That it was error to try your petitioner by a jury not composed of the venire summoned for the purpose; no reason appearing for summoning others, and it not appearing how or by whom they were called." The answer is, that in the absence of any objection spread upon the record by bill of exceptions or otherwise, it must necessarily be presumed that the jury which was elected, tried and sworn, was properly selected from and composed of persons legally summoned, and in all respects constituted according to law.

Nor is there any validity in the objection which is made the foundation of the 5th and last assignment of errors; "That it was error to give judgment upon the verdict rendered in the cause, because not responsive to the charge in the indictment." The charge was setting fire to and burning the dwelling house of one Charles East, on the 11th day of February 1850. The verdict is guilty of arson in the day time on the 11th of February 1850. What arson or burning did the jury mean? The only answer that can be given, is the arson or burning, whether you choose to denominate it statutory or common law, charged in the indictment. I interpret the verdict to mean the same thing as if it had said, "we of the jury find the prisoner guilty of the burning in manner and form as in the indictment against him is charged, and we find that it was committed in the day time on the 11th of February 1850."

FIELD, J. As to the prisoner's motion to grant him a new trial, upon the exceptions taken to the juror after the verdict was rendered, I concur in opinion with the judge of the Circuit court.

629 *But I regard the indictment as fatally defective, in not stating that the offence was committed in the day time of some day. The law makes it felony to burn a dwelling house by night, punishable by death. This is one offence. The law also makes it felony punishable by confinement in the penitentiary to burn a dwelling house by day. These are not common law offences. They are statutory offences, separate and distinct, and having no connection with each other. They are not grades of the same offence—one a lower grade, and the other a higher grade, as would be in the case of homicide, which might be involuntary manslaughter, voluntary manslaughter, murder in the second or murder in the first degree. The doctrine of arson at common law seems to have been abolished by the new Criminal Code of 1847-8, and the burning of a dwelling house in the day is made felony, punishable by confinement in the penitentiary. The jury finds the prisoner guilty of arson in the day; and it is contended that this finding of the jury cures the supposed defect in the indictment. It is a rule well established in criminal pros-

ecutions, that the indictment must set forth all the material circumstances of the offence. Hence, in an indictment for burglary, it must be alleged that the fact was committed in the night time of some day. No indictment would be sustained which omitted this averment. It would be a defect that could not be cured by a verdict. Suppose that the law made it felony to burn a dwelling house in the day time only, and said nothing about the burning of a dwelling house at night. Everybody, I presume, will admit that in framing an indictment upon the statute, it would be necessary to aver that the offence was committed in the day time of some day, specified in the indictment. The word day in an indictment, means the whole 24 hours, of which for one half of the year there is more night than day. Hence the necessity

630 in an indictment for burglary, *to aver that the offence was committed in the night time of some certain day; and equally necessary is it to aver in an indictment for burning a dwelling house under our statute, that the fact was committed in the day time of some day. And why is it so? The reason is plain; because the time is a material circumstance of the offence. Now let us suppose that another law is passed, making it felony punishable with death to burn a dwelling house in the night, would time then become a less material circumstance than it was before the passage of the last law. I should presume not. If time is a material circumstance of the offence, it will be so in all cases, and the pleadings must be made to conform to it.

The verdict of the jury upon an indictment for felony should be certain, and should respond to the indictment. The prisoner was indicted for burning a dwelling house. The jury found him guilty of arson committed in the day time. Now what is arson? Arson is the burning of a dwelling house feloniously. The term dwelling house embraces the dwelling house proper, kitchen, meat house, dairy, offices, barn and stables, and all other out buildings within the curtilage of the dwelling house. The finding of the jury may be construed to apply to this offence, and may have been rendered upon proof of the prisoner's burning a barn, stable, or some other out building falling within the common law definition of arson; when no out house, is to be regarded as the dwelling house, unless it be under the same roof with the dwelling house proper.

Upon the whole, I am of opinion that the judgment should be arrested, and for that purpose would award the writ of error.

Judges Lomax and Leigh concurred in the opinion of Judge Thompson.

Writ of error denied.

631 *Commonwealth v. Christian.

June Term, 1850.

1. Presentments—Commencement of Prosecution—Statute of Limitations.*—A presentment for a mis-

*Indictments—Commencement of the Prosecution.—

The date of the finding of an indictment is the com-

demeanor is the commencement of the prosecution; and unless the prosecution is then barred by the statute of limitations, it will not be barred by the failure to file an information or indictment upon the presentment before the time of limitation runs out.

2. Same—Objections to—Case at Bar.—A presentment for a misdemeanor does not conclude "against the peace and dignity of the Commonwealth." On this presentment process issues and the defendant appears and pleads "not guilty;" and the cause is continued. At the next term he by leave of the Court withdraws his plea; and then moves to quash the presentment for the defect aforesaid; but the attorney for the Commonwealth suggesting that an information might be filed upon the presentment, the Court overrules the motion to quash, and on the motion of the attorney orders a rule upon the defendant to shew cause why an information should not be filed upon the presentment. Upon this rule the defendant appears and again moves to quash the presentment, on the ground: 1st. That it should have been quashed upon his former motion. 2d. Because the Court having overruled his motion to quash, the presentment was pending as a separate and distinct prosecution; and therefore leave should not be given to file the information. 3d. Because the attorney for the Commonwealth having originally elected to try the case on the presentment, by suing out process thereon to answer the presentment, was not entitled to the rule for the information. 4th. Because the supposed offence must have been committed more than a year before granting the rule to file the information, and so was barred by the statute of limitations. HELD:

1. Same—Case at Bar.—That under the facts and circumstances of the case, the act of limitations does not protect the defendant against further prosecution by information.

2. Same—Same.—That the motion of the defendant to quash the presentment should be overruled.

3. Same—Same.—That the judgment of the Court at the previous term overruling the defendant's motion to quash the presentment, furnished no good reason against giving leave to file the information.

4. Same—Same.—That the issuing process against the defendant to answer the presentment, furnishes no reason against granting leave to file the information.

632 *The defendant was presented on the 8th November 1848, in the Circuit court for the county of James City and the city of Williamsburg, for unlawfully assaulting and beating Samuel S. Griffin, on the 9th of September 1848, in the city of Williamsburg, within the jurisdiction of the Court. And it was thereupon ordered that the defendant should be summoned to appear on the first day of the next term, to

commencement of the prosecution, and the statute of limitations ceases to run from that date. State v. Beasley, 21 W. Va. 781, citing the principal case.

The principal case was also cited in Wilson v. Com., 87 Va. 95, 12 S. E. Rep. 108. See, further, monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

answer the presentment; and process was awarded accordingly. A summons accordingly issued upon this presentment, on the 30th March 1849, for the defendant to appear before the Court on the first day of the following May term to answer of and upon the said presentment. This summons being returned executed, the defendant appeared by attorney on the 5th of May 1849, and pleaded not guilty to the presentment; and issue was thereupon joined, and the case continued till the next term. At the next term, on the 8th of November 1849, on motion of the defendant leave was given him to withdraw his plea; and he thereupon withdrew the same, and moved to quash the presentment, on the ground that the same did not conclude against the peace and dignity of the Commonwealth. And the record states that the Court being of opinion that the defendant ought not to be put upon his trial on the said presentment, because the same did not conclude, "against the peace and dignity of the Commonwealth;" and the attorney for the Commonwealth suggesting that an information might be filed upon the presentment, and that leave would be asked for the necessary process for that purpose, the Court overruled the defendant's motion to quash; and on motion of the Commonwealth's attorney it was ordered that the defendant should be summoned to appear at the next term to shew cause, if any he could, why an information should not be filed against him upon the presentment. A summons was accordingly,

on the 1st April 1850, issued under
633 that *order, to appear at the following

May term, to shew cause why the information should not be filed. The defendant appeared at the May term 1850, in pursuance of the summons, and again moved the Court to quash the presentment; and shewed for cause: 1. Because at the preceding term the defendant had moved to quash the presentment because informal, defective and insufficient, which motion was overruled by the Court, notwithstanding the Court was of opinion that the presentment was informal, defective and insufficient; the Court being also of opinion that though informal, defective and insufficient, yet it ought not to be quashed, but should stand as the foundation of the rule against the defendant for an information to be filed. 2. Because the Court having overruled the defendant's motion at the last term to quash, the presentment was still pending as a separate and distinct prosecution; and that therefore, by reason of the pendency of that other prosecution for the same supposed offence, charged in the information, leave should not be given to file the information. But on this point the Circuit court was of opinion that the whole proceedings formed but one prosecution, and not separate and distinct prosecutions. 3. Because the Commonwealth's attorney having originally elected to try the case upon the presentment, by suing out process thereon to answer the presentment, was not entitled to the rule for the information. 4. Because the said

supposed offence in the information must have been committed more than a year before granting the rule to file the information—and so barred by the statute of limitations: referring to 1 Rev. Code, ch. 169, § 60.

The Circuit court thereupon adjourned to this Court the following questions:

1. What judgment ought the Court to have rendered at the November term 1849, on the defendant's motion to quash the presentment; and what judgment
634 *ought now to be rendered on the defendant's motion renewed to the same effect?

2. Was the judgment of the Court at November term 1849, overruling the defendant's motion to quash the presentment, any good and sufficient reason why the rule to file information should not have been granted; or does that judgment of the Court furnish any good reason now against giving leave to file the information?

3. Does the suing out of process on the presentment to answer the presentment, and the proceedings had on the presentment up to the granting of the rule on the 14th November 1849, furnish any cause or reason against the granting of the rule, or the filing the information?

4. Under the facts and circumstances disclosed by the record, does the act of limitations referred to and relied on by the defendant, protect him against further prosecution by information in the mode and manner proposed, for the said supposed offence in the information charged?

LEIGH, J., delivered the opinion of the Court.

The Court is of opinion and doth decide, first, that under the facts and circumstances disclosed by the record, the act of limitations referred to and relied on by the defendant does not protect him against further prosecution by information in the mode and manner proposed for the said supposed offence in the said information charged. Secondly, that the motion of the defendant to quash the presentment ought to be overruled. Thirdly, that the judgment of the Court at the previous term, overruling the defendant's motion to quash the presentment, does not furnish any good reason against giving leave to file the information against the defendant for the offence mentioned in the presentment. And,

fourthly, that the suing out process
635 on the *said presentment against the defendant to answer the presentment merely, and not to shew cause why an information thereon should not be filed, and the proceedings had on the said presentment up to the granting of the said rule, on the 14th day of November 1849, does not furnish any cause or reason against the granting of the said rule or filing of the said information. Which is ordered to be certified, &c.

After the Court had decided the case the defendant presented a petition for a rehearing.

The case was argued by R. T. Daniel and Bouldin, for the defendant, and the Attorney General, for the Commonwealth.

LOMAX, J. A presentment made in the ordinary way by a grand jury is regarded, in the practice at common law, as nothing more than instructions given by the grand jury to the proper officer of the Court for framing an indictment for an offence which they find to have been committed. 4 Bl. Comm. 301; 1 Chitt. Cr. L. 162. When the indictment has been prepared by him, it is submitted to them; and upon their finding it a true bill, the prosecution commences upon that indictment. The presentment merged in the indictment ceases and becomes extinct. If, however, the officer of the Court, who is the representative of the Crown, and whose concurrence and co-operation in the prosecution are always required, declines framing an indictment upon these instructions, the presentment ceases to exist for any purpose.

In the practice of Virginia the presentment has been allowed an efficacy, not known at common law in England. It has been allowed, for many purposes, to stand in the place of an indictment; or to stand as the foundation for further proceedings against the party presented. *In the revisal of 1748, p. 188, the Legislature recognized this practice of making the presentment stand in the place of an indictment, in regard to presentments for penalties not exceeding £ 5.; and directed that such presentment need not be drawn up in other form than as the same stands presented, and thereupon the Court shall order a summons forthwith to issue, to answer the presentment at the next Court. 1 Rev. Code, 614; 12 Hen. Stat. 344. Again in 1788, in the act establishing District courts, it was declared by the Legislature, that upon presentment made by the grand jury of an offence not capital, the Court shall order the clerk to issue a summons, or other proper process, against the person presented, to appear and answer the presentment at the next Court. 12 Hen. Stat. 758; 1 Rev. Code 612. So in the gaming act, 1 Rev. Code, ch. 147, § 21, which was passed in 1802.

The presentment, moreover, seems, in Virginia, from a very distant period, to have been made the foundation for a summons to shew cause why an information for the offence presented, should not be filed against the accused. No authority has been found in the English books that warrants such an use of the presentment. From what has before been stated as to the nature of a presentment in the English practice, no such use, it is supposed, could be made of it. Such a practice as an existing one in Virginia, seems to be clearly recognized in 1786, in the act directing the method of criminal proceedings against free persons, (12 Hen. Stat. 344; 1 Rev. Code, 614,) where, in regard to presentments for small penalties, it is directed that "no information shall thereupon be filed," but a

summons to answer the presentment. So in the 21st section of ch. 147, 1 Rev. Code, in gaming cases, the Legislature recognizes proceedings upon presentments by rule to shew cause why an information should not be filed. With these peculiarities as to the nature of presentments in 637 *the Virginia practice, established by judicial and legislative authority, Mr. Robinson has laid it down, that, generally speaking, when a presentment is made, the order of the Court is, that the party be summoned to appear at the next Court to shew cause why an information should not be filed against him. But in some cases, the proceedings are of a more summary character. 3 Rob. Pr. 108.

These purposes of presentments and these proceedings upon them in our practice were, doubtless, within the view of the revisors of our new Code, when that general provision was made that prosecutions for offences against the Commonwealth, unless otherwise provided, shall be by indictment, presentment or information. 1847-8, ch. 20, § 1. It seems clear that the presentment has in Virginia the character, in itself, of a criminal proceeding, until it is embodied and merged in an indictment for the same offence, or in an information filed upon it; and may stand in the place of an indictment, on which the prosecution for a misdemeanor may proceed, without indictment or information, as was decided in *Towles' Case*, 5 Leigh 743. Whether the process upon the presentment be a summons to answer or be a rule and summons to shew cause why an information should not be filed upon it, the presentment must be regarded as the primal accusation of the defendant, as the commencement and institution of the prosecution. The proceedings, by way of information, must equally rest upon it, as the proceedings in the other case; for the rule for the information has nothing else to rest upon but the presentment. Immediately upon the presentment, the prosecutor may take, by leave of the Court, the summons or *capias* to answer, or take the rule for a summons to shew cause, and although such proceedings, the summons, or the rule, should be delayed or neglected, the prosecution instituted

638 by the presentment is not *discontinued. For it is enacted that no discontinuance shall take place in any criminal prosecution, by reason of the failure of the Court to award process, or to enter a continuance on the record. Sess. Acts 1847-8, p. 147. If the presentment is not discontinued, but is still pending, notwithstanding such delay or neglect, from whatever cause it may have proceeded, why shall not the presentment, whenever proceedings are to be taken upon it, be regarded in the same plight as it stood in at the regular term at which the proceedings should have been taken? If the period of the act of limitations had become complete in the interval between making the presentment and the motion at a subsequent term for process to answer the presentment, would

the running of the act of limitations, in such case preclude, by its bar, the process that was moved for? Would it not be a sufficient answer to such a defence, that there was a prosecution commenced by the presentment, before there was any time that could raise the bar; that that prosecution had ever since the presentment made, been pending; and that therefore the limitation could have no application to the case? Regarding the rule for information as only a varied mode of proceeding upon the same presentment, why should not the same principles apply to exclude such bar? When the motion is made for the rule, it seems not at all more unreasonable to carry the time back to the date of the pending presentment, than it would be in case the motion were for a summons to answer the presentment; which in both cases is equally the institution of the prosecution.

If such would have been the case, had there been no process to answer the presentment, or other proceedings upon it intervening between the presentment and the subsequent term at which the motion might be made, the prosecutor should not be any more precluded in this case from having a summons to shew cause, by the proceedings *which did here intervene.

The presentment had sufficiently, though not technically, described the body of the offence—the “unlawfully assaulting and beating of Samuel Griffin on the 9th September 1848, in the city of Williamsburg, and within the jurisdiction of the Court.” No objection is seen in the completeness and sufficiency of this presentment, as a foundation for a rule for an information according to the Virginia practice, though it did omit the conclusion required by the constitution in indictments—“against the peace and dignity of the Commonwealth.” If for that or any other technical defect or informality in the presentment, regarding it as an indictment, the Commonwealth’s attorney should apprehend that the prosecution might not, perhaps, be sustainable, and the real justice of the case be sacrificed, why should he be precluded by the erroneous or doubtful step which he had at first elected to take, from resorting to another course of proceeding, which was originally open to him, whereby the real justice of the prosecution would be attainable? It is not shewn that the change of the mode of proceeding could cause any surprise, or any wrong to the defendant. Every matter of fair defence and exculpation, was still fully open to him under this new phase of the prosecution. Why should not the Court allow, for the purpose of attaining substantial justice, the correction of pending proceedings in this case, that is allowable in other cases? No reason, therefore, can be perceived, why the Commonwealth’s attorney, waiving the proceedings upon the summons to answer, should not be permitted to resort to the alternative which he might have originally elected, a summons upon the presentment to shew cause why an information should not be filed. Moreover, the defend-

ant, at his own instance, was indulged with leave to retract his plea, and the issue which was joined upon it. In doing so he derived the prosecutor of the benefits which might have resulted, in curing 640 *the defects and informalities of the presentment, by reason of that mode of defence, and the trial and verdict which might have been obtained. The defence, instead of being thus placed upon the merits, and upon the substantial justice of the case, attempts to place itself upon mere technical exceptions, and thereby to defeat justice. Why should not the prosecutor be allowed upon his part to vary his proceedings to meet this new exigency which the defendant has produced, by reason of an indulgence which he had asked for? After the defendant was allowed to retract his plea, the obvious justice of the case required that the prosecutor should be restored to the same situation, as if there had been no appearance and plea put in by the defendant. Nor is there any strict rule of practice which should be allowed to defeat that justice. If in motions for leave to file an information, there is any likelihood of injustice or even anything inequitable being inflicted upon the defendant, the Court, in the exercise of its discretion, will always refuse the leave. But none such appears in this case.

Chichester’s Case, 1 Va. Cas. 312, is essentially different from the present case. The prosecution was there instituted by indictment, and was proceeded upon in the only way marked out in cases of indictments. The prosecution rested upon the indictment alone; and if not sustainable upon the indictment, it could not be sustained at all; and the defendant when discharged from the indictment must, of course would, be discharged from the prosecution. The indictment was for its defectiveness quashed, and thereby that prosecution terminated. It is a well settled principle, that the Court will not in any case grant an information, where the prosecutor has already preferred an indictment, and the grand jury found a true bill, although it was quashed for insufficiency, (Anon. 8 Mod. 187.) Here the prosecution was by presentment, 641 which was not as was the *indictment, the act of the prosecutor, at least in part, but it was the act of the grand jury. The presentment had not been quashed. It was still a pending prosecution, from which the defendant never had been discharged.

As has before been stated, the Court regards the presentment, not the time of filing the information upon it, as the date of the prosecution; and looking to that date, there is no room for the application of the statute of limitations. Acts 1847–8, ch. 20, § 14. And that being inapplicable to the case, no other serious objection can be urged against the information.

The petition of the defendant for a reconsideration of the judgment heretofore entered in this case is overruled.

Petition for a rehearing rejected.

Hunter v. The Commonwealth.

June Term, 1850.

1. **Criminal Law—Confessions of Accomplice—Admissibility*—Case at Bar.**—Confessions or admissions of an accomplice in a felony, made after the commission and completion of the offence, are not competent evidence against a prisoner, even though a previous conspiracy and combination between the prisoner and the accomplice to commit the felony has been proved.

2. **Same—Burglary—What Constitutes—Case at Bar.**—The only covering to an opening for a window, is a cloth hung over two nails at the top, and loose at the bottom. **QUÆRE:** If the removing the cloth from one of the nails is a sufficient breaking to constitute burglary.

Frederick B. Hunter was indicted for burglary in the Circuit court of Lee county, jointly with Thomas Hardy. There was also a count in the indictment charging Hunter with counselling, hiring and procuring the *said Hardy to commit the offence. The indictment charged the offence to have been committed on the night of the 23d of October 1848, by breaking and entering the house of Nancy Rogers, and taking therefrom some 1400 dollars in money, besides other things. It seems that Hardy was first tried, and that he was convicted.

On the trial of the prisoner, the proofs were, that the entry into the house was effected through an opening intended for a window, but to which there was neither sash or shutter; and that the covering over this opening was an old cloak hung at the top on two nails, one on either side of the opening, and loose at the bottom. This cloak was removed from one of the nails, and the end of the cloak was drawn through the opening.

The robbery having been discovered in the morning, and tracks of men near the house, and then of horses a little farther off having been found, several persons tracked the horses for twenty-one miles, until they came nearly to the house of the prisoner in the State of Tennessee. Here they found a horse whose footprints corresponded with those of one of the horses they had been tracing, and which had obviously been rode during the night. Near to the prisoner's house too, Hardy was found and arrested. After the witnesses had detailed the facts as to the breaking, the pursuit to the prisoner's house, the arrest of Hardy, and the subsequent arrest of the prisoner, the attorney for the Commonwealth proposed to introduce the confessions of Hardy made after his arrest, and in the absence of the prisoner. To this evidence the counsel of the prisoner objected, on the ground that no conspiracy between Hardy and the prisoner to commit the offence charged had

been proved. The Court stated that it could not then determine from the evidence that had been heard, whether the foundation for introducing the confessions of Hardy was or was not, *then sufficiently laid, but that the evidence might be introduced; and when the examination of witnesses had progressed further, the Court would direct whether it should be excluded or not, if requested by the prisoner's counsel. The witnesses thereupon went on to detail the confessions of Hardy made after his arrest and in the absence of the prisoner. These confessions shewed that the prisoner was not present when the robbery and burglary was committed, but that he was then probably at his house in Tennessee. And they only went to sustain the count against him, for advising, hiring and procuring Hardy to commit the offence.

Although the Court had reserved the question as to the competency of the confessions of Hardy, yet the question was not decided during the progress of the trial, nor was he called on to do so by the prisoner's counsel; but as the jurors were about retiring to consider of their verdict, one of them enquired of the Court, whether they were to consider the statements of Hardy as evidence for their consideration or not. And then the Court replied, "that if the jury believed from the evidence they had heard, that there was a conspiracy proved to have existed between Hardy and the prisoner, to commit the offence charged against them in the indictment, then they were to consider all Hardy's statements as proper evidence before them, and entitled to as much weight as if they were the confessions, admissions, or statements of the prisoner himself. But if they did not believe such conspiracy to be proved, they were to reject the statements of Hardy as no evidence against the prisoner." To this proceeding and opinion of the Court the prisoner excepted.

The jury found the prisoner guilty, and fixed the term of his confinement in the penitentiary at five years; and the Court gave judgment accordingly, sentencing the prisoner to solitary confinement for one twelfth of his time. Whereupon he applied to this Court for a writ of error, which was awarded.

644 *Grattan, for the prisoner.

THOMPSON, J., delivered the opinion of the Court.

It is the unanimous opinion of the Court, that it was erroneous in the Court below to admit the confessions, admissions, or declarations of Hardy as evidence against the prisoner, even though a previous conspiracy and combination had been proved; because it appears from the bill of exceptions, that they were made after the arrest, and consequently after the commission and completion of the offence charged. 1 Greenleaf's Evi. 268-9; Roscoe's Crim. Evi. 38, 39. A majority of the Court deem it unnecessary,

***Criminal Law—Conspiracy—Evidence—Admissibility of Declarations of Co-conspirator.**—See, on this question citing the principal case, Jones v. Com., 31 Gratt. 850, and note; Oliver v. Com., 77 Va. 594. See note to principal case in 56 Am. Dec. 121.

and therefore decline to express any opinion upon the sufficiency of the evidence certified, to establish such a breaking as to constitute the crime burglary, or upon any of the other questions presented by the prisoner's petition and assignment of errors. The judgment must be reversed, the verdict set aside, and the cause remanded for a new trial, and the proper order for the removal of the prisoner, who is now confined in the penitentiary, to the county of Lee for trial.

FIELD, J. The prisoner was convicted of burglary in the Circuit court of Lee county, and sentenced to confinement in the penitentiary for five years, one twelfth part of which he was to be confined in a solitary cell thereof. Upon the trial, the confessions of Hardy, an accomplice in the perpetration of the crime, which were made after its commission, were given in evidence against the prisoner, which he objected to, and asked the Court to exclude. The Court declined deciding the question then, and postponed it until all the testimony should be heard. And after the testimony had been closed, the Court instructed the jury, "that if they believed from the evidence that the prisoner and Hardy were accomplices, (or had entered into a conspiracy *to commit the offence,) then they were to regard Hardy's confessions as good evidence against the prisoner, otherwise not." I do not remember the precise language of the instruction. The above is the substance of it. The jury rendered a verdict of guilty. The prisoner

moved for a new trial, which was overruled, and a bill of exceptions signed, which sets out the facts proved upon the trial. I am of opinion that the Court erred in not deciding the question as to the admissibility of the confessions of Hardy. This was a question of law which it was the province and duty of the Court to decide, and not refer it to a jury. These declarations were improperly received as evidence against the prisoner. The confessions or declarations of an accomplice or confidant made when they were in the act of committing an offence, or when in its way of commission, can be received as evidence against all parties to the conspiracy. But after the commission of the act is complete and over, declarations subsequently made by an accomplice are good evidence against him only, unless made in the presence of his partners in the crime. I am also of opinion, that the facts set forth in the bill of exceptions do not amount to burglary. (See Lawrence's Case, 19 Eng. C. L. R. 560.) For these three errors I think the judgment should be reversed, the verdict set aside, and a new trial awarded. Believing that the offence proved upon the trial does not amount to burglary, I deem it unnecessary to say anything about the non-residence of the prisoner, and his being absent from the State when the offence charged in the indictment was committed.

I will further remark, that so much of the sentence as requires confinement in a solitary cell of the penitentiary is irregular, the law upon this subject having been repealed.

DECEMBER TERM 1850.

JUDGES PRESENT.

Field,
Lomax,

Leigh,
Thompson.

Bell's Case.

December Term, 1850.

Statute—Discharge of Prisoner—"Two Terms"—Interpretation.*—A prisoner being sent on for further trial by an examining Court, which sat during the session of the Circuit court to which he is sent for further trial; that term of the Circuit court is not one of the two at which the statute directs that he shall be indicted, or that he shall be discharged from imprisonment.

This is an application to this Court for a writ of habeas corpus by Alonzo G. Bell. It appears that he was arrested in the county of Campbell in March 1850, on a charge for horse stealing. At the May term of the County court he was examined, and sent on for further trial before the Circuit court. It seems that the Circuit court was in the sixth day of its session when the prisoner was examined before the County court; and he was not indicted either at that term of the Circuit court or at the October term.

In November the prisoner applied to the Judge of the Circuit court for a writ of habeas corpus, and to be discharged from custody, on the ground that two terms had passed since the examining Court without his being indicted. The Judge refused to

***Statute—Discharge of Prisoner after Two Terms of Court—What Term Not Counted.**—In *Bell v. Com.*, 8 Gratt. 604, the court reconsidered the question as to whether the term of court during which a prisoner is sent on for trial is to be counted as one of the two at which, according to statute, he must be indicted; but the court came to the same conclusion as that above laid down.

The principal case and *Bell's Case*, 8 Gratt. 600, were cited with approval in *Glover v. Com.*, 86 Va. 287, 288, 10 S. E. Rep. 420; and *Kibler v. Com.*, 94 Va. 811, 26 S. E. Rep. 858, where similar questions were before the court. In the former of these cases, it was held that where the accused is sent on for indictment during a term of court, that term is not to be considered as one of the two terms at which he must be indicted under sec. 4001, Va. Code 1887. In the latter case, it was decided that the term at which a prisoner is indicted is not to be counted as one of the three terms at which, according to sec. 4047, Va. Code of 1887, he must be tried.

See the principal case also cited with approval by *CHRISTIAN, J.*, in *Sands v. Com.*, 20 Gratt. 818.

discharge him. And then the prisoner applied to this Court to be discharged out of custody on the same grounds.

647 *Irving and Johnson, for the prisoner.

LOMAX, J., delivered the opinion of the Court.

Upon the petition filed in this case the petitioner asks that this Court "will cause the petitioner to be discharged from further imprisonment," &c. The writ of habeas corpus is not applied for expressly by the petition, but is now applied for by motion, as the means of effecting the discharge which is asked for. The evidence offered to shew probable cause to believe that the petitioner "is detained without lawful authority" in custody, consists of a petition offered by him to a circuit Judge, with an affidavit dated 21st October 1850, endorsed on the petition, of the truth of the statements therein contained; and the proceedings of the examining Court of Campbell county on the 13th May 1850, deciding in that Court that the charge whereof the petitioner was accused, should be "further enquired into and the accused remanded back to jail to await a trial of the said charge before the Judge of the Circuit Superior court of law and chancery for the said county, at the present or next term thereof;" and a certificate of the clerk of the Circuit court of Campbell county, dated the 21st October 1850, that there had been no indictment filed in said Court against Alonzo G. Bell; and the denial of the writ of habeas corpus endorsed on the 1st November 1850 upon the petition, by the circuit Judge when he was applied to for the writ. This Court has not paused to consider whether the application now made is presented in the proper shape, or upon sufficient proofs of the matters alleged, to be entertained by the Court. Supposing the application in all respects to be regular, the Court has considered the question upon which the petitioner contends that he is entitled to be discharged from further imprisonment. He claims his discharge upon the ground, that on the 13th of May 648 1850 he was remanded back to *jail to await a trial before the Circuit Superior court, which Court was then in session; and that he was not then indicted at that term, nor at the term of that Court in Oc-

tober, (presuming that there was a Court held in October,) as the second term of the Court at which he was held to answer.

This Court is of opinion that in ascertaining what is the second term of the Court at which the prisoner is held to answer, the May term, which was (as it would seem) at the time the prisoner was remanded, in the sixth day of its session, ought not to be taken into the computation. Regularly in the course of criminal proceedings, the grand jury who are to indict, are summoned to attend on the first day of the Court, (Code of 1849, p. 766,) the venire facias for the jurors to try him are summoned to the first day of the Court. Before the term of the Court, the clerk is directed to make out a docket of "the pending causes, including the Commonwealth's cases;" and in order to put the Circuit court and the officers of the law in possession of the case, it is required when a person is remanded, that the clerk of the examining Court shall certify to the clerk of the Court where the accused is to be tried, copies of all recognizances taken by the examining Court, (for attendance of witnesses &c. at the trial,) and shall certify to the attorney prosecuting for the Commonwealth in the Court wherein the trial is to be, a copy of the order remanding the accused, and of the depositions taken on the examination, and of any warrant in the case which remains filed in the clerk's office. All these preparatory proceedings for trial, to make them consistent, must all be taken together, as having reference to the first day of the term; and would seem to shew that when the Legislature speaks of a term of the Court at which the prisoner is held to answer, it contemplates a term complete by commencing on the first day. The Legislature seems to be

649 *more explicit in the 36th section of chap. 208, where "the prisoner is directed to be forever discharged from prosecution for the offence, if there be three regular terms of such Court after his examination, without a trial," &c. Consistency requires an uniformity of interpre-

tation in both parts of the law, where the terms are spoken of, viz.: complete terms commencing on the regular days. Many mischiefs in the administration of criminal justice might arise, if the term of the Circuit court, though only an hour before its adjournment, or however engrossed with its business on hand, shall be counted for a term at which the prisoner is held to answer, because the accused has at that period of the term been remanded by the examining Court. It is very true that potentially the prisoner might be tried during the remaining term of the Circuit court, when he is remanded by the examining Court after the first day of the term. The Court may cause another grand jury to be empaneled, though the regular grand jury summoned to the first day may have been discharged; and it may award a venire facias for petit jurors; and it may cause the witnesses to be summoned; and the preparatory certificate of the clerk of the examining Court may be accepted as satisfactory, though brought in at a subsequent day of the term. It seems much better to take some fixed and uniform rule from the language and meaning of the statute, than a rule derived from what the Circuit court may be supposed, in a presumed state of its business, to have had the capacity to do.

In England "the term," according to the common law, is understood as the term of a day, and that day is the first day of the term, to which all the after proceedings have reference. This interpretation is there given in criminal as well as in civil proceedings. The same notion has been recognized in our own Courts, where the date of a judgment rendered during the
650 *term has always had reference to the first day of the term.

There is an obvious propriety in the present and the like cases, to regard the term at which the accused is held to answer, to be the term commencing on the first day of the Court; to be a complete term as well in its beginning as its ending.

Petition rejected.

JUNE TERM 1851.

JUDGES PRESENT.

<i>Field,</i>	<i>Leigh,</i>
<i>Lomax,</i>	<i>Thompson.</i>

Perkins v. The Commonwealth.

June Term, 1851.

[56 Am. Dec. 123.]

1. Criminal Law—Forgery—Indictment—Allegations.*—

An indictment for forgery charged the forgery of a negotiable note, and set it out *in hac verba*; without setting out the endorsements upon the back of it. On the trial when the note was offered in evidence, it was objected to on the ground of variance. **Held:** It was not necessary to set out in the indictment the endorsements upon the note, or any other matter written upon the same paper, constituting no part of the note itself; and not entering into the essential description of that instrument.

2. Negotiable Notes—Case at Bar.—The note said "I promised to pay," &c. It was still a negotiable note, though a bank might refuse to discount it because of its informality.

3. Criminal Proceedings—Instructions†—Case at Bar.—

After the case had been submitted to the jury and they had retired to consider of their verdict, they returned into Court and asked the Court to instruct them as to whether it was necessary that they should be satisfied that the prisoner did actually and personally forge the paper charged in the indictment, in order to his conviction. The Court instructed them that either the actual forgery by the prisoner, or his actual presence aiding and assisting with a felonious intent, when the forged instrument was made, constituted the offence of forgery. **Held:** The instruction being responsive to the enquiry propounded by the jury, even if it was an abstract proposition, yet as the jury asked an instruction on the point, and the instruction given, correctly stated the law, it is not cause for setting aside the verdict.

652 *In April 1851, Henry T. Perkins was indicted for forgery, in the Circuit court of law for the county of Henrico. The first count of the indictment set out

*Criminal Law—Forgery—Indictment—Allegations.—

On this question, see the principal case cited in *State v. Henderson*, 20 W. Va. 147, 1 S. E. Rep. 220. See also, monographic note on "Forgery and Counterfeiting" appended to *Coleman v. Com.*, 25 Gratt. 865; monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

†Criminal Proceedings—Instructions.—The principal case is cited in *Whitehurst v. Com.*, 79 Va. 560. See monographic note on "Instructions" appended to *Womack v. Circle*, 29 Gratt. 192.

the paper which was charged to have been forged, which was as follows:

"\$4000.

Seven Islands, Fluvanna County,
December 10th, 1850.

Sixty days after date, for value received, I promised to pay to the order of William T. Hillous, 4 thousand dollars, without offset, negotiable and payable at the Bank of Virginia, at Richmond.

John H. Cocke."

There were two other counts which charged the forgery of the note. But none of the counts set out or referred to the endorsements upon it.

On the trial, the prosecuting attorney offered in evidence a note conforming on its face to that set out in the indictment; but on the back of it was endorsed the names of W. Gault and William T. Hillous: And the prisoner, by his counsel, moved the Court to exclude the paper from going in evidence to the jury, upon the ground that no count in the indictment set forth the endorsements upon it; so that there was a variance between the allegations and the proofs. But the Court overruled the motion, and the prisoner excepted.

After all the evidence had been introduced and the testimony closed, and the jury had retired to consider of their verdict, they returned into Court and asked the Court to instruct them as to whether it was necessary that they should be satisfied that the prisoner did actually and personally forge the paper charged in the indictment, in order to his conviction. And the Court instructed the jury that if from the evidence they were satisfied that the prisoner

653 either actually and personally *made the forged instrument, or was actually present, aiding, abetting and assisting, with a felonious intent, when the forged writing was made, they must find him guilty, and to this opinion of the Court the prisoner again excepted.

The jury found the prisoner guilty, and fixed the term of his imprisonment in the penitentiary at two years. Thereupon he applied to the Court for a new trial, which was refused; and he again excepted. The facts proved on the trial were spread on the record, and they are as follows:

On the 13th December 1850, the prisoner brought to the Bank of Virginia the paper writing referred to in the first bill of ex-

ceptions, and demanded the money for it. He was very much intoxicated, but appeared to know what he was about; and certainly seemed anxious to get the money. He was told he could not get the money, and said he was very much surprised to hear it; that his uncle had told him he had nothing to do but to present the paper and get the money. He said he had a drove of hogs coming to town; and added that the note would be all right. The president and cashier of the bank then had him taken into custody.

It was further proved that there was such a man as William T. Hillous; that he had been in Richmond in the Bank of Virginia, within ten days before the trial of this cause; and was thought to be a man of extensive dealings as a hog drover.

It was further proved that the signature, John H. Cocke, was not written by that gentleman, nor by his authority; and that no part of the note was written by him. That his post office is Seven Islands, Fluvanna county; and that he does not know the prisoner; and had never seen him, to his knowledge, until the time of his trial.

654 *It was further proved that the note introduced in evidence is informal according to the rules of the bank; and even if genuine would not have been discounted. It was further proved that the endorsement of the name of W. Gault on the note is not genuine; and the Court certified that it seemed to the Court that the names of W. Gault and William T. Hillous, endorsed on the note, are in the same handwriting with the whole body of the note, including the signature John H. Cocke.

The Court gave judgment upon the verdict, and thereupon the prisoner applied to this Court for a writ of error.

R. R. Howison for the prisoner.

LOMAX, J., delivered the opinion of the Court.

The Court is of opinion that, as this prosecution was only for forging the writing which purported to be a negotiable note, there was no necessity that the indictment should set out the endorsements, or any other matter written upon the same paper, constituting no part of the note itself, and not entering into the essential description of that instrument. It is enough to set out in the indictment the note itself, without any other extrinsic marks or writings upon the same paper. *Commonwealth v. Ward*, 2 Mass. R. 397; *Simmons v. The State*, (Ohio) 7 Ham. R. pt. 1, 116. When the paper with these unessential marks and writings is offered in evidence, for the purpose of sustaining the prosecution for the forgery of the note, there will be no valid objection on the ground of variance between the proofs and the charges laid in the indictment. *Stark. Cr. Pl.* 113; *Rex v. Testick*, in note, 1 East's R. 180; *East's Cr. Law* 925; *Commonwealth v. Adams*, 7 Metc. R. 50; *Commonwealth v. Searle*, 2 Binn. R. 332; *Commonwealth v. Ross*, 2 Mass. R. 373.

655 *Nor is there any ground for the exception that the negotiable note, which is truly set out, contained the acknowledgment of the promise to pay in the past tense, instead of the usual promise in the present tense. Whether it was in the past or present tense, it was equally a negotiable promissory note. *Commonwealth v. Parmenter*, 5 Pick. R. 279. Nor would the paper lose the character of a negotiable promissory note, as charged in the indictment, because there should be any thing in the frame of the note which might, for want of some conformity to the practice of the bank, deter the bank from discounting the note. It was not less a negotiable promissory note though the bank might refuse to negotiate it.

Nor is there any ground for the exception, stated as the third, in the petition. The instruction given by the Court was a direct response to the enquiry, which was propounded by the jury, for settling their doubts, according to the views taken by them of the evidence in the case. The matters of law, stated by the Court in that instruction, were correctly stated. Even if it might seem to others than the jury to be an instruction upon what might be deemed abstract and foreign from the case, yet the verdict ought not to be set aside on that account; the judgment of the Court being right upon the question submitted to it by the jury.

Another exception stated in the petition to the proceedings of the Court below, is the refusal of the Court to award a new trial, it being alleged that the evidence in the record is insufficient to sustain the verdict. It is abundantly proved that the note was forged; and that the note so forged was in the possession of the accused; and that he was seeking to utter it, and to derive benefit from it. When the forgery was detected, he offered no explanation whatsoever in regard to the paper—how or when it came to his hands—nor of any of the circumstances connected with the paper,

656 or his *possession of it. He made no attempt to offer any such explanation. By whom the forgery of the paper was committed, whether by the accused or some other person, was a question of fact for the jury to decide upon, after weighing all the proofs and circumstances of the case. It was so held by Story, J., in *United States v. Britton*, 2 Mason's R. 464; and seems so to have been held in *Spencer's Case*, 2 Leigh 751.

The rule of evidence in such cases was laid down in the Supreme court of North Carolina, in the case of *The State v. Britt*, 3 Dev. R. 122; and in the case of *The State v. Morgan*, 2 Dev. & Batt. 348. Ruffin, C. J., in delivering the opinion of the Court in the latter of these cases, maintained that the accused being in possession of the forged order, drawn in his own favor, were facts constituting complete proof that, either by himself, or by false conspiracy with others, he forged or assented to the forgery of the instrument—that he either

did the act or caused it to be done, until he shewed the actual perpetrator, and that he himself was not privy. A distinction was taken between having such paper, as a forged order, in possession, and having a counterfeit bank note; an instrument current in its nature, and which might well come innocently to any one's hands. In the case of the forged order, he who holds it under such circumstances, it was said, should be taken to be the forger, unless he shews the contrary. And it was moreover said, in one of the cases cited, that with the exception of such papers as pass from hand to hand in the common transactions of life, the uttering of a forged paper, if unexplained, is in sound sense, evidence of the forgery of the paper by the utterer.

In the present case, it was proved that the endorsement of Gault, as well as the note itself, was forged. Although in the order of endorsements his name precedes the endorsement of the payee, he must be regarded as the pretended endorsee of 657 the payee; and the title *of the accused must be regarded as derived under this forged endorsement of Gault's name. This case does not require the Court to decide what is the degree of proof, or the character of the proof, as being presumptive or prima facie, which is furnished against the accused as the forger, by the mere circumstances that the instrument was forged and that he was endeavouring to utter or to use it for his own benefit. These circumstances it was the province of the jury to weigh, as important proofs against him; and to combine them in their consideration of the case, with the circumstance of the forged endorsement, and the total omission on his part, to offer any exculpatory explanation whatsoever. In combination with these or any other circumstances before the jury, the evidence tended with powerful effect to convict the accused, as charged in the indictment, with having forged the note. In the exercise of its appellate jurisdiction in a criminal prosecution, this Court cannot, without violating the authority of precedent decisions in such cases, interpose to disturb or set aside the verdict which has been rendered by the jury in this case. It cannot pronounce that the Court below erred in refusing to grant a new trial.

The writ of error applied for is refused.

658 *Livingston v. The Commonwealth.

June Term, 1851.

Cause Submitted to Jury—Admission of Evidence after—Discretion of Court.*—Although as a general rule

*Admitting Evidence after Argument—Discretion of Court.—See, on this subject, *foot-note* to McDowell v. Crawford, 11 Gratt. 377. The principal case is cited in the following: Taylor v. Com., 77 Va. 604; Schonberger v. Com., 86 Va. 492, 10 S. E. Rep. 718; Hunter v. Snyder, 11 W. Va. 218; Burns v. Morrison, 25 W. Va. 426, 15 S. E. Rep. 64; *foot-note* to Armstead v. Com., 7 Gratt. 509.

it is improper after a cause has been submitted to the jury, to introduce new testimony or examine new witnesses; yet for good cause it may be done. In such case the Court must exercise a sound discretion; and when the circumstances of the case make it necessary, either party should be permitted to introduce new testimony and new witnesses.

George Livingston was indicted in May 1851, in the Circuit court of Petersburg, for larceny in stealing three gold chains and a ring, of the goods of John B. Stevens and Thomas R. Hopkins, jewellers, in the city of Petersburg, trading under the firm of Stevens & Hopkins.

After the evidence had been introduced, the counsel for the prisoner in his argument before the jury, insisted that the gold chains and the ring charged in the indictment to be the property of John B. Stevens and Thomas R. Hopkins, jewellers, in the city of Petersburg, trading under the firm and style of Stevens & Hopkins, had not been proved to be the property of said Stevens & Hopkins, as laid in the indictment. And the attorney for the Commonwealth in his reply to that part of the argument, contended that it had been so proved. The jury retired, and not being able to agree in their verdict, were adjourned over to the next day; and upon being brought into Court the next morning, the counsel for the prisoner moved the Court to instruct the jury, "that if they believe from the evidence that the Commonwealth has failed to prove the existence of the copartnership of Stevens & Hopkins, and that the property was in them as partners as alleged in the indictment, then they must acquit the prisoner, the burden of proof being on the Commonwealth to shew these facts." Whereupon the attorney

for the Commonwealth proposed 659 *to call upon John B. Stevens, one of the witnesses examined on the day before, to prove more explicitly the ownership of the property as laid in the indictment. To the introduction of this proof or any other at this stage of the trial, the prisoner objected; but the Court overruled the objection, and permitted the said Stevens to be again examined: And he proved that the gold chains and the ring were the property of Stevens & Hopkins as laid in the indictment. The Court thereupon refused to give the instructions asked for by the prisoner in the form in which they were propounded, but instructed the jury "that if they should believe from the whole evidence in the cause, as well that given in on yesterday as that given in to-day by the said Stevens, that the Commonwealth had failed to prove that the gold chains and ring or any part of them, were the property of John B. Stevens and Thomas R. Hopkins, jewellers, in the city of Petersburg, trading under the firm of Stevens & Hopkins, as laid in the indictment, then they ought to find the prisoner not guilty; it being incumbent on the Commonwealth to prove the ownership as laid in the indictment." And

the Court certified the evidence given in on the day before, from which it was obvious, that if the joint ownership of the property and the partnership of Stevens & Hopkins were not proved by the witnesses, it was only because the fact was not made a question. The witnesses were Stevens and two of the clerks in the shop. The clerks proved a taking from the shop; they proved that not knowing the price of a chain which the prisoner was proposing to buy, one of them was sent by the other to ask Mr. Hopkins the price, he being in another room. And when Mr. Stevens came into the shop, he was immediately informed that the prisoner had taken a gold chain, and he, and the witness by his directions, went in pursuit of him.

660 *The prisoner excepted to the opinions of the Court admitting the evidence and refusing the instruction as asked. And the jury having found him guilty, and fixed the term of his imprisonment in the penitentiary at eighteen months, and the Court having given judgment against him accordingly, he applied to this Court for a writ of error.

FIELD, J., delivered the opinion of the Court.

The prisoner was indicted in the Circuit court of Petersburg for larceny. He was convicted and sentenced to be confined in the penitentiary for eighteen months. The larceny consisted in stealing certain jewelry from John B. Stevens and Thomas R. Hopkins, jewellers, in the city of Petersburg, trading under the firm of Stevens & Hopkins. After the testimony had been given in upon the trial, and the arguments of counsel heard, the jury retired to consider of their verdict, and not being able to agree upon a verdict on the first day, they were brought into Court and adjourned over in the usual way, until the next day. On the next day they appeared in Court pursuant to their adjournment, and the counsel for the prisoner asked the Court to instruct the jury, "that if they believed from the evidence, that the Commonwealth has failed to prove the existence of the copartnership of Stevens & Hopkins, and that the property was in them as partners, as alleged in the indictment, then they must acquit the prisoner, the burthen of proof being on the Commonwealth to shew these facts." The Attorney for the Commonwealth then proposed to recall John B. Stevens, one of the partners, who had been examined the day before, to be examined more fully upon these points. The Court permitted him to be recalled. He was re-examined and proved that the stolen articles belonged to Stevens & Hopkins. The prisoner

661 complains *of this, and assigns it as one of the grounds for reversing the judgment. Whilst we have no hesitation in saying that, as a general rule, after a cause has been submitted to a jury, it is improper to introduce new testimony or examine new witnesses, there can be no doubt of the propriety for good cause shewn of

admitting new testimony, or the examination of new witnesses. But in allowing this to be done, the Court must exercise a sound discretion. When the circumstances of the case make it necessary and proper to do so, the Court ought to permit either party to introduce new witnesses and new testimony. But the case before the Court is not altogether a case of that sort; after the cause had been committed to the jury, it was the prisoner who called upon the Court to give an instruction, based no doubt upon a failure through inadvertence on the part of the prosecuting attorney, to examine the witness upon the right of property. The existence of the partnership was no doubt a matter of general notoriety throughout the city of Petersburg; so notorious as to cause it to be taken for granted as a fact already proved in the cause, and hence the tendency of the instruction was to get an unfair advantage of the Commonwealth, and defeat the claims of justice. The court to prevent this, allowed one of the partners who had been examined the day before, to be recalled and examined. In doing this, the Circuit court under the circumstances of the case, exercised its discretion properly. Having heard the witness, the Court then refused to give the instruction asked for by the prisoner, but instructed the jury "that if they should believe from the evidence in the cause, as well that given in on yesterday, as to-day by the said Stevens, that the Commonwealth had failed to prove that the gold chains and ring, or any part of them, were the property of John B. Stevens and Thomas R. Hopkins, jewellers, in this city, trading under the firm and style of Stevens & Hopkins, as laid in the indictment, they ought to find the prisoner not guilty; it being incumbent on the Commonwealth to prove the ownership, as laid in the indictment." This instruction was more favourable to the prisoner than the one he had asked for. For according to this instruction, although the jury might believe from the evidence that a part of the stolen goods were proved to be the property of Stevens & Hopkins; yet, if there was a failure in proof of their title to any part of them, the jury was bound to find the prisoner not guilty. We can perceive, therefore, no error in this record, of which the prisoner has any right to complain.

Writ of error refused.

Dye v. The Commonwealth.

June Term, 1861.

1. Malicious Trespass—Indictment—Omission of "But Not Feloniously."*—In an indictment for a malicious trespass, it is not error to omit the words "but not feloniously," these words not constituting any part of the description or definition of the offence.

*Malicious Trespass—Indictment.—See monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

2. **Discharge of Jury—Failure of Record to Show Objection—Presumption in Appellate Court.***—If it does not appear on the record that the defendant objected, it will be presumed in the appellate Court, that the Court below discharged the jury empaneled and sworn in the case for sufficient cause, and with the consent or acquiescence of the defendant.

3. **Misdemeanors—Discharge of Jury against Consent of Defendant.**†—In cases of misdemeanor the Court has authority to discharge the jury without or against the consent of the defendant.

4. **Malicious Trespass—Statute—Application.**—The act of February 14th, 1823, Supp. Rev. Code., ch. 226, § 1, p. 280, to punish malicious trespasses, was intended to apply to acts of trespass upon the property of another, without colour of title, or claim of right *bona Ade*, and not feigned for the occasion; and not to cases where there is a *bona Ade* claim of right to the property.

663 *John F. Dye was indicted in the Circuit court of Harrison county, at its June term for 1847, for that he "did then and there knowingly and wilfully without lawful authority, take and carry away two hogs of the value of five dollars, then and there belonging to Benjamin Stout," &c.

The defendant appeared and moved the Court to quash the indictment, for errors apparent on its face; the error being the omission of the words "but not feloniously; but the Court overruled the motion. The defendant thereupon pleaded not guilty.

The case came on for trial in October 1848, when the jury declaring they could not agree, they were discharged by the Court.

The cause came on again to be tried in November 1849, when the jury found the defendant guilty, and assessed his amercement to one cent; whereupon he applied to the Court for a new trial, which was refused, and there was judgment according to the verdict. And the defendant excepted and spread the facts on the record as follows:

Some time in September 1846, one Hardesty purchased up a small lot of hogs in the county of Harrison, and had them driven to the county of Marion. In driving them, two of the hogs strayed from the drove and found their way to the house of Stout, in the county of Harrison, and ran at large with his hogs. The defendant and one Piles were employed as hands to aid in driving the lot of hogs from Harrison to Marion. The defendant left Marion for his house a few days before Piles left; and when he was about to return home he had a conversation with Hardesty, in the presence of Piles, about the stray hogs, in

which Hardesty gave the defendant the right either to take the hogs if they could be found, and account to Hardesty for the original cost; or to take and sell them for

Hardesty, and after paying himself 664 for his trouble, to *account to Hardesty for the balance. But at that time the defendant did not make his election as to which he would do. Soon after his return home the defendant saw the prosecutor Stout, and enquired of him if two of Hardesty's hogs, which had strayed from the drove, were not at his place; and Stout informed him there were two of them running with his hogs. The defendant then told him that Hardesty wished the defendant to take care of the hogs. On the same evening Piles, in returning home from Marion county, called at the house of Stout, and enquired about the hogs, and informed Stout of what had taken place between the defendant and Hardesty about the hogs; and requested Stout to take care of the hogs for Hardesty if Dye had not taken them, and told him that Hardesty would pay him for keeping them.

It was proved that Hardesty requested Piles to have the hogs taken care of and provided for, if Dye had not done it. Prior to the request to Stout by Piles, the hogs had been running at large with Stout's hogs, but upon the same evening that the request was made they were put up in a pen by Stout and fed. On the next morning the defendant went to Stout's house where the hogs were, and told him that they were the defendant's under an arrangement with Hardesty, and demanded them; but Stout refused to let him have them without a written order from Hardesty; but set up no claim then for the keeping of the hogs. The defendant then told him that if he kept the hogs it would be at his own expense.

It was also proved that on the same evening that Piles had the conversation with Stout as aforesaid, he met with the defendant some two or three miles from Stout's house, and told him that the hogs were at Stout's, and of Hardesty's request; and the defendant swore that he would have the hogs if he had to go to Marion and buy them of Hardesty. Some weeks after

665 *the hogs were put in the pen by Stout, and before they were taken away by the defendant, Hardesty sent word to Stout by one Woodfield to take care of the hogs, and he would pay him for so doing, and not to give them up to the defendant.

About four weeks after the hogs were put in the pen, the defendant went to Marion county and paid Hardesty 4 dollars 50 cents for the two hogs; and obtained from him a written order upon Stout directing him to let the defendant have the hogs; and saying he let the defendant have them at the time he lost them.

Stout kept the hogs in the pen nine weeks, and fed them during that time sixteen bushels of corn; which was worth in the neighbourhood from twenty-five to thirty-seven and a half cents a bushel. At

*Discharge of Jury—Failure of Record to Show Objection—Presumption in Appellate Court.—For the proposition set forth in the second headnote, the principal case was cited in *Dove v. Com.*, 82 Va. 306. See monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 738.

†Same—Power of Court.—See principal case cited in *Wright v. Com.*, 75 Va. 916; *Jones v. Com.*, 86 Va. 742, 10 S. E. Rep. 1004. For further information on this subject, see monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 738.

the end of the nine weeks the defendant, with another person, went after them, and presented to Stout the paper executed by Hardesty, and demanded the hogs as his own. Stout said that neither Hardesty or the defendant had proved the hogs. That he would give the defendant in money what he had given Hardesty for them, or weigh him pork in the gross to the amount called for in the paper, (which was 260 lbs.,) or he would give them up on being paid for the keeping of them; but he did not then state his charge for keeping. Upon the refusal of Stout to give up the hogs, the defendant told him he would pay nothing for the keeping; and in the presence of Stout pulled down the fence, and turned the hogs out; and then put up the fence again, and drove the hogs away, without paying or offering to pay Stout anything for keeping the hogs; the prosecutor telling him that if he took them away without paying for keeping them, he would indict him. The hogs were thus driven away in the county of Harrison, about five months before the finding the indictment against the defendant. And it was proved that Hardesty and the defendant were each responsible; and *able to pay any charge that Stout was entitled to for keeping the hogs.

Upon the application of the defendant this Court awarded a writ of error to the judgment.

Cabell, for the defendant.

THOMPSON, J., delivered the opinion of the Court.

The motion to quash the indictment because of the omission of the words of the statute "but not feloniously" was properly overruled. They form no element or ingredient of, and constitute no part of the description or definition of the offence. Nor are they to be likened to the exceptions and provisos sometimes found in the body of a statute, which, according to the precedents, must be inserted in, or negatived by, the indictment. Whether inserted or omitted, the offence charged and the evidence to support it are the same, to wit, a trespass amounting to a misdemeanor, and not a felony. It is the opinion of the Court that the words were not employed by the statute as descriptive of the offence, but inserted out of abundant caution to exclude the possible conclusion or inference that the Legislature intended thereby to confound malicious trespasses with felonies; or to make them concurrent prosecutions of kindred offences, whereby a conviction of the trespass or lesser offence would be pleadable in bar of the felony, or higher offence. Judge Field concurs with us upon this point; he thinks the Court in Howard's Case, 11 Leigh 632, has so decided the question.

Upon the 2d error assigned, the Court is of opinion that it must be presumed from what appears on the record that the Court below discharged the first jury that was

empaneled and sworn for sufficient cause, to wit, inability to agree in a verdict; and in the absence of any bill of exceptions or objection entered on the record, if not with the express consent, with the acquiescence *of the defendant. But had the defendant objected, there would have been no error, not only because the power of the Court to discharge the jury in a case of misdemeanor, without and against the consent of the defendant, has been too long and too well settled in Virginia, in England, and some, if not all, the States of the Union, to be now questioned; but because the act of 14th March 1848, Sess. Acts 1847-8, pa. 150, which was in force and applicable quoad hoc, when the first trial occurred, expressly gives the power to the Court in all criminal cases.

Upon the 3d and last error assigned we are of opinion that the Circuit court erred in overruling the motion for a new trial, because it appears to us that the verdict was against the law and the evidence. Of the property, which is the subject of the alleged trespass, the defendant was the general fee simple owner, by purchase from Hardesty, the former owner. The prosecutor was at most a bailee, having a special or qualified property. A controversy arose between them as to the right of the prosecutor to retain the property until paid the expenses of keeping, and as to the quantum or proper charge for these expenses. The defendant, the owner, without a breach of the peace, took possession of his property; leaving the prosecutor to his legal remedy against himself or Hardesty, which ever was liable for his demand. It certainly was not the purpose of the act of February 1823, upon which this prosecution is founded, to convert every civil injury, by trespass to real or personal property, into an indictable misdemeanor; but it was intended to apply to acts of trespass upon the property of another, committed knowingly and wilfully, but not feloniously; which the Court interprets to mean, without colour of title or claim of right, bona fide, and not feigned or pretended for the occasion. If the defendant did not commit the alleged trespass knowingly and wilfully upon the property of the prosecutor, *but on the contrary, believed it to be his own, and that he had a bona fide right to it, he was not amenable to prosecution for a misdemeanor, under the act of February 1823; though he may have been guilty of a civil trespass. A majority of the Court is of opinion that the facts certified in this case did not warrant the jury in finding a verdict of guilty, because these facts certainly do not establish that the defendant took possession of and carried away property of the prosecutor wilfully, without bona fide colour of title or claim of right, and knowing or believing it was not his own. Therefore the judgment is to be reversed, the verdict set aside, and the cause remanded, for a new trial to be had therein, in conformity with the foregoing opinion of the Court.

LOMAX, J. I concur with the other members of the Court in their judgment upon the sufficiency of the indictment, and that there was no error in discharging the jury at the first trial of the case. But I do not concur with them in setting aside the verdict, which, upon a subsequent trial, was rendered by the jury.

It being the province of the jury to decide upon the evidence, and to draw such inferences from the proofs and circumstances as were reasonable, I think the conviction should not be disturbed, unless it be seen that it was contrary to law, and clearly unsustained by any proofs presented to the jury. I am of opinion that the jury were well warranted, upon the proofs exhibited in the record, to find the defendant guilty of "knowingly and wilfully, without lawful authority, but not feloniously, taking and carrying away personal property belonging to another." Indeed, that the jury could not well have found otherwise. The evidence shewed that Piles, returning home from Marion, requested Stout, the prosecutor, as by authority from Hardesty, the proprietor of the hogs, that he "should

669 take care of the hogs *for the said Hardesty, if the defendant had not

taken them; and that he, the said Hardesty, would pay him for the keeping of the said hogs." Immediately after the request so communicated, Stout penned the hogs, and kept and provided for them. Some weeks after the hogs were put into the pen, as aforesaid, by the prosecutor as aforesaid, and before they were taken away by the defendant, the said Hardesty sent word to the prosecutor, (Stout,) by one Woodfield, to take care of the hogs, and he would pay him for so doing; and not to give them to Dye (the defendant). What was meant by taking care of drove hogs, intended for the market as pork, the jury could have no difficulty in inferring: they were to be taken care of and provided for as pork. This message by Woodfield, confirmatory of the message communicated by Piles, it would seem from the proofs, must have been delivered to Stout within the first four weeks after the hogs were penned. It may have been delivered within a much less period. These proofs went strongly to establish a vested property in Stout as the bailee of Hardesty; with a right in the former to demand compensation for the keep of the hogs; and a possession and a lien upon the hogs, until that compensation was satisfied. For whilst he was taking care of the hogs, as requested by Hardesty, he was conferring an additional value upon them by the attention he was bestowing, and the food he was providing for them: without which he could not, as requested, have taken care of them in the mode which the jury might well have found was intended by Hardesty, and understood by Stout. Jackson v. Cummings, 5 Mees. & Welsb. 342; Scarfe v. Morgan, 4 Mees. & Welsb. 270. There is nothing in the proofs which bound the jury to consider that the defendant had acquired any interest in the

hogs, until he obtained from Hardesty the written evidence of his purchase, which, as it would seem, must have been

670 some four weeks *after the hogs were penned; and after the relation of bailor and bailee for compensation, had commenced between Hardesty and Stout. The jury were warranted by the proofs in finding that the defendant had knowledge of that relation almost simultaneously with its commencement, and that he ought to have known it from the mere circumstance of Stout's possession, which should have put him upon enquiry by what right that possession was held. When the defendant became the purchaser of the property, he did not, by his purchase, supersede or extinguish the rights and obligations which had been continuing for four weeks, in the relation of bailor and bailee between Hardesty and Stout. In regard to that, he substituted himself, at least as to the lien, in the place of Hardesty. His purchase gave him the power at once to terminate that relation, or to continue the same relation as between himself and Stout. It was not until the expiration of nine weeks after the hogs were penned, and five weeks after Dye had purchased them, that he made any demand upon Stout for the hogs; or, so far as is proved, ever made known to Stout that he had become the purchaser. Were the jury unwarranted to infer from such circumstances, that the relation of bailor and bailee, with all the rights and obligations incident to it, were renewed as between the defendant and the prosecutor, in full force, as they had before existed between the prosecutor and Hardesty. During the period of the nine weeks the hogs had consumed 16 bushels of corn that the prosecutor had provided them, worth from 25 to 37½ cents per bushel. When the demand was made by the defendant for the hogs, the prosecutor, after making some overtures for the purchase of them, refused to give them up to the defendant, unless he was paid for the keeping them: the amount of which, however, was omitted to be stated by Stout. The defendant there-

671 upon declaring that he would pay nothing for the keeping, in the *presence of the prosecutor, pulled down the pen, and drove the hogs away. In the proof of these circumstances, I do not think the jury erred in regarding the hogs as belonging to the prosecutor, at least by special property; which the law will protect, even as against the owner of the general property himself, as effectually as if that special property had been absolute. The penalties of the statute are designed to protect against trespasses, all property belonging to another, whether holding for the time being, a limited or an absolute interest in the same. The lien, as against the general proprietor, was not in any manner waived by the prosecutor. It may indeed have been incumbent upon Stout to have stated the amount of his charge for keeping; but he may have been deterred from doing so, nor was it at all necessary

that he should have done so, after the defendant's declaration, that he would pay nothing whatsoever for the keeping. There is nothing in the record to shew satisfactorily, if at all, that Dye put his claim to the possession of the hogs, which he forcibly took, upon any such ground as a bona fide controversy as to the right of property in himself, or the want of right in the prosecutor. His deportment, in taking possession, manifests only his refusal to pay anything for the keep, and a taking and carrying away per fas aut nefas. The record shews no ground for supplying, by any legal intendment, the defendant with the exculpation arising out of a controversy bona fide, in regard to the title in the property, when he himself pretended no such ground of justification or excuse at the time the trespass was committed. Nor did he, upon that occasion, claim any exculpation by reason of any complaint as to the measure of Stout's compensation, claimed for keeping, but utterly refused to pay anything whatever on that account. Even in the case of felonies, the law protects the special property of the bailee against the *larceny of the bailor or general proprietor; much more readily ought the law in this case, to be applied to vindicate the former against the trespasses of the latter. It was, as matters of fact, for the jury to decide upon the evidence and the circumstances of the case, whether there was any such exculpatory matter in the case as a bona fide controversy between the defendant and the prosecutor as to rights of property. Their verdict gives the negative to any such ground of exculpation. It was in like manner for them to decide whether the circumstances shewed a special property in the prosecutor, which he was justified in retaining, and to decide whether the taking and carrying away that property out of his possession was knowingly, wilfully, without lawful authority, but not feloniously: and all these matters have been affirmatively found by their verdict. The proofs justified, in my opinion, the verdict so found by them; and this Court, therefore, ought not to set it aside. I am for affirming the judgment of the Court below in all things.

673 *Souther v. The Commonwealth.*

June Term, 1851.

1. **Killing of Slave by Owner—Murder.**—The killing of a slave by his master and owner, by wilful and excessive whipping, is murder in the first degree; though it may not have been the purpose and intention of the master and owner to kill the slave.
2. **Examining Court—Signing Bill of Exceptions—Record.**—An examining Court has no right to sign a bill of exceptions to any opinion or act of the Court; and if they do, it is no part of the record of the trial.
3. **Criminal Procedure—Case at Bar.**—A prisoner when arraigned pleads in abatement that he has not been tried by an examining Court for the offence

*For monographic note on Homicide, see end of case.

for which he has been indicted. The attorney for the Commonwealth files a defective replication, to which the prisoner demurs; and the Court sustains the demurrer and quashes the indictment. The prisoner is then again indicted without any other trial before an examining Court; and he pleads in abatement again the want of a trial for the offence before the examining Court. To this plea the attorney for the Commonwealth replies that he has been tried by the examining Court, and vouches the record; and then the prisoner rejoins setting up the quashing of the former indictment as a bar to any other and subsequent indictment against the prisoner for the same offence, based upon the trial by the examining Court which had been had before the first indictment. **Held:** That the matters set up in the rejoinder constitute no bar to the prosecution.

4. **Criminal Cases—Jurors—Compensation—Statute.**†—The Code of 1849, ch. 208, § 10, p. 774, gives to all jurors sitting in criminal cases compensation at one dollar for each day he attends on such jury.

Simeon Souther was indicted at the October term for 1850, of the Circuit court for the county of Hanover, for the murder of his own slave. The indictment contained fifteen counts, in which the various modes of punishment and torture by which the homicide was charged to have been committed, were stated singly and in various combinations. The fifteenth count unites them all; and as the Court certifies that the indictment was sustained by the evidence, the giving the facts stated in that count will shew what was *the charge against the prisoner, and what was the proof to sustain it.

The count charged that on the first day of September 1849, the prisoner tied his negro slave Sam, with ropes about his wrists, neck, body, legs, and ankles, to a tree. That whilst so tied, the prisoner first whipped the slave with switches. That he next beat and clobbered the slave with a shingle, and compelled two of his slaves, a man and a woman, also to cob the deceased with the shingle. That whilst the deceased was so tied to the tree, the prisoner did strike, knock, kick, stamp, and beat him, upon various parts of his head, face and body; that he applied fire to his body, back, sides, belly, groins, and privy parts; that he then washed his body, &c., with warm water, in which pods of red pepper had been put and steeped, and he compelled his two slaves aforesaid, also to wash him with this same preparation of warm water and red pepper. That after the tying, whipping, clobbering, striking, beating, knocking, kicking, stamping, wounding, bruising, lacerating, burning, washing, and torturing, as aforesaid, the prisoner untied the deceased from the tree, in such way as to throw him with violence to the ground, and he then and there did knock, kick, stamp, and beat the deceased upon his head, temples, and various parts of his body. That the prisoner then had the deceased carried into a shed room of

†See monographic note on "Juries" appended to Chahoon v. Com., 20 Gratt. 778.

his house, and there he compelled one of his slaves in his presence, to confine the deceased's feet in stocks, by making his legs fast to a piece of timber, and to tie a rope about the neck of the deceased, and fasten it to a bed post in the room, thereby strangling, choking and suffocating the deceased. And that whilst the deceased was thus made fast in stocks as aforesaid, the prisoner did kick, knock, stamp, and beat him, upon his head, face, breast, belly, sides, back, and body. And he again compelled his two slaves to apply fire to

the body of the deceased whilst he
675 *was so made fast as aforesaid. And

the count charged that from these various modes of punishment and torture, the slave Sam then and there died. It appeared that the prisoner commenced the punishment of the deceased in the morning, and that it was continued throughout the day; and that the deceased died in the presence of the prisoner and one of his slaves and one of the witnesses, whilst the punishment was still progressing.

Upon the arraignment of the prisoner he demurred generally to the whole indictment, and to each count thereof; and the attorney for the Commonwealth joined in the demurrer, and it was overruled by the Court. The prisoner then filed a plea in abatement, that he had not been examined according to law for the offences alleged in the indictment, by a Court of examination constituted according to the act of Assembly. And he prayed judgment that the indictment be quashed. To this plea the attorney for the Commonwealth replied, alleging that the prisoner had been examined for the offences charged in the indictment by a court duly and legally constituted, as appeared by the record. And the record of the examining Court was filed with the replication. The record shews that two bills of exception were taken to opinions of the Court in the progress of the trial in the examining Court; but it is unnecessary to notice them further. The facts proved on that examination were obviously the same on which the charge in the indictment was based.

To this replication the prisoner tendered a rejoinder, that after the examination set out in the record filed with the replication, he had been regularly indicted, and had pleaded in abatement that he had not been duly and legally tried by an examining Court, for the offences charged in the indictment; and that after replication to that plea by the Commonwealth, the Court held that

he had not been duly and legally
676 tried, and that he *should not be held to answer the indictment, and that the same should be quashed and he discharged therefrom. And he insisted that the Commonwealth was estopped and concluded from relying upon the examination mentioned in that record as a proper and legal examination of the defendant for the offences charged in the indictment, as appeared by the record.

The record filed with the rejoinder set out an indictment containing fourteen

counts, the first thirteen of which were the same as the first thirteen in the present indictment. To this indictment the prisoner had pleaded that he had not been duly examined by an examining Court; and the attorney for the Commonwealth replied that the prisoner had been duly and legally examined for the said offences in the said indictment alleged against him, by an examining Court duly and legally constituted according to the laws of Virginia, and this he prayed might be enquired of by the country. To this replication the prisoner demurred; and the attorney for the Commonwealth joined in the demurrer. Whereupon the Court sustained the demurrer; and adjudged that the indictment be abated and quashed, and that the prisoner be discharged therefrom.

The attorney for the Commonwealth objected to the reception and filing of the rejoinder of the prisoner to the Commonwealth's replication; and the Court sustained the objection, and rejected the rejoinder. Whereupon the prisoner excepted.

The prisoner filed three other pleas in abatement varying in form, but all relying upon the fact that he had not been duly and legally tried before an examining Court. To one of these pleas there was a demurrer which was sustained; the others were objected to by the attorney for the Commonwealth and rejected. He then demurred to the replication of the Commonwealth to his plea; and his demurrer was overruled, to all which he excepted. And he then pleaded
"not guilty."

677 *The prisoner's trial came on at the April term 1851, when the jury found him guilty, and fixed the term of his imprisonment in the penitentiary at five years. Whereupon the prisoner moved the Court to set aside the verdict, and grant him a new trial; but the Court overruled the motion, and entered a judgment according to the verdict. The prisoner again excepted, and on his motion, the Court certified that the following facts appeared in evidence upon the trial, to wit: The slave Sam, in the indictment mentioned, was the slave and property of the prisoner. For the purpose of chastising the said slave for the offence of getting drunk, and dealing as the slave confessed and alleged, with Henry and Stone, two of the witnesses for the Commonwealth, he caused him to be tied and punished in the presence of the said witnesses, who were present at the request of the prisoner, (with the exception of slight whipping with peach or apple tree switches before the said witnesses arrived at the scene,) and of several slaves of the prisoner in the manner and by the means charged in the indictment, and the said slave died under and from the infliction of the said punishment, in the presence of the prisoner, and one of his slaves, and one of the witnesses for the Commonwealth. But it did not appear that it was the design of the prisoner to kill the said slave, unless such design be properly inferrible

from the manner, means and duration of the punishment; and on the contrary it did appear that the prisoner frequently declared, whilst the said slave was undergoing the punishment, that he believed the slave was feigning, and pretending to be suffering and injured when he was not.

After the judgment, the prisoner moved the Court to direct the clerk, in taxing the costs in this prosecution, that he should not tax as a part of the costs thereof against the prisoner, the allowance theretofore made by the Court for the payment
678 of a per diem allowance to *each juror who served on the trial. Which motion the Court overruled, and decided that such allowance should be taxed as a part of the costs of the prosecution against the prisoner. And the prisoner again excepted; and applied to this Court for a writ of error.

Lyons and Scott, for the petitioner.

FIELD, J., delivered the opinion of the Court.

The prisoner was indicted and convicted of murder in the second degree, in the Circuit court of Hanover, at its April term last past, and was sentenced to the penitentiary for five years, the period of time ascertained by the jury. The murder consisted in the killing of a negro man slave by the name of Sam, the property of the prisoner, by cruel and excessive whipping and torture, inflicted by Souther, aided by two of his other slaves, on the 1st day of September 1849. The prisoner moved for a new trial, upon the ground that the offence, if any, amounted only to manslaughter. The motion for a new trial was overruled, and a bill of exceptions taken to the opinion of the Court, setting forth the facts proved, or as any of them as were deemed material for the consideration of the application for a new trial. The bill of exceptions states: "That the slave Sam in the indictment mentioned, was the slave and property of the prisoner. That for the purpose of chastising the slave for the offence of getting drunk, and dealing as the slave confessed and alleged, with Henry and Stone, two of the witnesses for the Commonwealth, he caused him to be tied and punished in the presence of the said witnesses, with the exception of slight whipping with peach or apple tree switches, before the said witnesses' arrival at the scene after they were sent for by the prisoner, (who were present by request from the defendant,) and of several slaves of the
679 prisoner in the manner and by the means charged in *the indictment; and the said slave died under and from the infliction of the said punishment, in the presence of the prisoner, one of his slaves, and one of the witnesses for the Commonwealth. But it did not appear that it was the design of the prisoner to kill the said slave, unless such design be properly inferrible from the manner, means and duration of the punishment. And on the contrary, it did appear that the prisoner frequently declared while the said slave

was undergoing the punishment, that he believed the said slave was feigning and pretending to be suffering and injured, when he was not." The judge certifies that the slave was punished in the manner and by the means charged in the indictment. The indictment contains fifteen counts, and sets forth a case of the most cruel and excessive whipping and torture. The negro was tied to a tree and whipped with switches. When Souther became fatigued with the labour of whipping, he called upon a negro man of his, and made him cob Sam with a shingle. He also made a negro woman of his help to cob him. And after cobbing and whipping, he applied fire to the body of the slave; about his back, belly and private parts. He then caused him to be washed down with hot water, in which pods of red pepper had been steeped. The negro was also tied to a log and to the bed post with ropes, which choked him, and he was kicked and stamped by Souther. This sort of punishment was continued and repeated until the negro died under its infliction. It is believed that the records of criminal jurisprudence do not contain a case of more atrocious and wicked cruelty than was presented upon the trial of Souther; and yet it has been gravely and earnestly contended here by his counsel, that his offence amounts to manslaughter only.

It has been contended by the counsel of the prisoner, that a man cannot be indicted and prosecuted for the cruel and excessive whipping of his own slave.
680 That *it is lawful for the master to chastise his slave; and that if death ensues from such chastisement, unless he was intended to produce death, it is like the case of homicide, which is committed by a man in the performance of a lawful act, which is manslaughter only. It has been decided by this Court, in *Turner's Case*, 5 Rand., that the owner of a slave, for the malicious, cruel and excessive beating of his own slave, cannot be indicted; yet it by no means follows when such malicious, cruel and excessive beating results in death, though not intended and premeditated, that the beating is to be regarded as lawful, for the purpose of reducing the crime to manslaughter, when the whipping is inflicted for the sole purpose of chastisement. It is the policy of the law in respect to the relation of master and slave, and for the sake of securing proper subordination and obedience on the part of the slave, to protect the master from prosecution in all such cases, even if the whipping and punishment be malicious, cruel and excessive. But in so inflicting punishment for the sake of punishment, the owner of the slave acts at his peril; and if death ensues in consequence of such punishment, the relation of master and slave affords no ground of excuse or palliation. The principles of the common law in relation to homicide, apply to his case, without qualification or exception; and according to those principles, the act of the

prisoner, in the case under consideration, amounted to murder. Upon this point we are unanimous.

But what was the law in respect to felonious homicide on the 1st day of September 1849, when the offence was committed. It is to be found in the Sessions Acts of 1847-8, p. 95. By that act it is declared "that unlawful homicide shall be murder of the first degree, murder of the second degree, or manslaughter."

"Murder committed by poison, lying in wait, duress of imprisonment, starving, wilful and excessive whipping, 681 *cruel treatment, or any kind, (not any other kind as the law theretofore was,) 'of wilful,' deliberate and premeditated killing, or in the attempt to commit any arson, rape, robbery, or burglary, shall be murder in the first degree, and all other murder shall be murder in the second degree." "Murder in the first degree shall be punished with death." The Judge certifies in his bill of exceptions, as a fact proved in the cause, that "the slave died under and from the infliction of the said punishment." Apply the words of the act of Assembly to this case, and it clearly appears that the crime of the prisoner is not manslaughter, but murder in the first degree.

Judge Leigh does not concur in this last view, namely, that homicide committed by excessive whipping, must be necessarily murder in the first degree, without regard to the intention of the offender. He is of opinion that to constitute murder in the first degree, there must be an intention to kill.

The record in this case presents several other matters for the consideration of the Court. It is contended that the proceedings before the Court of examination were not such as the law required. A copy of these proceedings have been exhibited in the record, and it appears from that copy that objections were made in the Court of examination to the previous proceedings had before the committing magistrate; but they were overruled by the Court. Whether properly overruled or not, is a matter which this Court has no jurisdiction to enquire into; nor had the Circuit court any such jurisdiction. No appeal could be taken from the decision of that Court. They had no right to sign any bill of exceptions: and consequently a bill of exceptions signed by the Court cannot be regarded as a part of the record of the case. *Commonwealth v. Hickman*, 2 Va. Cas. 60; Code of Va., p. 672, § 8. But if we could look into the proceedings of that Court, for

682 *the purpose of reviewing those opinions upon the objections to them by the prisoner's counsel, we should say that the proceedings were, in all respects, regular, and that the Court properly overruled the objections of the prisoner. The Circuit court has the right however, of looking into the proceedings of the Court of examination for two purposes, and for two purposes only. 1st, To see that it was a legally

constituted Court, to make the examination. 2d, To see what offence it was for which the prisoner had been examined. The pleadings in this cause made it necessary to look into the proceedings of the Court of examination for those purposes, and this brings us to the questions arising upon those pleadings.

The prisoner was first indicted on the 2d of April 1850. This indictment contained fourteen counts. The prisoner demurred to the indictment and to each count thereof, in which the attorney for the Commonwealth joined. The Court overruled the demurrers, except the demurrer to the fourteenth count, which was sustained. To the remaining thirteen counts the prisoner pleaded in abatement that he had not been examined for the offences charged in the indictment before the Court of examination. To this plea the attorney for the Commonwealth filed a very short replication, stating that the prisoner had been duly examined by a Court of examination; and tendered an issue to the country. Not one word of reference is made in the replication to the record and proceedings of the Court of examination. This plea was fatally defective. The prisoner demurred to it, and the demurrer was sustained, which the Court was bound to do, and following it up quashed the indictment, not because no such examination had been had, but because no record of such examination had been produced and avouched with the replication. This was done at the October term

1850, and on the following day a new 683 indictment was framed *by the grand jury, containing fifteen counts, fourteen of which are the same as those of the first indictment, with, in some of the counts, some few and very immaterial deviations from the old indictment, and the new count being substantially like the others, or some of them. To this indictment the prisoner demurred. He also demurred to each count thereof; in which demurrer the attorney for the Commonwealth joined; and the Court overruled the demurrer out and out. And we think it was properly done. For we cannot perceive any error in the indictment or in either count; and it is very certain that no error has been specifically presented in the pleading or alluded to in argument. Yet we beg to be understood as not approving of the practice of embarrassing the trial of an important cause with so many unnecessary counts in an indictment. The prisoner then pleaded in abatement that he had not been examined for the offences charged in the indictment before a proper and legally constituted Court of examination according to law. To this plea the attorney for the Commonwealth replied that the prisoner had been duly examined for the said offences, and avouched the record of the Court of examination. To this replication the prisoner tendered four rejoinders, all of which, according to the rules of pleading, were inadmissible, except the first, one of which was held to be bad upon demurrer, and the other three were rejected.

by the Court. These several rejoinders, though differing somewhat from each other in words and phraseology, were in substance the same. They relied upon the judgment of the Court upon the demurrer of the prisoner to the replication of the attorney for the Commonwealth to the prisoner's plea in abatement to the first indictment, by which that indictment was quashed, as being a bar to any other and subsequent indictment against the prisoner for the same offence, upon the examination

which had been had before the County
684 court of *Hanover before the finding of the first indictment; and averred that no new or subsequent examination of the prisoner for that offence had been had before a Court of examination. We are unanimously of the opinion, to say nothing of the objection that might be made to them upon other grounds, that the matters set forth in these rejoinders constituted no bar whatever to the present prosecution. The judgment of the Court referred to in these rejoinders extended to the first indictment only, and constituted a bar to all further proceedings upon that indictment. When that indictment was quashed the case stood as if no indictment had been found; and it was the unquestionable right and duty of the Commonwealth's attorney to prefer against the prisoner a new indictment for the murder of which he had been examined by the County court of Hanover. The prisoner after the Court had disposed of his rejoinders, demurred to the replication. This demurrer was also properly overruled by the Court.

Upon the whole we are clearly of opinion that there is no error in the record of which the prisoner can complain, and the writ of error is refused.

After the trial was over, the prisoner moved the Court in taxing the costs of the prosecution, to omit the per diem allowance which had been made for the venire. The Court refused to do so, and directed the clerk to include the allowance in the bill of costs. It is provided by law that when qualified jurors cannot be conveniently found in the county in which the trial is to take place, they may be procured in some other county; the law then provides that "Every juror so summoned shall be paid one dollar for each day he attends, and the same mileage as a witness in a civil case; and every juror residing in such

county or corporation, and serving on
685 such jury, shall be paid in like *manner one dollar for each day he attends on such jury." See Code of Va. 774, sec. 10th of chap. 208. The prisoner contends that this law does not apply to a case in which all the jurors are procured within the county in which the trial is had. We can see nothing in the law to authorize such a restriction of its operation. The words are general and apply alike to all jurors in criminal cases without respect to the place from whence they come. The pay to each is the same, whether the juror attends from a neighbouring county or is a

resident of the county in which the trial takes place. But there is this difference between resident and nonresident jurors. The nonresident is entitled to mileage, and to be paid for every day that he attends the Court. The resident juror is not entitled to mileage, and can be paid only for each day that he serves on the jury. This being our view of the law, we think the Court did right in not directing the clerk to omit in his taxation of the costs of prosecution the per diem allowance made for the jurors, as directed to be done under the 11th section of chap. 211, Code of Va., p. 783.

Petition for a writ of error denied.

HOMICIDE.

- I. Defined.
- II. What Constitutes Criminal Homicide.
 - A. Subjects of Homicide.
 - B. Acceleration of Impending Death.
 - C. Negligence and Maltreatment of Wound.
- III. Kinds of Homicide.
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 - a. What It Is.
 - b. What Felonies May Be Justifiably Prevented by Homicide.
 - c. The Several Instances.
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 - a. What Constitutes.
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 - B. Felonies.
 (See main heads, "Suicide," "Murder," and "Manslaughter," which follow.)
- IV. Suicide.
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 - D. Degree.
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 - 4. Absence of Malice.
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 - A. Statutory Provisions.
 - B. Nature and Elements of the Offence.
 - C. Assault with Intent to Kill or Injure a Party Other Than the One in Fact Injured.
 - D. Degree of Crime Had Death Ensued.
 - E. Defences.
- VIII. Jurisdiction.
 - A. Courts.
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- IX. Preliminary Examination.
- X. Bail.
- XI. Change of Venue.
- XII. Trial.
 - A. Conduct.
 - B. Arraignment.
 - 1. What Constitutes.
 - 2. Necessity of New Arraignment upon Change of Venue.
 - 3. Joint Arraignment.
 - 4. Statutory Provisions.
 - C. The Indictment.
 - (See monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.)
 - D. Presence of Accused.
 - E. Defences.
 - 1. Homicide to Prevent the Commission of Crime.
 - a. In Defence of Person.
 - (1) Self-Defence.
 - (2) Defence of Another.
 - b. In Defence of Habitation and Property.
 - 2. Insanity.
 - a. Competency as a Defence.
 - b. What Such as Will Excuse.
 - c. Burden of Proof.
 - F. Evidence.
 - 1. Reception of Evidence.
 - 2. Presumption and Burden of Proof.
 - a. Corpus Delicti.
 - b. Malice.
 - c. Deliberation and Premeditation.
 - d. Grade or Degree of Offence.
 - e. Burden of Proof.
 - 3. Admissibility.
 - a. Intent, Malice, Deliberation and Premeditation.
 - b. Preparations.
 - c. Commission of or Participation in Act by Accused.
 - d. Character.
 - (1) Showing Accused's Character.
 - (2) Character of Person Assaulted.
- e. Habits of Accused.
- f. Personal Relations of Parties.
 - (1) Accused and Deceased.
 - (2) Relation of Accused or Deceased to Third Persons.
- g. Motive.
- h. Previous Attempts.
- i. Nature of Act and Attendant Circumstances.
- j. Previous Difficulties and Circumstances Thereof.
- k. Circumstances of Conspiracy or Concerted Action.
- l. Declarations, Conversations and Exclamations of Accused.
- m. Declarations of Deceased Other Than Dying Declarations.
- n. Circumstances.
- o. Means Used and Cause of Death.
- p. Capacity to Commit and Responsibility.
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- s. Dying Declarations.
 - (1) Grounds of Admissibility in General.
 - (2) Condition of Person Making Declaration.
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 - (5) Making and Form of Declaration, and Circumstances Attendant on Making.
 - (6) Subject-Matter and Relevancy of Declaration.
 - (7) Competency of Declaration as Evidence.
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- t. Proceedings at Inquest.
- u. Introduction of Circumstances Proven in Trial of Other Persons.
- 4. Weight and Sufficiency.
 - a. Corpus Delicti and Identity of Deceased.
 - b. Elements of Offence in General.
 - (1) Malice.
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 - c. Cogency of Particular Facts.
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 - e. Identification by Deceased and Others.
 - f. Sufficiency of Circumstantial Evidence.
 - g. Motive Accompanied by Other Evidence.
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 - i. Threats and Expressions of Ill Will Accompanied by Other Evidence.
 - j. Cause of Death.
 - k. Capacity to Commit and Responsibility.
 - 1. Excuse or Justification.
 - m. Accident and Misfortune.
 - n. Principals and Accessories.
 - o. Degree of Homicide.
 - (1) In General.
 - (2) Degree of Murder.
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 - (4) Assault with Intent to Kill.
 - p. Question for the Jury.
- G. Instructions.
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 - 2. Province of Court and Jury in General.
 - 3. Intent, Malice, Deliberation and Premeditation.
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 - 5. Nature and Circumstances of the Act.

6. Nature of Means or Instruments Used.
7. Capacity and Responsibility.
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 - a. Nature of Plea.
 - b. Form and Language in General.
 - c. Confused, Misleading and Inconsistent Instructions.
 - d. Reasonable Doubt.
 - e. Onus Probandi and Weight.
 - f. Duty in Absence of Evidence.
9. Evidence.
10. Degree of Offence.
 - a. Murder.
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11. Conviction.
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- H. Verdict.
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- XIII. New Trial.
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- XIV. Appeal and Error.
 1. In General.
 2. Review of Questions of Fact.
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- XV. Discharge.
- XVI. Sentence.
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- XVIII. Execution.
 1. Sentence of Death.
 2. Sentence to Penitentiary.
 3. Time of Execution.
 4. Mode of Inflicting Death Penalty.

Cross References to Monographic Notes.

- Accessories, appended to *Maybush v. Com.*, 29 Gratt. 857.
- Argument of Counsel, appended to *Coleman v. Com.*, 25 Gratt. 865.
- Autrefois, Acquit and Convict (Jeopardy), appended to *Page v. Com.*, 26 Gratt. 943.
- Confessions, appended to *Schwartz v. Com.*, 27 Gratt. 1025.
- Dying Declarations, appended to *Jackson v. Com.*, 19 Gratt. 656.
- Fines and Costs in Criminal Cases, appended to *Piper v. Com.*, 14 Gratt. 710.
- Indictments, Informations and Presentments, appended to *Boyle v. Com.*, 14 Gratt. 674.
- Insanity, appended to *Boswell v. Com.*, 20 Gratt. 860.
- Instructions, appended to *Womack v. Circle*, 29 Gratt. 192.
- Judgments, appended to *Smith v. Charlton*, 7 Gratt. 425.
- Juries, appended to *Chahoon v. Com.*, 20 Gratt. 738.
- Res Gestæ, appended to *Jordan v. Com.*, 25 Gratt. 943.

I. DEFINED.

Blackstone in 4 Bl. Comm. 177, defines homicide in its most extensive sense, to be the killing of any human creature. Hawkins in his Pl. Cr. ch. 8, § 2, gives the word a more limited meaning by defining it to be "the killing of a man by a man." The word as thus described is sufficiently comprehensive to embrace the destruction of the life of one human

being either by his own act, or by the act, procurement or omission of another.

II. WHAT CONSTITUTES CRIMINAL HOMICIDE.

A. SUBJECT OF HOMICIDE.

Slaves.—A negro slave was a person on whom a free white person could commit the offence of unlawful shooting, stabbing, etc., under Acts Feb. 9th. 1819. *Com. v. Carver*, 5 Rand. 660.

B. ACCELERATION OF IMPENDING DEATH.—Where it appears in a case of homicide that a wound or beating was inflicted on deceased which was not mortal, and that the deceased, while laboring under the effects of the violence, became sick of a disease not caused by such violence, from which disease death ensued within a year and a day, the party charged with the homicide is not criminally responsible for the death, although it should appear that the symptoms of the disease were aggravated, and its fatal progress quickened by the enfeebled or irritated condition of the deceased, caused by the violence. *Livingston v. Com.*, 14 Gratt. 592.

C. NEGLIGENCE AND MALTREATMENT OF WOUND.—Where a person intentionally inflicts a wound calculated to destroy life, and death ensues within a year and a day, he will not be relieved from responsibility for his act because of the carelessness or ignorance of his victim, or allowed to shield himself behind the doubt which disagreeing doctors may raise as to the treatment proper for the case in question. *Clark v. Com.*, 90 Va. 360, 18 S. E. Rep. 440.

III. KINDS OF HOMICIDE.

A. NONFELONIOUS.

1. JUSTIFIABLE HOMICIDE.

a. What It Is.—In justifiable homicide no degree of blame, and consequently no guilt at all, attaches to the act. 4 Bl. Comm. 178.

b. What Felonies May Be Justifiably Prevented by Homicide.—Forcible and atrocious felonies alone can be justifiably prevented by homicide, such as murder, rape, robbery, burglary, and arson, whether directed against one's self, or against one in the relation of husband or wife, parent or child, master or servant. So a stranger may, and ought to, interpose to prevent such a felony, and to that end may be justified in killing the aggressor. 3 Bl. Comm. 3; *Wheat. Cr. L.* (8th Ed.) § 495 *et seq.*

c. The Several Instances.—(1) Killing a public enemy in the lawful prosecution of a war. 1 East P. C. 227; 2 Bish. Cr. Law, § 631.

(2) Killing in execution of public justice, in pursuance of legal sentence. 1 Hale P. C. 497; 4 Bl. Comm. 178.

(3) Killing in advancement of public justice. 1 East P. C. 494; 4 Bl. Comm. 180. See *Muscoe v. Com.*, 86 Va. 448, 10 S. E. Rep. 584.

(4) Killing in defence of person or property. *Fost.* 273; 1 East P. C. 220, 271; *Valden's Case*, 12 Gratt. 717; *Docks' Case*, 21 Gratt. 909; *McWhirts' Case*, 3 Gratt. 594; *Poindexter's Case*, 83 Gratt. 767.

But, a person is not justified in shooting another when there is mere apprehension of the danger, no matter how sincere the apprehension may be; but there must be an honest and reasonable belief of such danger, that is to say, if the act done, or the circumstances existing are of such a character as to afford reasonable ground for believing that there is a design to commit the felony, or to do some serious bodily harm, and that there is imminent danger of such design being carried into immediate execution, then the shooting, or even killing, will be justifi-

liable; otherwise not. *Field v. Com.*, 89 Va. 690, 16 S. E. Rep. 865; *Stoneman's Case*, 25 Gratt. 887; *Brown's Case*, 86 Va. 466, 10 S. E. Rep. 745. See also, *New Orleans, etc., R. R. Co. v. Jopes*, 142 U. S. 18.

And in *Byrd v. Com.*, 89 Va. 536, 16 S. E. Rep. 727, it is held, that a homicide is not in self-defence and so excusable, where the deceased was not following defendant or threatening him with any immediate danger at the time he threw a rock which killed the deceased.

And it is declared in West Virginia in *State v. Evans*, 33 W. Va. 417, 10 S. E. Rep. 792, that, when one, without fault himself, is attacked by another, he may kill his assailant without retreating, if he has reasonable ground for believing, and does believe that his assailant intends to take away his life, or do him some great bodily harm, that such danger is imminent, and that the killing is necessary in order to avoid the danger, although it may afterwards turn out that the appearances were false. *State v. Abbott*, 8 W. Va. 741.

It appeared in *Gaines' Case*, 88 Va. 682, 14 S. E. Rep. 375, that defendant went to the decedent's store, and cursed and abused decedent, and declared, upon being requested to leave, that he would not go, whereupon decedent threw a two-pound weight at him. Defendant then drew a pistol, and shot decedent in the back, while he was crouching down behind the counter. It was held, in accord with this doctrine, that since the defendant was a trespasser and had provoked the quarrel, he could not justify the killing on the ground that it was done in self-defence, even if, when he recovered from the shock of the blow inflicted by the weight, he found decedent drawing a pistol to shoot him.

However, in *Hash v. Com.*, 88 Va. 172, 18 S. E. Rep. 398, it appeared that defendant was engaged in building a fence on his land, which he had removed from the line between him and the deceased, contrary to a prohibition of the latter, although the fence was owned by the defendant. It was held that the removal of the fence, notwithstanding the prohibition of the deceased, was not an unlawful act; and *it was error* to charge that if defendant built it upon the line, so that it rested partly upon the land of each, and had been used as a line fence for a number of years, and if deceased had notified the defendant not to remove it, and that defendant, arming himself with a pistol, went to the fence to remove it by force, if necessary, and did remove it, he was guilty of an unlawful act; and if, while removing it, the conflict arose on account thereof, in which defendant killed deceased, then defendant cannot avail himself of a plea of necessary self-defence.

But words of reproach howsoever grievous are not provocation sufficient to free the party killing from the guilt of murder, nor are contemptuous actions or gestures without an assault upon the person, nor is any trespass against lands or goods. This rule governs every case, where the party killing upon such provocation made use of a deadly weapon or otherwise manifested an intention to kill or to do some great bodily harm. But if he had given the other a box on the ear or had struck him with a stick or other weapon not likely to kill him, and had unluckily and against his intention killed him, it had been but manslaughter for no malignant intention can be collected from such acts. 1 East C. L. 233; *State v. Douglass*, 28 W. Va. 297; *State v. Cain*, 20 W. Va. 679.

Moreover, a charge to the effect that the defend-

ant in a murder case is not excused under the plea of self-defence if he had reason to believe and did believe assault to be only intended to commit a trespass and not to take life or inflict bodily harm, is correct. *State v. Greer*, 22 W. Va. 800.

And a request to charge that if, when defendant threw the stones which killed deceased, he believed the deceased intended to kill him or do him some grievous bodily harm and is not guilty, is properly modified by inserting "and if, when he stood where he picked up stones, he in good faith believed he was not out of danger from the assault of the deceased." *Byrd v. Com.*, 89 Va. 536, 16 S. E. Rep. 727.

2. EXCUSABLE HOMICIDE.

a. *What Constitutes.*—Homicide is not justifiable, but excusable, where there is some fault, error or omission in the party committing the deed, but so trivial as to exempt him from punishment, although not wholly from blame. 4 Bl. Comm. 182.

b. *Self-Defence.*—Thus, where death ensues on sudden provocation or quarrel, without malice pre-pense, the killing is manslaughter, and to reduce the offence to killing in self-defence or excusable homicide, the accused must prove two things: (1) that before the mortal blow is given he declined further combat, and retreated as far as he could with safety, and (2) that he killed the deceased through the necessity of preserving his life or to save himself from great bodily harm. *Clark v. Com.*, 90 Va. 360, 18 S. E. Rep. 440; *Vaiden's Case*, 12 Gratt. 717.

But words of reproach howsoever grievous are not provocation sufficient to free the party killing from the guilt of murder; nor are contemptuous actions or gestures without an assault upon the person, nor is any trespass against lands or goods. This rule governs every case, where the party killing upon such provocation made use of a deadly weapon or otherwise manifested an intention to kill, or to do some great bodily harm. But if he had given the other a box on the ear or had struck him with a stick or other weapon not likely to kill him, and had unluckily and against his intention killed him, it had been but manslaughter for no malignant intention can be collected from such acts. 1 East C. L. 233; *State v. Douglass*, 28 W. Va. 297; *State v. Cain*, 20 W. Va. 679.

In view of these principles it is error to refuse to charge that accused must have been without fault in bringing on the combat and must not have provoked or produced an occasion for killing the deceased; but if he was so at fault, or provoked the combat or produced the occasion in order to effect a pretext for killing yet he fairly declined the combat by retreating as far as he could, and then killed the deceased in self-defence, he is not guilty. *Hash v. Com.*, 88 Va. 172, 18 S. E. Rep. 398.

And a homicide is not in self-defence and so excusable, where the deceased was not following defendant or threatening him with any immediate danger at the time when he killed the deceased. *Byrd v. Com.*, 89 Va. 536, 16 S. E. Rep. 727.

And to reduce a homicide to killing in self-defence, an instruction, asked by the defendant, that if he went to the house where the killing had occurred to stop a quarrel between deceased and deceased's wife, and to demand an apology for slanderous words previously spoken by deceased, and if, when he attempted to do so, deceased attacked him with a deadly weapon, the killing of the deceased is not murder, is properly modified, by requiring that the defendant shall have gone to the house for

the purpose of "peaceably" stopping the quarrel, and demanding an apology. *Watson v. Com.*, 87 Va. 608, 18 S. E. Rep. 22.

B. **FELONIOUS.**—For treatment of these homicides reference is made to the subjects "Suicide," "Murder," and "Manslaughter," which succeed this head.

IV. SUICIDE.

At common law one who, being of the years of discretion and sound of mind, destroyed himself, was guilty of the crime of suicide, and being treated as such, the person forfeited all chattels real or personal, and various other property. 4 Bl. Comm. 190. But the doctrine of forfeiture of estate has now been abrogated in Virginia and West Virginia. See Va. Code 1887, § 8883; W. Va. Code 1899, ch. 152, § 4.

V. MURDER.

A. **IN GENERAL.**—Murder is the unlawful killing of any person in being, under the protection of the commonwealth, with malice aforethought. 4 Bl. Comm. 195; 1 Whart. Cr. L. (8th Ed.) § 303.

The malice may be either express or implied by law, the source of which malice is not only confined to a particular ill will to the deceased, but is intended to denote, as MR. JUSTICE FOSTER expresses it, an action flowing from a wicked and corrupt mind, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of the heart, regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate, cruel act, against another, however sudden. *State v. Douglass*, 28 W. Va. 297; 1 East C. L. 215, 235.

B. ELEMENTS.

1. **FORMED DESIGN.**—If the determination is formed deliberately, and upon due reflection, it makes no difference how soon afterwards the fatal resolve is carried into execution. *McDaniel v. Com.*, 77 Va. 281; *Whiteford v. Com.*, 6 Rand. 731; *Wright v. Com.*, 33 Gratt. 880; *Hill's Case*, 2 Gratt. 594.

2. MALICE.

a. *In General.*—Malice is an essential element in the crime of murder, either at common law or under the statute. It is imperative that this malice exist at the time of the beginning of the quarrel, scuffle or affray, during which the killing occurs; for, if the killing, or the act which leads to it, be not committed out of present malice, it is not murder. But, it is not necessary, that this malice should exist in the heart of the accused against the deceased. If the accused was guilty of striking with a deadly weapon another and of killing him, the intent and the malice may both be inferred from such act; and such malice may not be directed against any particular person, but is such as shows a "heart regardless of social duty and fatally bent on mischief." *State v. Douglass*, 28 W. Va. 297.

b. *Malice Aforethought.*—The killing must be committed with malice aforethought to make it a crime of murder. This is the great criterion which now distinguishes murder from any other killing, and this malice prepense, *malitia praeconitata*, is not so properly spite or *malevolence* to the deceased in particular, as any evil design in general, the dictate of a wicked, depraved and malignant heart; and it may be either express or implied in law. 4 Bl. Comm. 199; *State v. Douglass*, 28 W. Va. 297.

c. *Express Malice.*—In *Bristow v. Com.*, 15 Gratt. 634, the question arose as to whether the facts proved justified the conclusion that the killing was malicious. The court said: "It is true, there was

provocation at the time, which, in the absence of proof of express malice, might have been sufficient to reduce the killing to manslaughter. But the proof that malicious and revengeful feelings existed, and that the prisoner acted under their influence, is abundant. He had for a week previously manifested strong animosity against the deceased, and had repeatedly stated that, on receiving any provocation from him, he would kill him. The first thing that he did, on taking part in the contest between his father and the deceased, was to use a deadly weapon, without warning and from behind, when there was no necessity, real or apparent, for the use of such weapon.

"His declarations, after the fight and before he knew the serious character of the wound he had inflicted, showed that he had been prompted by the desire and intent to kill, and referred that desire and intent not to the immediate provocation, but to the previous act of the deceased in whipping his brother. If all this does not show express malice, it is difficult to say what would be sufficient proof for the purpose. The prisoner then was guilty of murder."

d. *Malice Implied.*

(1) **Implied from Act of Killing.**—Where a homicide is proved to have been committed by the defendant, the presumption of malice exists, if no circumstances of mitigation appear. *State v. Douglass*, 28 W. Va. 297.

Thus, where a person who is neither assaulted nor threatened, gets down from his horse, arms himself with a club, interposes between two others about to engage in a fight, and kills one of them, he is guilty of murder. *Johnston's Case*, 5 Gratt. 600.

(2) **Implied from Use of Weapon.**—Where the homicide is committed by the use of a deadly weapon the intent and malice may both be inferred from such act. *State v. Douglass*, 28 W. Va. 297.

(3) **Malice Shown by Surrounding Circumstances.**—Where a full disclosure of all the facts and circumstances, obviates all necessity for presumption, all of such facts and circumstances taken together constitute the only basis for a finding that the homicide was committed with "malice aforethought." Thus, in *McWhirt's Case*, 3 Gratt. 594, a father was informed on the evening of one day, that his son, a small boy, had been wantonly whipped by a man. He met with the man on the evening of the next day, and then with his fists and feet, beat and stamped him, whilst he was unresisting, with so much violence that the man died from the effects of the beating on the next night. There was evidence of deliberation, and the beating was cruelly severe. From these facts malice could be inferred, constituting a case of murder.

And in a case where the prisoner was in his shop cutting a child's hair, when the deceased came to the door and made some remark to some one in the shop, and the prisoner replied insultingly, whereupon the deceased said: "I can whip you," threw off his coat, advanced two steps towards the prisoner and threw up his right hand, upon which the prisoner to scare him, advanced two steps, threw up his right hand, and thrust at deceased with the scissors in his left hand, and on a general scuffle ensuing, it subsequently appeared without any one else having struck the deceased, that he had been mortally wounded by a stab in the heart. It was held that the evidence would support a verdict of murder. *State v. Smith*, 24 W. Va. 814.

So there may be single acts or circumstances en-

tering into the homicide, aside from the means used in its commission, from which malice may properly be inferred, as, for instance, threats made by defendant against deceased before the killing.

Thus, two days after threatening to kill deceased on sight, defendant met him and proposed a fair fight without weapons which deceased refused, whereupon defendant deliberately shot him. Deceased had at the time an axe with which he was chopping wood, but made no motion to assault defendant. The prisoner was guilty of murder. *Harrison v. Com.*, 79 Va. 374.

3. PREMEDITATION AND DELIBERATION.—To constitute murder, the killing must be predetermined, yet the design to kill need not have existed for any particular length of time and may be formed at the moment of committing the act; and an instruction on a murder trial, that it is not necessary that the design of killing should have existed "for any length of time," is not misleading as being equivalent to telling the jury that a killing on sudden impulse is murder. *Com. v. Brown*, 90 Va. 671, 19 S. E. Rep. 447.

McWhirt's Case, 3 Gratt. 594, presents a set of facts constituting deliberation sufficient to amount to murder. Thus, a father was informed on the evening of one day, that his son, a small boy, had been wantonly whipped by a man. He met with the man on the evening of the next day, and then with his fists and feet, beat and stamped him whilst he was unresisting, with so much violence that the man died from the effects of the beating on the next night. The court held that there was evidence of deliberation and the beating was cruelly severe, amounting to murder.

C. NATURE OF ACT CAUSING DEATH.

1. STAB FOLLOWING CONTINUED ALTERCATION.—On a trial for homicide, it appeared some altercation had arisen between defendant's employees and the employee of a third person, in which defendant joined, offering to fight any one of such employees; that the altercation was kept up at various times throughout the day, and that finally, in the evening, as such employees were going home, it was renewed; and that in the course of such last altercation the defendant, and deceased got into a fight, in which defendant was thrown to the ground and so held, whereupon defendant drew his knife and stabbed the deceased. Upon these facts it was held that the defendant was guilty of murder. *Com. v. Crane*, 1 Va. Cas. 10.

2. BEATING WITH CLUB BY PRETENDED PEACEMAKER.—Where a person who is neither assaulted nor threatened gets down from his horse, arms himself with a club, interposes himself between two other persons who are about to engage in a fight, and kills one of them, he is guilty of murder. *Johnston's Case*, 5 Gratt. 600.

3. UNPROVOKED ATTACK WITH GUN.—Two days after threatening to kill deceased on sight, the defendant met him and proposed a fair fight without weapons, which the deceased refused, whereupon the defendant deliberately shot him. The deceased had at the time an axe, with which he was chopping wood, but made no motion to assault defendant. It was held to be a case of murder. *Harrison v. Com.*, 79 Va. 374.

4. KILLING IN ATTEMPT TO COMMIT ROBBERY.—One who, in the attempt to commit, or commission of, robbery, kills another, is guilty of murder in the first degree. *Robertson v. Com.*, 1 Va. Dec. 851, 20 S. E. Rep. 302.

5. BLOWS STRUCK SUDDENLY AND WITHOUT PROVOCATION.—In *Wright v. Com.*, 75 Va. 914, a fight was going on outside of a barroom in which the prisoner was, between the grandfather of the prisoner and two others. Prisoner on hearing of the fight seized a large stick, ran out in the crowd, struck several persons with it, breaking the arm of one person, and struck another person, who was not engaged in or noticing the fight, a blow on the ear, from which he died the next day. It was held that he was guilty of murder in the first degree.

D. DEGREE.

1. FIRST DEGREE.

a. In General.—Murder by poison, lying in wait, imprisonment, starving, or any wilful, deliberate, and premeditated killing, or in the commission of, or attempt to commit arson, rape, robbery, or burglary, is murder in the first degree. Va. Code 1887, § 3662; W. Va. Code 1899, ch. 144, § 1.

But if poison be administered negligently, it is only manslaughter at common law, and cannot be made more by a statute prescribing that murder committed by means of poison shall be murder in the first degree. See *Souther v. Com.*, 7 Gratt. 678; *Com. v. Jones*, 1 Leigh 610.

b. Provocation Insufficient.—Where a person though excited by strong drink and by an insult, and by a severe blow for which he had a right of redress, was not by any of these causes so deprived of his mental faculties that he could not distinctly understand what he was about, kills the person by whom he had been insulted and struck, and after he had done so said that he was glad of it, and that any man of spirit would do the like, it constitutes murder in the first degree within 1 Rev. Code, ch. 171, § 2, providing that murder by certain methods, or by any other kind of wilful, deliberate, or premeditated killing, constitutes murder in the first degree. *Com. v. Jones*, 1 Leigh 598.

c. Deliberation and Premeditation.

(1) What Constitutes.—To constitute a "wilful, deliberate and premeditated killing," it is necessary that the killing should have been done on purpose, and not by accident, or without design; that the accused must have reflected with a view to determine whether he would kill or not, and that he must have *determined to kill*, as the result of that reflection, before he does the act, that is to say, the killing must be a predetermined killing upon consideration, and not a sudden killing under the momentary excitement and impulse of passion, upon provocation given at the time, or so recently before, as not to allow time for reflection; and this design to kill need not have existed for any particular length of time, it may be formed at the moment of the commission of the act. *King's Case*, 2 Va. Cas. 84, and *note*; *Whiteford's Case*, 6 Rand. 721; *Jones' Case*, 1 Leigh 598; *Hill's Case*, 2 Gratt. 505; *Howell's Case*, 26 Gratt. 995; *Wright's Case*, 75 Va. 914; *McDaniel v. Com.*, 77 Va. 281; *Mitchell's Case*, 33 Gratt. 873; *State v. Morrison* (W. Va. 1901), 38 S. E. Rep. 481; *Wright v. Com.*, 33 Gratt. 880.

Thus, one who, while sober, deliberately resolves to kill another, and makes himself drunk for that purpose, and while temporarily insane, and unconscious of what he is doing, because of such drunkenness, kills the person, is guilty of murder in the first degree. *State v. Robinson*, 20 W. Va. 713.

And, in *Barbour v. Com.*, 80 Va. 287, it appeared that defendant met deceased and another as they were leaving a small town at night, and requested them to return to the store or other place and

take a drink; but deceased remonstrated, saying that his family was alone and that he must go on as it was getting late; and that defendant without provocation, thrust a knife into his throat remarking, "what have you got to do with it." The verdict was properly murder in the first degree.

(2) **Reasonable Doubt as to Premeditation—Instruction.**—That the jury were instructed that a verdict of guilty of murder in the first degree might not be found, if there was a reasonable doubt whether defendant had premeditated a serious bodily injury which "probably" would occasion death, is not ground for reversal. *Honesty v. Com.*, 81 Va. 283.

d. Intention.—In *State v. Morrison* (W. Va. 1901), 38 S. E. Rep. 481, it is held that a specific intention to kill is essential to murder in the first degree.

But in *Souther's Case*, 7 Gratt. 678, it is held that the killing of a slave by his master and owner, by wilful and excessive whipping, is murder in the first degree; though it may not have been the purpose and intention of the master and owner to kill the slave.

2. SECOND DEGREE.

a. In General.—All other murder (than murder in the first degree) is murder in the second degree. Va. Code 1887, § 3662; W. Va. Code 1889, ch. 144, § 1; *Whiteford v. Com.*, 6 Rand. 721. See *McCune v. Com.*, 2 Rob. 778; *State v. Sheppard* (W. Va.), 39 S. E. Rep. 676.

b. Intention.—A specific intention to kill is not essential to murder in the second degree. *State v. Morrison* (W. Va. 1901), 38 S. E. Rep. 481.

c. Presumption When Homicide Is Proven.—Where a homicide is proven, the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree, the state must establish the characteristics of the crime; and if the prisoner would reduce it to manslaughter, the burden of proof rests upon him. *State v. Douglass*, 28 W. Va. 297; *Cain's Case*, 20 W. Va. 679.

E. CAPACITY TO COMMIT AND RESPONSIBILITY.

1. **INSANE PERSON.**—No person shall, while he is insane, be tried for a criminal offence. W. Va. Code 1899, ch. 159, § 9; Va. Code 1887, § 4090; *State v. Harrison*, 36 W. Va. 729, 15 S. E. Rep. 982; *State v. Maier*, 36 W. Va. 757, 15 S. E. Rep. 991; *State v. Robinson*, 20 W. Va. 713.

2. **INTOXICATION—WHEN NO DEFENCE.**—An intoxicated person may yet be capable of deliberation and premeditation; if the jury believe from all the evidence, that the prisoner wilfully, maliciously, deliberately and premeditatedly killed the deceased, they should find him guilty of murder in the first degree although he was intoxicated at the time of the killing.

Thus, if a person, who has formed a wilful, deliberate and premeditated design to kill another, and in pursuance of such design voluntarily makes himself drunk for the purpose of nerving his animal courage for the accomplishment of the design, and then meets the subject of his malice, when he is so drunk as not then to be able to deliberate on and premeditate the murder and kill the person, it is murder in the first degree. *State v. Robinson*, 20 W. Va. 713; *State v. Douglass*, 28 W. Va. 297.

Accidental Discharge of Revolver Causing Death.—But the fact that one who killed another by an accidental discharge of a revolver, was drunk at the time, and that the intoxication was the cause of the accident, does not render the killing a wilful and

premeditated one. *State v. Cross*, 42 W. Va. 253, 24 S. E. Rep. 996.

F. PERSONS LIABLE AND PARTIES TO OFFENCES.

1. **PRINCIPAL IN THE FIRST DEGREE.**—Where several persons go together to rob a store, and one is posted some distance from the house to watch and the other two obtain admittance into the storehouse, kill the owner and rob the store, and the person on watch shares the booty, such person is a principal in the first degree of the crime of murder. *Mitchell v. Com.*, 38 Gratt. 845.

2. **AIDERS AND ABETTORS.**—It is not necessary, in order to make a party liable, that he should be actually and immediately present at the commission of the offence. If he co-operates in the execution of the common purpose by watching at a proper distance to prevent surprise, or the like, or if, with the intention of giving assistance, he remains near enough to afford it, if the occasion for it should arise, he is constructively present, aiding and abetting, and is equally guilty with those who are actually present and do the act. *Trim v. Com.*, 18 Gratt. 983.

And it was proper to instruct the jury, that, though they believed that the shot which killed deceased was fired by another than the prisoner, if such other was engaged jointly with the prisoner in the commission of a felonious act, and the shot was fired in an attempt to accomplish their common escape, and the prisoner was present, aiding and abetting the person who fired the shot, the prisoner was guilty. *Com. v. Brown*, 90 Va. 671, 19 S. E. Rep. 447.

VI. MANSLAUGHTER.

A. NATURE AND ELEMENTS.

1. **DEFINED.**—Manslaughter is the unlawful killing of a human being without malice, either express or implied, and without excuse. *King v. Com.*, 2 Va. Cas. 78; *Mitchell's Case*, 1 Va. Cas. 115; *McWhirts' Case*, 8 Gratt. 594; 1 Hale P. C. 466; 4 BL. Comm. 91.

Poison Administered Negligently.—And if poison be administered negligently, it is manslaughter at common law, and cannot be made more by a statute prescribing that murder committed by means of poison shall be murder in the first degree. See *Souther v. Com.*, 7 Gratt. 678; *Com. v. Jones*, 1 Leigh 610.

2. **ELEMENTS OF VOLUNTARY MANSLAUGHTER.**—Voluntary manslaughter is the unlawful killing of another without malice actual or implied, upon a sudden heat, on reasonable provocation, or in mutual combat. 1 East P. C. 232. See *King v. Com.*, 2 Va. Cas. 78.

3. **ELEMENTS OF INVOLUNTARY MANSLAUGHTER.**—Involuntary manslaughter is the killing of one accidentally contrary to the intention of the parties, in the prosecution of some unlawful, but not felonious, act; or in the improper performance of a lawful act. 1 East P. C. ch. 12, § 1; 4 H. Comm. 192. See *Souther's Case*, 7 Gratt. 678; *Com. v. Jones*, 1 Leigh 610.

4. **ABSENCE OF MALICE.**—Manslaughter is distinguished from murder by the absence of the malice, either express or implied, which is the essence of murder. *King's Case*, 2 Va. Cas. 78; *Mitchell's Case*, 1 Va. Cas. 116; *McWhirts' Case*, 8 Gratt. 596.

5. **SUDDEN HEAT OR PASSION.**—Where defendant and deceased were actually engaged in combat, during the heat of which defendant dealt the blow which caused the death of deceased, such killing is

manslaughter only. *King v. Com.*, 3 Va. Cas. 78. See *Watson v. Com.*, 87 Va. 608, 13 S. E. Rep. 22. See *Horton v. Com.*, 99 Va. 848, 38 S. E. Rep. 184.

And an instruction that if defendant was acting in the heat of passion, engendered by the slanderous words spoken of his wife, and if sufficient time had not elapsed for his passion to cool and subside, the killing was murder in the second degree; but, that it was murder in the first degree, if sufficient time had elapsed for his passion to subside, and if he afterwards went after deceased with a deadly weapon for the purpose of killing him on account of the slanderous words, and did kill him wilfully and with malice and premeditation, is proper. *Watson v. Com.*, 87 Va. 608, 13 S. E. Rep. 22.

6. **PROVOCATION.**—In *Mitchell v. Com.*, 1 Va. Cas. 116, it appeared that the defendant came home intoxicated, got into a fight with his wife, and began to abuse her, whereupon the deceased interposed. The defendant took down his gun, but the deceased took it away from him, and hung it up on the wall in its place again. A second quarrel shortly ensued between the defendant and his wife, and deceased again interposed and in the course of the scuffle the defendant fell over a spinning wheel and hurt himself causing his face to bleed; the deceased immediately ran out of the house. The defendant arose and took down his gun, followed the deceased to the door and fired at him, killing him instantly. It was held that he was guilty of manslaughter only.

But where defendant insulted and threatened the deceased, and, when warned against approaching, took hold of him, whereupon deceased struck defendant lightly with a light cane, and defendant then struck deceased a murderous blow, it was held on the trial for murder, that there was no legal provocation. *Honesty v. Com.*, 81 Va. 283.

7. **ASSAULT AND MUTUAL COMBAT.**—Where defendant and deceased were actually engaged in combat, during the heat of which defendant dealt the blow which caused the death of deceased, such killing is manslaughter only. *King v. Com.*, 3 Va. Cas. 78.

VII. ASSAULT WITH INTENT TO KILL.

A. **STATUTORY PROVISIONS.**—An indictment for the malicious stabbing of a slave can be supported under Act Jan. 28th, 1803, § 3, though the act provides that one-third of the fine shall go to the "party aggrieved"; and in such case the slave could not collect that portion. *Com. v. Chapple*, 1 Va. Cas. 184; *Com. v. Carver*, 5 Leigh 660. See *State v. Newsom*, 18 W. Va. 859; *Com. v. Lester*, 2 Va. Cas. 199; *Derieux v. Com.*, 3 Va. Cas. 379; *Ex parte Mooney*, 26 W. Va. 36; *State v. Yates*, 31 W. Va. 761; *State v. Davis*, 31 W. Va. 390, 7 S. E. Rep. 24; *State v. Mooney*, 27 W. Va. 546.

B. NATURE AND ELEMENTS OF THE OFFENCE.

1. **INTENT.**—On the trial of an indictment for maliciously or unlawfully shooting a person "with intent to disfigure, disable and kill" him, it is error to instruct the jury, that if they believe the shooting was done "with intent to maim, disfigure or kill him, or to cause him bodily injury," they must find a verdict of guilty. *State v. Meadows*, 18 W. Va. 658.

So it is error to instruct the jury that if they have any reasonable doubt, whether the prisoner under the circumstances was excusable for the use of the deadly weapon, they must acquit him. *State v. Jones*, 30 W. Va. 764.

But it is not error upon the trial of an indictment for shooting with intent to kill to charge the jury in

general terms, "that if all the evidence and circumstances of the case warrant the finding, they may find the prisoner guilty of the offence charged in the indictment; or if all the facts and circumstances of the case warrant such finding, the jury may find the prisoner guilty of a part of the offence charged in said indictment, whether such part be a felony or misdemeanor." If the prisoner had desired the court to give the jury more specific instructions as to what they might find, if warranted by the evidence, he should have asked the court to so instruct the jury. *State v. Donohoo*, 22 W. Va. 761.

C. **ASSAULT WITH INTENT TO KILL OR INJURE A PARTY OTHER THAN THE ONE IN FACT INJURED.**—If A is indicted for shooting C with intent to maim, disfigure, disable and kill him, and the proof is, that he shot at B and missed him and accidentally hit C, he can be convicted on such indictment for shooting C with intent to maim, disfigure, disable and kill him. But being indicted for an attempt to shoot C with intent to maim, disfigure, disable and kill him, and C is not in fact shot, and the proof is, that the attempt was to shoot B and not C, he cannot be convicted of an attempt to shoot C. *State v. Meadows*, 18 W. Va. 658.

D. **DEGREE OF CRIME HAD DEATH ENSUED.**—Whether a prisoner on trial is guilty of malicious shooting with intent to kill, depends upon the question, whether if he had killed the person at whom he shot, instead of only wounding him, with intent to kill him, the offence would have been murder. *Read v. Com.*, 22 Gratt. 924. See *Com. v. Chapple*, 1 Va. Cas. 184.

E. **DEFENCES.**—If upon a trial for shooting with intent to kill, the use of a deadly weapon is proved, and the prisoner relies upon self-defence to excuse him for the use of the weapon, the burden of showing such excuse is on the prisoner, and to avail him he must prove such defence by a preponderance of the evidence. He may show it by his own evidence—the evidence adduced by the prosecution, the circumstances arising out of the case, or by all of these modes. *State v. Jones*, 30 W. Va. 764.

VIII. JURISDICTION.

A. **COURTS.**—The Va. Code 1887, § 4016, provided that the county courts, except where otherwise provided, should have exclusive original jurisdiction of indictments within their respective counties, and that a person charged with a capital felony could, on his arraignment, demand to be tried in the circuit court. Acts 1893-4, p. 270, amended this section, and omitted therefrom the provision for trial in the circuit court. It is held in *Gilligan v. Com.*, 99 Va. 816, 37 S. E. Rep. 902, that the right to remove a prosecution for murder to the circuit court was not preserved, by the Acts of 1891-92, providing the right of removal should be exercised before a motion for continuance, since such act did not give a right of removal but merely regulated its exercise, and, if it did give a right of removal, it was repealed by the Acts of 1893-94. See *Com. v. Brownwell*, 2 Va. Cas. 223; *Boswell v. Com.*, 20 Gratt. 860.

B. **PLACE.**—In the absence of statute the doctrine formerly prevailed that if a person be stabbed in this state and die of his wounds in another, he could not be tried for the murder in any county in this commonwealth. *Com. v. Linton*, 2 Va. Cas. 205.

This ruling has now been changed by statute in Virginia which provides that, "If any person be stricken or poisoned in, and die, by reason thereof, out of this state, the offender shall be guilty, and

be prosecuted and punished, as if the death had occurred in the county or corporation in which the stroke or poison was given or administered." Va. Code 1887, § 3867; W. Va. Code 1849, ch. 144, § 6. The West Virginia statute further provides, that if any person be stricken or poisoned out of the state and die by reason thereof, within the state, the offender shall be as guilty, and may be prosecuted and punished as if the mortal stroke had been given, or poison administered in the county in which the person so stricken or poisoned may so die.

In *Ex parte McNeely*, 36 W. Va. 86, 14 S. E. Rep. 436, this latter clause was attacked as unconstitutional. After thorough consideration the court sustained the constitutionality of the provision. See *U. S. v. Guiteau*, 47 Am. Rep. 247.

All criminal proceedings against convicts in the penitentiary shall be in the circuit court in the city of Richmond: provided, that when convicts are employed for any public or private improvement in any county in the state, the criminal proceedings shall be in the county court of the county in which the convict is so employed. Va. Code 1887, § 4179; Acts 1887-88, p. 521. See *Ruffin's Case*, 21 Gratt. 790.

IX. PRELIMINARY EXAMINATION.

Necessity.—In some of the early Virginia cases it seems to have been usual if not necessary, before prosecuting by information or indictment a person who had been apprehended for felonious homicide, to have him examined and committed by a magistrate upon a finding of probable cause to believe him guilty. *Com. v. Linton*, 2 Va. Cas. 205; *Bailey's Case*, 1 Va. Cas. 258; *Com. v. Myers*, 1 Va. Cas. 188; *Sorrell's Case*, 1 Va. Cas. 253.

Before Whom Conducted.—The proper magistrates before whom they should be conducted are justices of the peace (*Com. v. Linton*, 2 Va. Cas. 205); or persons having some general jurisdiction, as mayors or police justices of cities. *Com. v. Myers*, 1 Va. Cas. 188.

In *Wormeley v. Com.*, 10 Gratt. 658, it is left a query, as to whether a coroner has authority to commit to jail for trial a person charged by the inquest with felony. But it was also held in this case that a justice of the peace acting as coroner, and having as coroner committed a person to jail for felony, may certify the fact of such committal as a justice of the peace.

Power to Acquit for Murder and Remand for Manslaughter.—It was early held that an examining court had no power to acquit a person, charged before it with murder, of the murder of which he so stood charged, and to remand him for trial for manslaughter only. And if the court made such discrimination the prisoner was not thereby discharged, but could be indicted for murder in the superior court. *Com. v. Myers*, 1 Va. Cas. 188; *Sorrell's Case*, 1 Va. Cas. 253; *Bailey's Case*, 1 Va. Cas. 258.

X. BAIL.

Right to Demand Bail and Ground for Granting.—All public offences are bailable at common law, not excepting such crimes as are punishable as capital offences; yet the right to refuse bail to a person charged with such crime is discretionary with the court.

In *Ex parte Eastham*, 48 W. Va. 637, 27 S. E. Rep. 896, the court of appeals refused to bail the prisoner who was indicted for murder, where the prisoner admitted the killing. In delivering the opinion of the court, BRANNON, J., said, "I understand the

almost universal practice is to refuse bail in West Virginia, in murder cases. This party rests under an indictment charging murder, which furnishes strong presumption of guilt, on a motion for bail. And even if that indictment were void, we would consider it on a motion for bail. In view of that indictment, and the evidence taken before the grand jury, and as murder cases are not generally bailable, I cannot grant bail, and would remand the accused."

But in *Com. v. Semmes*, 11 Leigh 696, where it was shown that a prisoner, under an indictment for murder, was confined in jail in the felon's department, a very small, damp, ill-ventilated room, and incapable from its construction of being rendered more comfortable; that he was laboring under a present painful, severe, and dangerous disease, caused by his imprisonment, and likely to be aggravated by a continuance thereof as probably to terminate fatally, it was held a good cause for admitting him to bail.

And in *Archer's Case*, 6 Gratt. 705, it was held that where it appeared that there was a strong ground for the opinion that the continued confinement of the person would cause the disease under which he suffered to terminate fatally, he was entitled to bail.

Effect of Error in Recognizance on Bail Bond.—Under Va. Code 1889, § 4100, providing that no action or judgment on recognizance shall be defeated or arrested by reason of any defect in the form of the recognizance, it is no objection to the issuance of a *scire facias* on a bail bond given by one accused of felonious assault that the condition of the bond was that the defendant should appear "to answer the charge against him," instead of "to answer the felony whereof he stands charged." *Allen v. Com.*, 90 Va. 356, 18 S. E. Rep. 437.

Excessive Bail.—Regarding the constitutional prohibition of excessive bail, see Va. Const. 1892, art. 1, § 11; W. Va. Const. 1872, art. 3, § 5.

XI. CHANGE OF VENUE.

Right to Have the Venue Changed.—A circuit court may, on the motion either of the accused or of the attorney for the commonwealth, or without such motion, for good cause, order the venue of trial of a criminal case in such court to be changed to some other circuit or corporation court; and, in like manner, the court of a county may order the venue to be changed to the court of another county, or the court of a corporation to another circuit or corporation court. Va. Code 1887, § 4036. See W. Va. Code 1899, ch. 159, § 15; *Joyce v. Com.*, 78 Va. 287; *Wright v. Com.*, 33 Gratt. 890; *Boswell v. Flockheart*, 8 Leigh 364; *Vance v. Com.*, 2 Va. Cas. 163; *State v. Douglass*, 41 W. Va. 537, 23 S. E. Rep. 724; *Wormeley v. Com.*, 10 Gratt. 658; *State v. Flaherty*, 42 W. Va. 240, 24 S. E. Rep. 885; *State v. Greer*, 22 W. Va. 800.

What Affidavit Should State.—An affidavit for change of venue must state facts and circumstances from which the conclusion is deduced that a fair trial cannot be had, and not merely opinion that it cannot, and the court must be satisfied from those facts that he cannot or may not get such fair trial, and not from conclusions or opinions of the defendant or his witnesses. *State v. Douglass*, 41 W. Va. 537, 23 S. E. Rep. 724. See *Brooks v. Com.*, 4 Leigh 669; *State v. Manns (W. Va.)*, 37 S. E. Rep. 613.

XII. TRIAL.

A. CONDUCT.

Course of Trial—In General.—Where defendant in-

forms his attorney of the whereabouts of the pistol with which the man was murdered, the attorney cannot tell the jury where the pistol was concealed, and where he found it under the direction of his client. *State v. Douglass*, 20 W. Va. 770.

Presence and Use of Articles Connected with the Offence.—A bullet taken from the body of the deceased, which was the same kind as that used in a pistol habitually carried by accused, and burglar's nippers found on the scene of the killing and identified as those of accused, are properly admitted as part of the *res gestæ*. *Williams v. Com.*, 85 Va. 607, 8 S. E. Rep. 470.

B. ARRAIGNMENT.

1. **WHAT CONSTITUTES.**—Technically, an arraignment is completed by calling the accused to the bar by his name and commanding him to stand up, reading the indictment to him, and asking him, "How say you—are you guilty or not guilty?" *Sutton v. Com.*, 85 Va. 128, 7 S. E. Rep. 828.

2. **NECESSITY OF NEW ARRAIGNMENT UPON CHANGE OF VENUE.**—A prisoner, who has been arraigned in the court from which the case is removed and there pleaded (which is entered upon the record), need not be arraigned nor required to plead anew in the court of the county to which the venue is changed. *Vance v. Com.*, 2 Va. Cas. 102.

3. **JOINT ARRAIGNMENT.**—Two prisoners may be arraigned together, which does not prevent their pleading separately, nor electing to be tried separately. *Whitehead v. Com.*, 19 Gratt. 640.

4. **STATUTORY PROVISION.**—Under the statute (Acts 1866-67, p. 981, § 1, now repealed by Acts 1893-94, p. 270), providing that a person indicted for an offence punishable with death, "may, upon his arraignment in the county court," elect to be tried in the circuit court, it is held that as the arraignment and pleading are distinct things, therefore, a prisoner may, upon his arraignment and without pleading, make such election. *Whitehead v. Com.*, 19 Gratt. 640.

And where the prisoner has been arraigned and has pleaded in the county court, and then elects to be tried in the circuit court, under the statute (Acts 1877-8, p. 329, § 1), now repealed, it is held, that those matters appearing in the certified record, he need not be arraigned or plead anew in the circuit court. *Sutton v. Com.*, 85 Va. 128, 7 S. E. Rep. 828.

C. **THE INDICTMENT.**—See monographic *note* on "Indictments, Presentments and Informations" appended to *Boyle v. Com.*, 14 Gratt. 674.

D. PRESENCE OF ACCUSED.

Necessity—When Inferred from Record.—Proceeding in a trial in a felony case in the absence of the prisoner is fatal to the verdict. It has been uniformly held in Virginia and West Virginia, that it is absolutely necessary to a valid conviction, that the prisoner shall be present in court when anything is done in his case in any way affecting his interest. *State v. Greer*, 23 W. Va. 801; *Sperry's Case*, 9 Leigh 623; *Hooker's Case*, 18 Gratt. 763. In *Jackson's Case*, 19 Gratt. 656, it was held that upon a trial for felony it is the right of the prisoner, a right which he cannot waive, to be present from the arraignment to the verdict. And if the evidence of a witness on the trial, which has been reduced to writing, or any part of it is read to the jury in the absence of the prisoner, it is error, for which the verdict will be set aside. If notes of the testimony are afterwards read to the jury, it is no less his privilege and right to hear the reading of it.

How much influence the reading of the testimony

may have upon the minds of the jury is impossible to determine. It is not, however, a question, whether the effect of the reading of the testimony, in the prisoner's absence, was unfavorable to him or otherwise, or how far his case was affected by it, or at all. See *Younger's Case*, 2 W. Va. 579; *Conkle's Case*, 16 W. Va. 786; *Sutlin's Case*, 23 W. Va. 771. When inferred from record, see *Lawrence's Case*, 30 Gratt. 845.

It is especially provided by statute that a person tried for a felony shall be personally present during the trial. If when arraigned he will not plead or answer, and does not confess his guilt, the court shall have the plea of not guilty entered, and the trial shall proceed as if the accused had put in that plea. Va. Code 1887, § 4017; W. Va. Code 1899, ch. 159, § 3; *Wolf v. Com.*, 30 Gratt. 833; *State v. Allen*, 45 W. Va. 65, 30 S. E. Rep. 209; *State v. Aler*, 39 W. Va. 549, 20 S. E. Rep. 585; *Sperry v. Com.*, 9 Leigh 623; *Jackson v. Com.*, 19 Gratt. 656; *Boswell v. Com.*, 20 Gratt. 860; *Hooker v. Com.*, 18 Gratt. 763; *Pifer v. Com.*, 14 Gratt. 710; *State v. Parsons*, 39 W. Va. 464, 19 S. E. Rep. 876; *State v. Conkle*, 16 W. Va. 786; *State v. Sutlin*, 23 W. Va. 771; *State v. Greer*, 23 W. Va. 800; *Younger v. State*, 2 W. Va. 579; *State v. Strauder*, 8 W. Va. 690; *Cluverius v. Com.*, 81 Va. 787; *Jones v. Com.*, 79 Va. 213. See, in general connection, *Shiffett v. Com.*, 90 Va. 386, 18 S. E. Rep. 838; *Price v. Com.*, 33 Gratt. 819.

Where at the end of the record of the proceedings of the court on the day of the conviction, it is stated, "and thereupon the accused was remanded to jail," it is conclusive that he had been personally present during all the proceedings had that day. *Cluverius' Case*, 81 Va. 787.

E. DEFENCES.

1. HOMICIDE TO PREVENT THE COMMISSION OF CRIME.

a. In Defence of Person.

(1) Self-Defence.

Reasonable Relief of Imminent Danger Necessary.—In order to justify a homicide on the ground that it was committed in self-defence, it must be shown that the defendant, at the time he caused the death of deceased, was acting under a reasonable belief that he was in imminent danger of death or great bodily harm from deceased, and that it was necessary for him to strike the fatal blow or to perform such other act causing the death of deceased, in order to avoid the death or great bodily harm which was apparently imminent. *Honesty v. Com.*, 81 Va. 283; *Stoneman v. Com.*, 26 Gratt. 887; *Valden's Case*, 12 Gratt. 717; *State v. Greer*, 23 W. Va. 800; *State v. Maier*, 36 W. Va. 757, 15 S. E. Rep. 991.

The necessity relied on to justify the killing must not arise out of the prisoner's own misconduct. *State v. Hatfield* (W. Va. 1900), 37 S. E. Rep. 626.

"But 'when one, who is without fault himself, is attacked by another in such manner or under such circumstances, as to furnish reasonable ground for apprehending a design to take away his life, or do him some great bodily harm, and there is reasonable ground for believing the danger imminent, that such design will be accomplished, he may safely act upon appearances and kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterwards turn out, that the appearances were false, and there was in fact neither design to do him serious injury nor danger, that it would be done. He must decide at his peril upon the face of the

circumstances, in which he is placed; for that is a matter, which will be subject to judicial review. But he will not act at the peril of making that guilt, if appearances prove false, which would be innocence had they proved true.' The distinction between the circumstances, under which a defendant is compelled by law to retreat before killing his assailant to preserve his own life or to prevent the infliction of great bodily harm upon him, and those, under which without retreating he may kill his assailant in self-defence, is well and sharply drawn. It is absurd to say, that when in the dead of night on the public road or street one is violently assaulted without fault on his part, he is bound to retreat before he uses a deadly weapon in defence of his person. His very attempt to retreat under these circumstances might forfeit his life. This is a very different case from the one, where a man being himself in fault enters into a combat with another. He must cease the combat and retreat, as far as safety will permit, before he is justified under any circumstances in taking life on the ground of self-defence.

"We hold the law to be, that where there is a quarrel between two persons, both being in fault, and a combat as the result of such quarrel takes place, and death ensues, in order to reduce the offence to killing in self-defence, the prisoner must prove two things: First, that before the mortal blow was given, he declined further combat and retreated, as far as he could with safety; and secondly, that he necessarily killed the deceased in order to preserve his own life or to save himself from great bodily harm. *Dock v. Com.*, 31 Gratt. 909.

"When one without fault himself is attacked by another in such a manner or under such circumstances, as to furnish reasonable ground for apprehending a design to take away his life, or do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, and the person assaulted has reasonable grounds to believe and does believe, such danger is imminent, he may act upon such appearances and may without retreating kill the assailant, if he has reasonable grounds to believe and does believe, that such killing is necessary to avoid the apprehended danger; and the killing under such circumstances is excusable, although it may afterwards turn out, that the appearances were false, and there was in fact neither design to do him serious injury nor danger, that it would be done." *State v. Cain*, 20 W. Va. 679; *State v. Abbott*, 8 W. Va. 741.

The question, whether, under all the circumstances, there are grounds for a reasonable belief in the mind of the slayer that a necessity existed for taking the life of the other, is one for the determination of the jury, and to arrive at a conclusion, it is legitimate for the jury to consider the condition of both the parties at the time. *State v. Cain*, 20 W. Va. 679.

It is impossible to lay down a general rule, applicable to all cases, as to what constitutes, as a matter of law, sufficient ground to cause a reasonable belief of imminent danger. The question depends on the facts and circumstances of each particular case. In *Stoneman's Case*, 25 Gratt. 887, it is laid down that a bare fear that a man intends to commit a felony, however well grounded, will not warrant the killing the party by way of prevention. There must be some overt act indicative of imminent danger at the time.

But an assault, without a weapon, apparently causing peril of a mere indignity to the person, or of a mere battery, from which great bodily harm cannot reasonably be apprehended, will not excuse a resistance so violent as to take the life of the assailant, even though such peril cannot be escaped by retreat, or the danger may be thereby increased.

Thus, where the prisoner insulted and threatened the deceased, and, when warned by the deceased against approaching, took hold of him, whereupon the deceased struck the prisoner a slight blow with a light cane, and the prisoner then struck the deceased a murderous blow, on the trial for the murder, it was held, that there was no legal provocation. *Honesty v. Com.*, 81 Va. 283.

2. **DEFENCE OF ANOTHER.**—The right of self-defence may be exercised in behalf of a brother, or of a stranger. What one may lawfully do in the defence of himself when threatened with death or great bodily harm, he may do in behalf of a brother; but if the brother was in fault in provoking an assault, that brother must retreat as far as he safely can, before his brother would be justified in taking the life of his assailant in his defence of the brother. But if the brother was so drunk as not to be mentally able to know his duty to retreat, or was physically unable to retreat, a brother is not bound to stand by and see him killed or suffer great bodily harm, because he does not under such circumstances retreat. *State v. Greer*, 22 W. Va. 800.

b. *Defence of Habitation and Property.*—Where a dwelling house is assailed with the intent to take life or inflict great bodily harm, the owner or occupant may lawfully use such fatal means to protect himself and family as would be necessary if met by his assailant face to face in any other place. He is not bound to retreat, but may kill his assailant if it reasonably appears to be necessary for the protection of the dwelling.

Thus, in *Stoneman v. Com.*, 25 Gratt. 887, it was held that, if the prisoner shot the deceased under a reasonable apprehension that he or some member of his family was in imminent danger, or under a reasonable apprehension that the deceased intended to burn the dwelling house of his mother, or commit some other known felony, and that there was imminent danger of such design being carried into execution, he is justified in so doing, though such danger was unreal.

Where one in defence of his habitation or property kills another, who manifestly intends and endeavors by violence or surprise to commit a forcible or atrocious felony upon either, such killing is justifiable homicide. And in such case, the justification of the prisoner must depend on the circumstances as they appear to him.

Thus, where a violent and forcible attempt on the deceased's part to break into the prisoner's tobacco house in the nighttime to remove a crop claimed by the deceased, but which had not been divided, the prisoner denying the deceased's right to any of it, was met by prisoner shooting and killing the deceased with a single barrel fowling piece, loaded with small shot, it was held that the case was one of justifiable homicide. *Parrish v. Com.*, 81 Va. 1.

3. **INSANITY.**

a. *Competency as a Defence.*—Under the plea of not guilty, it is competent for the prisoner to set up the defence of insanity at the time the assault was made

for which he is on trial. *Baccigalupo v. Com.*, 33 Gratt. 807.

b. What Such as Will Excuse.

In General.—In *Dejarnette's Case*, 75 Va. 867, it is said that insanity which will exempt a person from punishment who commits a homicide consists in such a depraved and deranged condition of the mental and moral faculties as to render him incapable of distinguishing between right and wrong with respect to that particular act, and, therefore, unconscious of its criminal nature. The insanity and the act of killing must be connected, and the latter must be the offspring of the former.

It is further held in this case that where insanity is relied on as a defence it must be proved to the satisfaction of the jury, but it is not necessary that the jury shall be satisfied of the sanity of the prisoner, beyond all reasonable doubt. See *Boswell's Case*, 20 Gratt. 860. Compare *Gruber v. State*, 3 W. Va. 699; *Davis v. United States*, 160 U. S. 469, 16 Sup. Ct. Rep. 353; 1 Va. Law Reg. 932.

Voluntary Drunkenness.—A person, whether he be an habitual drinker or not, cannot voluntarily make himself so drunk as to become, on that account, irresponsible for his conduct during such drunkenness. He may be perfectly unconscious of what he does, and yet he is responsible. He may be incapable of express malice, but the law implies malice in such a case, from the nature of the instrument used, the absence of provocation, and other circumstances under which it is done. If, however, permanent insanity is produced by habitual drunkenness, then, like any other insanity, it excuses an act which would be otherwise criminal. *Boswell's Case*, 20 Gratt. 860.

Similarly, it is held in *Willis v. Com.*, 32 Gratt. 936, that, "Voluntary immediate drunkenness is not admissible to disprove malice, or to reduce the offence to manslaughter. But where by reason of it, there is wanting that deliberation and premeditation which are necessary to elevate the offence to murder in the first degree, it is properly ranked as murder in the second degree, as the courts have frequently decided." *Com. v. Jones*, 1 Leigh 598. See, in accord, *Honesty v. Com.*, 81 Va. 209; *State v. Welch*, 36 W. Va. 690, 15 S. E. Rep. 419.

Habitual Intemperance.—A killing is not excused by the fact that defendant had for many years been accustomed to drinking heavily at times, and was drinking at the time of the offence; it not appearing that he was so under the influence of liquor that he did not know what he was doing, or right from wrong. *Hite v. Com.*, 96 Va. 489, 31 S. E. Rep. 895.

c. Burden of Proof.—Insanity, when it is relied on as a defence to a charge of crime, must be proven to the satisfaction of the jury to entitle the accused to an acquittal on that ground. The clear weight of authority is to the effect, that when insanity is set up by the defendant in a confession and avoidance, he has the burden to prove it. *Boswell's Case*, 20 Gratt. 860. See *Hite v. Com.*, 96 Va. 489, 31 S. E. Rep. 895; *Baccigalupo v. Com.*, 33 Gratt. 807.

F. EVIDENCE.

1. RECEPTION OF EVIDENCE.

a. In General.

Use of Dying Declarations.—Regularly the court should first ascertain that the deceased expected to die, before his dying declarations are permitted to be given in evidence to the jury. But if the court permits the dying declarations of the deceased to be given in evidence to the jury, reserving the question whether they are made under an expectation of

death, and it appears from the testimony they were made in expectation of death, and were therefore competent testimony, there is no error of which to complain. *Hill v. Com.*, 2 Gratt. 594.

Laying Foundation.—The testimony introduced to lay the foundation for offering the declarations in evidence may be introduced in the presence of the jury, especially if they are admonished that the evidence is addressed, not to them, but to the court. *State v. Cain*, 20 W. Va. 679.

2. PRESUMPTION AND BURDEN OF PROOF.

a. Corpus Delicti.—The *corpus delicti* consists of two fundamental facts: first, the death, and second, the existence of the criminal agency as the cause thereof. The former must be shown neither by direct proof, nor by presumptive evidence of the strongest kind, which is clearly satisfactory to the jury, and convinces them beyond a reasonable doubt. *Smith v. Com.*, 31 Gratt. 809; *Hatchett v. Com.*, 76 Va. 1026; *Sutton v. Com.*, 85 Va. 128, 7 S. E. Rep. 323; *Dean v. Com.*, 32 Gratt. 912; *Russell v. Com.*, 78 Va. 400.

b. Malice.

Presumption Arising from Mere Killing.—Malice is presumed from the fact of killing unaccompanied with circumstances of extenuation; and the burden of disproving malice is upon the accused. *Lewis v. Com.*, 78 Va. 782; *State v. Douglass*, 28 W. Va. 297; *Dejarnette v. Com.*, 75 Va. 867. See *Jackson v. Com.*, 97 Va. 762, 33 S. E. Rep. 547.

Presumption Arising from Means or Weapons Used.—Malice may be presumed from the use of a deadly weapon in the previous possession of the slayer. *Com. v. Brown*, 90 Va. 671, 19 S. E. Rep. 447.

In *King's Case*, 3 Va. Cas. 78, where defendant and deceased engaged in combat, and the first blow that was struck was given by the defendant with a deadly weapon, resulting in the death of the deceased, the law will presume malice constituting the offence of murder.

But malice is not implied from the fact that a deadly weapon was used in the killing of another, unless it first appears that the killing was wilfully or intentionally done. *State v. Cross*, 42 W. Va. 258, 24 S. E. Rep. 996.

Rebuttal of Presumption.—On a murder trial malice is presumed from the fact of killing, without proof of circumstances of extenuation, and the accused has the burden of disproving the malice. *Lewis v. Com.*, 78 Va. 782.

c. Deliberation and Premeditation.

Burden of Proof.—A mortal wound given with a deadly weapon, in the previous possession of the slayer, without any, or upon very slight provocation, is *prima facie*, wilful, deliberate and premeditated killing; and throws upon the accused the necessity of proving extenuating circumstances, as the rule of law is, that a man shall be taken to intend that which he does; or which is the immediate, or necessary consequence of his act. *Hill v. Com.*, 2 Gratt. 594.

d. Grade or Degree of Offence.

Presumption Arising from Mere Fact of Killing.—Defendant having shot deceased with a gun, after fighting and abusive language by both, an instruction that if deceased used the most grievous words of reproach, aggravated with the most provoking circumstances, and on such provocation defendant killed him with a deadly weapon, it was murder in the first degree, is error, as the presumption is that every killing is murder in the second degree, and the burden is on the prosecutor to raise it to the

first degree. *Watson v. Com.*, 85 Va. 867, 9 S. E. Rep. 418.

a. Burden of Proof.—Where homicide is proved, the presumption is, that it is murder in the second degree. If the prosecutor would make it murder in the first degree, he must establish the characteristics of that crime; and if the prisoner would reduce it to manslaughter, the burden of proof is on him. *State v. Cain*, 20 W. Va. 679; *State v. Hobbs*, 87 W. Va. 812, 17 S. E. Rep. 880; *Vance v. Com.*, 1 Va. Dec. 880, 19 S. E. Rep. 785; *Tilley v. Com.*, 89 Va. 186, 15 S. E. Rep. 526; *State v. Welsh*, 86 W. Va. 690, 15 S. E. Rep. 419; *Myers v. Com.*, 90 Va. 706, 19 S. E. Rep. 881; *Robertson v. Com.*, 1 Va. Dec. 851, 20 S. E. Rep. 802. See *Willis v. Com.*, 82 Gratt. 929.

3. ADMISSIBILITY.

a. Intent, Malice, Deliberation and Premeditation.

Previous Quarrels and Ill Feeling.—On the trial of an indictment for murder, the commonwealth's attorney, after proving the affray during which the homicide was committed, attempted to introduce testimony tending to show that the prisoner had conspired with another, on the morning of the homicide, to whip the deceased, and that an assault had been made and the deceased beaten by the prisoner about two hours earlier in the day than the time of said affray. It was held that the occurrences were so connected that the evidence was competent. *Polindexter v. Com.*, 33 Gratt. 766.

Previous Threats and Expressions of Ill Will.—Declarations of defendant just before the killing, that he felt like killing someone, are admissible to show the frame of mind of the prisoner. *Muscoe v. Com.*, 87 Va. 460, 12 S. E. Rep. 790.

But it is error for a court to admit in evidence the impersonal threats made by defendant that he intended to kill somebody before sundown, in connection with other evidence that defendant pointed out deceased as the person he would kill, and made demonstrations looking towards a difficulty with him. *Snodgrass v. Com.*, 89 Va. 679, 17 S. E. Rep. 238. See *Lewis v. Com.*, 78 Va. 732.

So statements made by a prisoner showing malevolence towards the father and family of the deceased, who was killed while attempting to assist his father in preventing an unlawful trespass of the prisoner on the lands occupied by them, are admissible to establish the maliciousness of the prisoner's conduct. *State v. Kohne* (W. Va. 1900), 87 S. E. Rep. 553.

Previous Hostile Acts.—In a prosecution for murder the state may show that the prisoner at times and places other than those charged in the indictment, attempted to kill deceased, to show defendant's felonious intent, and rebut the theory of accident. *Nicholas v. Com.*, 91 Va. 741, 21 S. E. Rep. 864.

b. Preparations.

Nature and Circumstances of the Act.—Evidence of defendant's threats to the witness of the killing, and his attempt to assault him, after the killing, was admissible to show defendant's demeanor as indicating his motive and *animus*, since he was claiming that the killing was an accident. *Snodgrass v. Com.*, 89 Va. 679, 17 S. E. Rep. 238.

c. Commission of or Participation in Act by Accused.

Motive for Others to Commit Crime.—In a trial for murder, it is proper to exclude as evidence an indictment against another person for the same offence. *Taylor v. Com.*, 90 Va. 109, 17 S. E. Rep. 812.

Threats and Admissions by Others.—It is not error to exclude testimony, offered by the prisoner, to the

effect that another and a different person from himself had made threats to kill the deceased, but before the commission of the offence with which he was charged, and immediately after the offence such other person left the country and has not since been heard from. *Crookham v. State*, 5 W. Va. 510.

d. Character.

(1) Showing Accused's Character.—Upon the trial of a person charged with the crime of murder, evidence of his good character may always be received as tending to disprove his guilt; but evidence of the ferocious, brutal, vindictive, or other dangerous character of the deceased is only admissible as part of the proof of self-defence, as tending to show the *bona fides* of the defendant's belief in the necessity of killing his assailant to save himself from death or great bodily harm. It is not error to refuse an instruction directing the latter class of evidence of character to be considered in determining generally the guilt or innocence of the accused. *State v. Morrison* (W. Va. 1901), 38 S. E. Rep. 481. See *State v. Madison* (W. Va.), 38 S. E. Rep. 492.

But where the prisoner, on a former occasion, has been charged with having murdered a person other than the one for the killing of whom he is on trial, and such former homicide is in no way connected with the other, and the prisoner has been acquitted of such former charge, it is improper for the attorney for the state, in cross-examining a witness, to propound questions or make remarks relating in any way to the prisoner's connection with such former homicide; he not having put his character in issue. *State v. Sheppard* (W. Va. 1901), 39 S. E. Rep. 676.

(2) Character of Person Assaulted.

Admissibility on Behalf of Prosecution.—On a trial for murder, it is not competent for the commonwealth to introduce evidence in chief as to the character of the person on whom the offence was committed. *Dock v. Com.*, 31 Gratt. 909; *Jackson v. Com.*, 98 Va. 845, 36 S. E. Rep. 487.

In *State v. Madison* (W. Va.), 38 S. E. Rep. 492, the law is stated to be that the bad character of a murdered man is not admissible on the trial of his murderer, where there was no physical altercation and no question of self-defence involved in the case.

E. HABITS OF ACCUSED.

Intoxication—Reformation.—Where defendant, on a trial for the murder of his wife, testifies as having written her letters in which he claimed to have reformed his habits and wished to take her to live with him, evidence that defendant was drunk on his meeting with his wife and for some time previously was admissible in rebuttal. *Reed v. Com.*, 98 Va. 817, 36 S. E. Rep. 399.

Carrying a Revolver.—Evidence tending to show that the prisoner had the legal right to carry a revolver ten months before the killing is not admissible to establish such right at the time of the killing. *State v. Kohne* (W. Va. 1900), 87 S. E. Rep. 553.

f. Personal Relations of Parties.

(1) Accused and Deceased.—In cases of homicide, where the *corpus delicti* has been proved, it is competent to show the relations of the accused and the deceased, and their state of feeling and course of conduct towards each other. Such evidence is received for the purpose of showing the motive and intent with which the act charged was done. The admissibility of such evidence is not determined by the length of time intervening between the threat, or act proved and the homicide under investigation, but the weight to be attributed to it by the jury will

be in proportion to the proximity of time, and the directness of its connection with the principal fact under consideration. *O'Boyle v. Com.*, 7 Va. Law Reg. 691.

(2) **Relation of Accused or Deceased to Third Persons.**

—On indictment for murder, where defendant testifies that he killed deceased because he had spoken insultingly of his wife, he may be asked on cross-examination whether the woman was lawfully married to him. *Watson v. Com.*, 87 Va. 608, 18 S. E. Rep. 22.

And it is not error to recall a witness who has stated that he advised defendant to claim that the killing was an accident, and ask him why he had advised him to do so, and permit him to state that it was because he was more friendly to defendant than to deceased. *Snodgrass v. Com.*, 89 Va. 679, 17 S. E. Rep. 238.

g. Motive.—A statement of accused as to his reasons for killing deceased is admissible; having been made, after the preliminary examination, to a justice of the peace, who was not the acting justice of the peace on that occasion, in reply to his question without any inducement being held out. *Elte v. Com.*, 96 Va. 489, 31 S. E. Rep. 895.

And evidence that two weeks before the homicide deceased appeared before a justice, riding a mule which the justice supposed belonged to accused's father, and that deceased had two deeds made, which were delivered for record by accused about two weeks preceding the homicide, is inadmissible to show motive. *McBride v. Com.*, 95 Va. 818, 30 S. E. Rep. 454.

However, the record of an indictment in another state against the prisoner at the time of the homicide is admissible to show the motive for resisting arrest. *Williams v. Com.*, 85 Va. 607, 8 S. E. Rep. 470.

h. Previous Attempts.—Defendant was accused of the murder of M, an invalid, who, with six others, was waylaid on a highway at midday, five being shot. Two witnesses testified that defendant had said, "M offered \$100 to have me killed on Saturday, and his bed was shot into on Sunday, but I was over in Kentucky." "Sometime after he had offered the reward to have me killed, somebody shot into his bed, but it wasn't me," and laughed. Three others testified to similar statements by defendant. It was held that it was not error to permit another witness to testify that about three weeks before the murder M's bed was fired into. *Taylor v. Com.*, 90 Va. 109, 17 S. E. Rep. 812.

i. Nature of Act and Attendant Circumstances.—The defendant was tried for the murder of a woman eight months advanced in pregnancy. The theory of the prosecution was that he had seduced her, and murdered her to avoid exposure. The prosecution offered in evidence a letter written and signed by the deceased in a name not her own, for the purpose of giving to the lady for whom deceased worked an excuse for leaving and going to the city, where she met defendant and her death. It was held that the letter was part of the *res gestæ*, and admissible. *Cluverius v. Com.*, 81 Va. 787.

j. Previous Difficulties and Circumstances Thereof.—Under an indictment for murder, evidence that a few minutes before the killing the prisoner had a quarrel with another person in another barroom, where deceased was not present and with which he was in no wise connected, is not admissible as part of the *res gestæ*. *Joyce v. Com.*, 78 Va. 287.

k. Circumstances of Conspiracy or Concerted Action.—On a trial for murder, evidence that defendant,

shortly before the killing of deceased, shot a third person, was admissible, though proving a distinct felony committed by defendant, where such shooting and the killing of deceased appeared to be connected as parts of one entire transaction. *Heath v. Com.*, 1 Rob. 735. See *Poindexter v. Com.*, 33 Gratt. 766.

In *McBride v. Commonwealth*, 95 Va. 818, 30 S. E. Rep. 454, a piece of paper was found near the body of the deceased, similar to paper used by accused in wadding his gun. A merchant, in the vicinity where people of the neighborhood made their purchases, used like paper for wrapping paper. It was held that testimony that similar paper was found in the house of one jointly indicted with the accused, together with a rope supposed to have been used in carrying away the body of the deceased, and that the house was newly scrubbed, was inadmissible, without connecting accused with the house or the other defendant.

l. Declarations, Conversations and Exclamations of Accused.

In General.—When one is charged with a crime anything he says or does voluntarily, which can have any bearing towards showing his guilt, is competent to go to the jury for what it is worth, of which the jury alone can judge. *State v. Kinney*, 26 W. Va. 141; *State v. Sheppard* (W. Va. 1901), 39 S. E. Rep. 676.

In such case it is competent to prove any actions and declarations of the prisoner, subsequent to the homicide, tending to show a lack of concern at the death of the deceased or indifference as to her fate, although such acts and declarations would not be admissible as a part of the *res gestæ*, because too remote. *State v. Sheppard* (W. Va. 1901), 39 S. E. Rep. 676.

Thus, evidence of a conversation by accused, relevant to the issue, is admissible, though witness did not hear all, the conversation being such as amounted to nothing. *Sutton v. Com.*, 85 Va. 128, 7 S. E. Rep. 323.

And in *State v. Morgan*, 35 W. Va. 260, 13 S. E. Rep. 385, an exclamation made by a person at night, while in bed, not addressed to any one, was offered against her in evidence on trial for murder, and objected to, because made in her sleep. It not appearing whether the person was asleep or awake, it was properly allowed to go to the jury.

Regarding Deceased's State of Health.—It is competent for the state to show on a murder trial, that the defendant a short while before the death of the deceased stated to some of his relations that the deceased had heart disease and was likely to die at any time. *Nicholas' Case*, 91 Va. 741, 21 S. E. Rep. 364.

Self-Serving Declarations.—Self-serving declarations made by the prisoner to another person in the absence of the person slain on the night of the murder but before it was committed, a mile and a quarter from the place of the killing, are inadmissible. *Crite v. Com.* (Va. 1881), 1 Va. Dec. 423, Va. Law Jour. 1881, p. 568.

m. Declarations of Deceased, Other Than Dying Declarations.—Declarations made by deceased, on the day preceding the homicide, as to where he was going that night, and what he proposed doing on the day following, defendant not being present, are inadmissible. *McBride v. Com.*, 95 Va. 818, 30 S. E. Rep. 454.

*n. Circumstances.**(1) Contemporaneous.*

In General.—In an indictment for murder, minute and remote circumstances may be given in evidence on the part of the prosecution. *Mendum v. Com.*, 6 Rand. 704.

And the state may properly be allowed to prove as part of the *res gestæ*, that on the day of her death the deceased was on her way to a neighbor's house, near which her body was found. *Tilley v. Com.*, 89 Va. 136, 15 S. E. Rep. 526.

Declarations and Admissions in General.—A party on trial for murder is entitled to prove his declarations, made at the time of the shooting which caused the death of the party killed. Such declarations made at that time, are part of the *res gestæ*. *State v. Abbott*, 8 W. Va. 741.

(2) Subsequent.

In General.—On a murder trial evidence is admissible that when deceased was killed two persons ran rapidly away in the same direction, and that one said, as they ran past a bystander, "Will, you have killed him." *Briggs v. Com.*, 82 Va. 554.

Declarations of Accused.—On the trial of a prisoner for murder, a statement made by him to a person, a few minutes after the homicide was committed, and near the place, and in the presence and hearing of eyewitnesses of the homicide, who were not introduced as witnesses by the commonwealth, should be admitted as evidence at the instance of the prisoner, as part of the *res gestæ*. *Little v. Com.*, 25 Gratt. 921.

Declaration of Person Killed or Assaulted.—In *Hill v. Com.*, 2 Gratt. 594, it was left a query whether declarations made by the deceased immediately after the wound is inflicted, and before he has had time to fabricate a story, and when the *lis mota* did not exist, may not be given in evidence as part of the *res gestæ*.

And where in a trial for shooting with intent to kill, it appeared that complainant was alone in his store, when a man came in and shot him through the head and complainant immediately ran out of his store to a door eighty feet away, and, after knocking and being admitted, said that defendant had shot him, it was held that the declaration was part of the *res gestæ* and admissible. *Kirby v. Com.*, 77 Va. 681.

So the testimony of a witness, on a trial for murder, of a charge made by deceased while in the agonies of death, which quickly followed, in the presence of the accused, her husband, that he had killed her with poison mixed in whiskey administered to her a short time before, is admissible: first, as part of the *res gestæ*, second, as a dying declaration, third, as a statement made in the presence of the accused, and not denied by him; he rushing from the room precipitately after it was made. *Puryear v. Com.*, 83 Va. 51, 1 S. E. Rep. 512.

o. Means Used and Cause of Death.

(1) Instrument Used.—On a trial for murder by shooting, evidence in relation to the examination of guns in the neighborhood, to ascertain whether any of them carried a ball of the size of the one found in the body of the murdered man, is admissible. *Dean v. Com.*, 32 Gratt. 912.

(2) Cause of Death.—Upon a trial for murder, it having been proved that the prisoner had beat the deceased, the complaint of the deceased of pain suffered by her within two hours of the beating, is competent evidence. *Livingston v. Com.*, 14 Gratt. 592.

p. Capacity to Commit and Responsibility.

Intoxication.—While voluntary intoxication is no excuse for a crime, evidence of it is admissible, where the question is between murder in the first and second degree, to enable the jury to determine whether there was premeditation or not on the part of the accused. *Willis v. Com.*, 33 Gratt. 929; *State v. Robinson*, 20 W. Va. 713.

q. Passion and Provocation.

Cooling Time.—Where, on a trial for homicide, threats by deceased against accused, communicated to the latter, have been admitted in evidence; defendant, on a plea of self-defence, may also prove like threats not communicated to him, for the purpose of showing the state of feeling of deceased towards him. *State v. Abbott*, 8 W. Va. 741.

*r. Self-Defence.**(1) Character and Habits.*

Manner of Proving Character.—Where a case of self-defence has been *prima facie* made out, it is admissible to introduce evidence of the dangerous character of the deceased, but this must be proved by evidence of his general reputation, and not by the opinions of witnesses. *Harrison v. Com.*, 79 Va. 374.

*(2) Intent.**(a) Previous Threats.*

Uncommunicated Threats.—Evidence of uncommunicated threats by deceased is admissible to show his mental attitude. *State v. Evans*, 33 W. Va. 417, 10 S. E. Rep. 792.

Accompanied by Proof of Communicated Ones.—Where defendant shot and killed deceased in a brawl in her own house of ill fame, evidence offered by defendant that, several months before, deceased had assaulted her with intent to commit rape, was properly excluded, being in no way connected with the homicide. *Hodges v. Com.*, 89 Va. 265, 15 S. E. Rep. 513.

Communicated Threats.—Threats by deceased communicated to the prisoner directly or indirectly or through others, are admissible to show the motive of the killing. *Lewis v. Com.*, 78 Va. 782.

And in a prosecution for homicide, evidence is admissible of communicated threats of the deceased, as calculated to shed light upon the mental attitude of defendant towards deceased. *State v. Evans*, 33 W. Va. 417, 10 S. E. Rep. 792.

(3) Sufficiency of Showing.—On a trial for murder, where the evidence repelled the idea of self-defence, the court instructed the jury, that if they believed from the evidence that the deceased and the prisoner were engaged in a sudden and mutual combat, in which no weapon dangerous in itself was used, and during the progress of the fight the prisoner struck the deceased an ordinary blow or blows with his fist or feet, without any intention either to kill the deceased or to do him great bodily harm, but to repel his attack, and that the death of the deceased was caused thereby accidentally and apart from the prisoner's intention, then the prisoner is guilty of involuntary manslaughter; it is not erroneous. *Bull v. Com.*, 14 Gratt. 613.

s. Dying Declarations.

(1) Grounds of Admissibility in General.—"The principle upon which, in cases of homicide, the dying declarations of the deceased are admitted in evidence, is that they are declarations made in extremity, under a sense of impending death, and, therefore, when every motive to falsehood is silenced. It is not necessary, however, that they should be stated, at the time, to be so made. It is

enough if it appears that they were made under that sanction; and, when this is shown, the length of time between the declarations and the death of the declarant is an immaterial matter." *Hall v. Com.*, 89 Va. 177, 15 S. E. Rep. 517, citing the principal case; *Bull v. Com.*, 14 Gratt. 618; *Vass v. Com.*, 3 Leigh 786. The principal case is cited with approval by CHIEF JUSTICE FULLER in *Mattox v. U. S.*, 146 U. S. 145, 13 Sup. Ct. Rep. 54; also, by the same eminent jurist in *Carver v. U. S.*, 160 U. S. 554, 16 Sup. Ct. Rep. 388. See further, *King v. Com.*, 2 Va. Cas. 78; *Hill v. Com.*, 2 Gratt. 594; *Puryear v. Com.*, 83 Va. 51, 1 S. E. Rep. 512; *Jackson v. Com.*, 19 Gratt. 656. The principal case is reported in 21 Am. Dec. 330. See in support of this doctrine, *State v. Burnett (W. Va.)*, 35 S. E. Rep. 983; *State v. Cain*, 20 W. Va. 679; *State v. Thompson*, 21 W. Va. 741.

And, being a substitute for sworn testimony they must be such narrative statements as would be admissible had the dying person been sworn as a witness. If they relate to facts to which the declarant could have thus testified, they are admissible. Mere declarations of opinion, which would not be received if the declarant were a witness, are inadmissible. *State v. Burnett (W. Va.)*, 35 S. E. Rep. 983.

(2) Condition of Person Making Declaration.

Necessity of Being Made under Impending Death.—On a trial for murder, where the state seeks to introduce dying declarations, it must be shown that, at the time the declarations were made, deceased not only evidently considered himself in imminent danger, but that he evidently believed he was without hope of recovery. *King v. Com.*, 2 Va. Cas. 78.

(3) Necessity of Deceased Stating His Belief as to Impending Death.—The proof of the deceased's expectation of death is not confined to his declarations, but the fact may be satisfactorily established by the circumstances of the case. *Hill's Case*, 2 Gratt. 594.

And where the deceased, when shot, during the afternoon, stated to his wife: "It is a death shot this time," and that he wanted to go to heaven when he died, but did not expressly say that he believed he was going to die; and deceased then stated to others that defendant shot him, and the circumstances of the shooting, but did not say anything about dying; and deceased died the following night, it was held that his statements were properly received as dying declarations. *Hall v. Com.*, 89 Va. 171, 15 S. E. Rep. 517.

(4) Hopes and Expectation of Recovery by Deceased.—In a case of murder, declarations of the deceased when made *in extremis* (he being conscious of his situation), are admissible evidence, although the witness who deposed to the declarations was rather of opinion that the deceased thought he would recover, other witnesses having deposed that he was conscious he could not. *Gibson v. Com.*, 2 Va. Cas. 111.

But in *Jackson v. Com.*, 19 Gratt. 656, a person who was mortally wounded seemed impressed with the belief that he must soon die of his wounds, and so expressed himself. In preparation for death, he made his will; but afterwards, on awakening from sleep and being told that he had slept, he replied, "Yes, who knows but I may get well." It was held that there was in his mind the existence of such a probability of recovery as to exclude the admission of his statements in evidence as such dying declarations. *Jackson v. Com.*, 19 Gratt. 656. See *Swisher v. Com.*, 26 Gratt. 968.

(5) Making and Form of Declaration and Circumstances Attendant on Making.

In General.—On the issue of the admissibility of dying declarations, consisting of replies by the deceased in answer to the inquiry, "who did the shooting?" it is no objection that such questions are leading. *Vass v. Com.*, 3 Leigh 786.

(6) Subject-Matter and Relevancy of Declaration.

Relevancy to Homicidal Act.—A witness was asked, "after the deceased declared he was dying, did he make any declaration as to how he received the wounds and by whom they were inflicted? and, if so, state what those declarations were,"—to which the answer was, "none, except he said it was hard to die by the hands of another and leave his family." The court held that it was error to admit such declaration as part of the *res gestae* because too remote, or as a dying declaration, because the death of the deceased was not the subject of the charge, and the circumstance of the death was not the subject of the declaration. *Crookham v. State*, 5 W. Va. 510.

(7) Competency of Declaration as Evidence.

Completeness.—If it appears that the declarations were designed by the dying man, to be connected with and qualified by other statements and with them to form an entire complete narrative, and before the proposed disclosure was fully made it had been left unfinished; such partial declaration will not be competent evidence. But a person, having received a mortal wound, and being unable in consequence of the wound, for the greater part of the interval which elapsed before his death, to speak at all, and, when able to speak, only able to utter a short word or two, yet retaining his perfect senses and understanding, and being under apprehension of his approaching death, was asked: "Did A. strike you first?" to which he answered, "Yes, sir." "Did A. stab you?" to which he also answered, "Yes, sir." "Do you think you are going to die?" to which he again answered, "Yes, sir." He was then asked a fourth question, but it did not appear what it was, or whether it had any relation to the subject, or at what interval after the first three it was put,—it was held that these were such death bed declarations, being distinct and competent in themselves, as were competent evidence on the trial of A. for the homicide. *Vass v. Com.*, 3 Leigh 786.

(8) Proof and Effect of Declaration.

Question for Court.—It is the duty of the court, in the first place, to determine the admissibility of declarations sought to be introduced as dying declarations. *Vass v. Com.*, 3 Leigh 786; *Hill v. Com.*, 2 Gratt. 594; *Bull v. Com.*, 14 Gratt. 618.

Question for Jury.—But it is not for the jury to determine upon the weight or credibility of dying declarations. *Vass v. Com.*, 3 Leigh 786.

t. Proceedings at Inquest.

Admissibility in General.—Proceedings before a coroner are generally inadmissible as evidence at the trial of an indictment for murder. *Whitehurst v. Com.*, 79 Va. 556.

Testimony and Statements of Accused.—No statement made by one accused of murder, while a witness testifying at the coroner's inquest can be used against him on his trial; but anything said by him before such examination as a witness is competent, if relevant. *State v. Hobbs*, 37 W. Va. 812, 17 S. E. Rep. 380.

Testimony of Witnesses—At Another Trial.—A deposition made by a witness at the coroner's inquest at the trial of another person, for the murder, is ad-

missible in evidence, to contradict such witnesses. *Wormeley v. Com.*, 10 Gratt. 658.

In this connection, it was held in *Crite v. Com.* (Va. 1881), 1 Va. Dec. 423, Va. Law Jour. 1881, p. 568, that on a trial for murder, the evidence of a witness taken down at a coroner's inquest, which witness was not recognized, and who has since removed beyond the jurisdiction of the court, and whose efforts were made by the prisoner for that purpose, cannot be read. It was left a question whether it could be read if the witness had died.

u. Introduction of Circumstances Proven in Trial of Other Persons.—Where two persons are guilty at the same time and place, and apparently in the same transaction or proximately so, evidence as to the circumstances of the killing of one is admissible on the trial of an indictment for the killing of another. *Heath's Case*, 1 Rob. 735.

4. WEIGHT AND SUFFICIENCY.

a. Corpus Delicti and Identity of Deceased.

(1) Corpus Delicti.

In General—Of What it Consists.—The *corpus delicti* consists of two fundamental facts: first, the death, and second, the existence of the criminal agency as the cause thereof. The former must be shown either by direct proof, or by presumptive evidence of the strongest kind, which is clearly satisfactory to the jury, and convinces them beyond a reasonable doubt. Thus, in *Smith's Case*, 21 Gratt. 809, on a trial for murder, it was held, that the death of the person charged to have been murdered, must be proved by the most cogent and irresistible evidence, either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead, or by proof of criminal violence adequate to produce death and which accounted for the disappearance of the body.

This principle is well illustrated in *Flanagan v. State*, 26 W. Va. 116, a prosecution for the murder of a woman, alleged to have been committed by burning the house in which she lived; it appeared that the house was a small log house one quarter of a mile from the next neighbor, that the fire might easily have been caused by the coals rolling over the hearth; that the door of the house was securely locked from the end side; that snow that fell immediately before and after the fire bore no trace of man or beast; that defendant, who had been with the deceased the day before the fire, was not absolutely proved to have been any where in the vicinity of the house at the time the fire occurred; and that the defendant had no motive in killing deceased. There was no sign of violence of the remains of the deceased. It did not appear that any property of the prisoner was found on the burnt premises, nor that anything belonging to deceased was found in defendant's possession. The appellate court held that the verdict of guilty would be set aside.

(2) Identity of Deceased.—In a trial for murder the proof must show that the body found is the body of a person for whose murder the person has been indicted and is being tried. *Smith v. Com.*, 21 Gratt. 809.

And the general rule is that the *corpus delicti* taken as a whole may be shown by any evidence which satisfies the jury, beyond a reasonable doubt, whether it be direct or circumstantial. But this is qualified and limited where the rule that defendant's confession taken alone and without corroborating proof of the *corpus delicti* is not sufficient to support a conviction. *Smith v. Com.*, 21 Gratt. 809.

b. Elements of Offence in General.

(1) Malice.—Where there was provocation at the time by the deceased striking the prisoner's father, sufficient to reduce the crime to manslaughter, but express malice was proved by declarations of the prisoner before the crime and afterwards, but before the wound was thought fatal, he was properly convicted of murder. *Bristow v. Com.*, 15 Gratt. 634.

(2) Deliberation and Premeditation.—A father was informed on the evening of one day, that his son a small boy, had been wantonly whipped by a man. He met the man on the evening of the next day, and then with his fist and feet, beat and stamped him, while he was unresisting, with so much violence that the man died from the effects of the beating on the next night. The court held that this was murder, there being evidence of deliberation. *McWhirt's Case*, 3 Gratt. 594.

c. Cogency of Particular Facts.—Where the court charges that defendant is considered innocent until he is proven guilty to the exclusion of every reasonable doubt, it is not error to refuse to charge that no inference could be drawn from the defendant's failure to introduce evidence to account for his whereabouts at the time of the murder, though there was evidence that he told a witness that he was at the time "waiting on some sick folks on the other side, in Kentucky," or from his failure to explain other such circumstances surrounding him. *Taylor v. Com.*, 90 Va. 109, 17 S. E. Rep. 812.

d. Participation in Crime Committed by Another.—Where it appears that the accused was an habitual companion in crime of a person, that a policeman, in attempting to arrest such person and a companion at night, was killed by the companion; that accused was in company with such person a few minutes before the killing; that his burglar's nippers were found on the spot where the killing occurred; and that he was a fugitive from justice,—a verdict of guilty of murder in the second degree will not be set aside. *Williams v. Com.*, 85 Va. 607, 8 S. E. Rep. 470.

And in *Lashley v. Com.*, 88 Va. 400, 13 S. E. Rep. 803, one witness testified that on the return of the defendant, the wife of the deceased, with a person by the name of L, from a dance where they had clandestinely gone, defendant induced her husband to go to the door where L shot him. Another witness testified that defendant told her that she got L to kill her husband. There was evidence that L had threatened to kill the deceased, with whom he had been on bad terms, growing out of the intimacy of L and the defendant. Upon these facts it was held that the evidence warranted a conviction.

e. Identification by Deceased and Others.—In *Taylor v. Com.*, 90 Va. 109, 17 S. E. Rep. 812, there was evidence that the deceased, the murdered man, had \$1,000 at the time of the murder, part of which was in a bag in the wagon and the balance on his wife's person, all of which was taken; and defendant made a statement indicating that he shot into M's bed a few days before the murder; that he asked a witness how he would like to have the deceased put out of the way; that he proposed to two witnesses several times to go with him and kill the deceased and his brother, and said that if they would not go with him he would go alone; that he and the F. brothers were seen the night before going with Winchester rifles towards the place which the murder was committed; that cartridge shells fitted the rifles that were found there; that deceased's sister-in-law,

who was with deceased and his brother when they were killed, and who had known defendant for fifteen years, saw defendant and the F. brothers "from the breast up"; that they had veils over part of their faces; that they spoke to her and she recognized them; and that after the murder defendant concealed himself for a number of days and finally escaped to Florida. The court held that a verdict of murder in the first degree was supported by the evidence. See *Sutton's Case*, 85 Va. 128, 7 S. E. Rep. 323.

f. Sufficiency of Circumstantial Evidence.

In General.—If, on a trial for murder, the evidence is wholly circumstantial, but as to time, place, motive, means, and conduct it concurs in pointing to the accused as the perpetrator of the crime, he may properly be convicted. *Dean v. Com.*, 33 Gratt. 912.

The jury must believe from such evidence, to a moral certainty and beyond a reasonable doubt, that the defendant is guilty of the crime alleged against him; and the jury may be properly so instructed; and that they have the right to convict upon such evidence in a case in which the evidence is circumstantial, if from it they so believe the defendant is guilty, and, further, that such evidence is not only competent, but is sometimes the only mode of proof in criminal cases. *State v. Sheppard (W. Va.)*, 89 S. E. Rep. 676. See *Sutton v. Com.*, 85 Va. 128, 7 S. E. Rep. 323; *Russell v. Com.*, 78 Va. 400; *Hatchett v. Com.*, 76 Va. 1036; *Dean v. Com.*, 33 Gratt. 912; *Fincham v. Com.*, 83 Va. 689, 3 S. E. Rep. 343; *Cluverius' Case*, 81 Va. 787.

Conclusiveness of Particular Circumstances.—Where prisoner was in his shop cutting a child's hair, when deceased came to the door and made a remark to some one in the shop, and prisoner replied insultingly, whereupon deceased said, "I can whip you," threw off his coat, advanced two steps towards the prisoner, and threw up his right hand, upon which the prisoner, "to scare him," advanced at the deceased with the scissors in his left hand, and, on a general scuffle ensuing, it subsequently appeared, without any one else having struck deceased, that he had been mortally wounded by a stab in the heart. It was held that the evidence would support a verdict of murder. *State v. Smith*, 24 W. Va. 814.

g. Motive Accompanied by Other Evidence.—In *Tucker's Case*, 88 Va. 20, 18 S. E. Rep. 208, accused and deceased had long been inimical, and had made frequent threats to kill one another. On the day of the homicide, both were seen going towards an orchard, part of which each possessed. The former with his gun, two children aged ten and twelve, respectively, a sled and horse, was going for apples. The latter, also with his gun followed at no great distance, and a few hours later was found near the fence of the orchard dead, with his head crushed and back pierced by a bullet. A commonwealth's witness testified that on that day from mountains three-quarters of a mile off, he heard accused's voice swearing, in the orchard; saw smoke arise; heard report of gun; and later a second shot, and immediately a man ran and disappeared in the orchard. The children, for the defence, testified that they were with accused; that he did not shoot, but that some unseen person fired twice at him, one ball passing through his hat, the other through his shirt; that he did not hear of the homicide for several hours, and before hearing had started for a warrant to arrest deceased. It was held that the evidence was sufficient to warrant a verdict of guilty

of murder in second degree. See *Tilley v. Com.*, 90 Va. 99, 17 S. E. Rep. 895, reversing *Tilley's Case*, 89 Va. 186, 15 S. E. Rep. 526. See also, *Nicholas' Case*, 91 Va. 741, 21 S. E. Rep. 364.

And where a defendant, indicted for murder, was shown to have had hard feelings towards the deceased and to have uttered threats against him, and defendant's shoes exactly fitted tracks leading from the house of deceased on the night of the homicide, and defendant seemed embarrassed when arrested and asked to take off his shoes, it was held that a verdict of guilty would not be disturbed by the supreme court. *Russell v. Com.*, 78 Va. 400; *Lewis v. Com.*, 81 Va. 416. See *Cluverius' Case*, 81 Va. 787.

Upon the facts presented in *State v. Sheppard (W. Va.)*, 89 S. E. Rep. 676, it was also held proper to show, against a prisoner charged with having murdered his wife, that the deceased had some property; that they had been married but a short time; that he had stated, prior to the marriage, that if she disposed of her property he would not have her; that he had been displeased after the marriage because of her useless expenditure of money; that he had used language after the marriage importing that her property was one of the inducements to the marriage; and that he had stated before the homicide that he intended to get shut of her child, and, if he could not do that, he would get shut of both of them,—it being shown that the child was murdered at the same time, for the purpose of showing a motive for, and an intention to commit, the crime; and how much weight such facts and circumstances, taken in connection with all the other evidence in the case, are entitled to, is for the determination of a fair and impartial jury, duly impressed with a sense of their responsibilities and duties.

h. Confession Accompanied by Other Evidence.—In *Cash v. Com.*, 3 Va. Dec. 1, 20 S. E. Rep. 893, the evidence showed that defendant was present at a murder committed during a drunken brawl; that the murdered man was struck with a blunt instrument, and the accused was seen at the time and place of the murder with a piece of rail; that, on his way home that night, the accused said not to mind about "the murdered man," that he had been bulldozing around there long enough, but "I've fixed him to-night"; and that the accused admitted to his brother that he struck deceased. The court held that a verdict of guilty of voluntary manslaughter, and an imprisonment for five years, would not be set aside.

i. Threats and Expressions of Ill Will Accompanied by Other Evidence.—Where a defendant, indicted for murder, was shown to have had hard feelings toward deceased and to have uttered threats against him, and defendant's shoes exactly fitted tracks leading from the house of deceased on the night of the homicide, and defendant seemed embarrassed when arrested and asked to take off his shoes, it was held that a verdict of guilty would not be disturbed by the supreme court. *Russell v. Com.*, 78 Va. 400. See *Lewis v. Com.*, 81 Va. 416.

j. Cause of Death.

(1) Wounds.—On an indictment for murder, a physician testified that he had examined deceased, and thought death resulted from wounds which he had found on his head. A witness testified, that defendant confessed to him that, with others, he went to deceased's store, and struck him on the head, and killed him, and that a companion threw a

mattress on him and ignited it. He also testified that defendant stated that, after the mattress was fired, he heard deceased groan, but it appeared that defendant was at the time one-third of a mile away, and with the wind blowing towards deceased. It was held that the jury were justified in finding that death was caused by the wounds on the head. *Curtis v. Com.*, 87 Va. 589, 18 S. E. Rep. 73.

(2) **Poison.**—In *Hatchett v. Com.*, 76 Va. 1026, a defendant was indicted for the murder of Y by poison. There was no post-mortem, and no analysis of the contents of the deceased's stomach, or of the vessel which contained the liquor administered; or sufficient proof that the accused administered it, or that he knew that it contained the poison, and that there was any motive or provocation for the deed. The appellate court held that the verdict of guilty should be set aside and a new trial granted the accused.

k. Capacity to Commit and Responsibility.

Insanity.—Insanity, when it is relied on as a defence to a charge of crime, must be proven to the satisfaction of the jury to entitle the accused to an acquittal on that ground. If, upon the whole evidence, the jury believe he was insane when he committed the act they will acquit him on that ground, but not upon any fanciful ground, that though they believe he was then sane, yet, as there is a rational doubt of such sanity, he is therefore entitled to acquittal. *Boswell v. Com.*, 20 Gratt. 860.

Neither will a conviction of murder in the first degree be set aside on the ground of the lack of understanding of the accused, although several witnesses spoke of him as hardly up to the average in mental capacity and one of the witnesses for the defence, who had employed him for four years just previous to the murder, testified that he exercised very good judgment in caring for his own interest, and other witnesses gave similar evidence. *Taylor v. Com.*, 1 Va. Dec. 817, 19 S. E. Rep. 789.

l. Excuse or Justification.

Defendant's Statement Affected by Other Evidence.—In *Howell v. Com.*, 26 Gratt. 995, the defendant, a strong man in the prime of life, claimed that, while he was at work with a small chop axe in his mill, the deceased, a delicate boy, fifteen years old, came into his mill and came towards him with a pocket knife open in a threatening attitude, whereupon defendant struck him with the axe, knocking him to the lower floor of the mill; defendant immediately gave the alarm, made no effort to escape and surrendered himself. It was shown that defendant had complained of deceased's treatment of his children at school and threatened "to get him yet." Minor circumstances tended to contradict defendant's account of the trouble. It was held that a conviction of murder in the first degree was justified by the evidence. See *Hite v. Com.*, 96 Va. 489, 31 S. E. Rep. 895.

Degree of Proof Required.—Upon a trial of an indictment for shooting with an attempt to kill, if the prisoner claims, by way of defence, that the shooting was done in self-defence he must prove this by preponderance of evidence. *State v. Jones*, 20 W. Va. 764; *State v. Hatfield* (W. Va. 1900), 37 S. E. Rep. 626.

And if there be in the opinion of the jury, a substantial conflict in the evidence or circumstances, as to whether the killing was done in self-defence, and the circumstances of other evidence preponderate in favor of self-defence, or if it was equally balanced as to the killing being done in

self-defence, the jury ought not to convict either of murder or manslaughter. *State v. Zeigler*, 40 W. Va. 593, 21 S. E. Rep. 763.

m. Accident and Misfortune.—In *Roadcap v. Com.*, 88 Va. 896, 14 S. E. Rep. 625, on a prosecution for shooting one M, in attempting to shoot one R under the Va. Code 1887, § 3672, making it a crime "if any person, in the commission of, or attempt to commit, a felony, unlawfully shoot, stab, cut or wound another person," where the evidence of the commonwealth shows when accused attempted to shoot R he was grabbed by M for the purpose of preventing the shooting, that M in this trouble caught hold of the pistol, and accidentally caused it to go off, and wound him, a conviction was held not to be warranted.

And it should be noted that the defence of accidental killing is a denial of criminal intent, and throws upon the state the burden of proving such intent beyond a reasonable doubt, and the accused is not required to sustain such defence by a preponderance of testimony. *State v. Cross*, 42 W. Va. 253, 24 S. E. Rep. 996.

n. Principals and Accessories.—In a prosecution for murder, it appeared that deceased, who had been quarreling with defendant and his brother, advanced on the defendant with a stick, the latter retreating at some distance when the deceased struck him with the stick knocking him down. At this moment, defendant's brother came up from the rear and stabbed deceased. The evidence did not warrant a verdict of guilty, since there was no proof that defendant aided or abetted in the killing. *Reynolds v. Com.*, 33 Gratt. 834.

And it is held that where, although A was present when B killed C, there is no proof of A's having aided and abetted, A's conviction cannot be sustained. *Kemp v. Com.*, 80 Va. 443.

o. Degree of Homicide.

(1) **In General.**—Where the evidence sufficiently tends to show that the prisoner induced a chance quarrel, and concluded it by advancing upon his adversary, and striking him a mortal blow with a deadly weapon with which he had previously armed himself, it is for the jury to decide upon the character of the provocation, or whether the offence is manslaughter or murder in the second degree; and, if the record does not disclose any improper instructions upon the subject which the appellate court cannot review, it will not reverse the decision of the circuit court overruling a motion, to set aside the verdict, and grant a new trial. *State v. Scott*, 86 W. Va. 704, 15 S. E. Rep. 405.

(2) **Degree of Murder.**

(a) **First Degree.**

Nature of Means or Instrument Used.—A verdict of murder in the first degree was found where the facts showed a quarrel of words, renewed twenty minutes later by the deceased, who came towards defendant with a cane, when defendant killed deceased by striking him two severe blows on the head with a stick of moderate size, which defendant took from a woodpile as deceased came towards him; there being much larger and more formidable sticks which defendant might equally well have used. In such case a new trial should be ordered. *McDaniel v. Com.*, 77 Va. 281.

In *Weatherman v. Com.*, 1 Va. Dec. 819, 19 S. E. Rep. 778, defendant who had been drinking, came home, called for his pistol, and not getting this, threatened his wife with a large knife, which she got and hid. He then got an axe, and inflicted two

wounds, from which she died. He was not on good terms with her, and did not show signs of being very drunk. It was held that a verdict of murder in the first degree was justified. *Davis v. Com.*, 80 Va. 122, 15 S. E. Rep. 268.

Threats and Previous Attempts.—On an indictment for murder it appeared that during a quarrel between defendant and deceased, the latter spoke insultingly of defendant's wife, and called defendant a thief, murderer and a fugitive from justice; and defendant procured a gun and followed deceased who had fled, declaring that he would kill him; that deceased secreted himself in the house, and defendant waited outside with his gun for him all night; and on another occasion he sought deceased out, declaring an intention to kill him, that about four weeks after the quarrel, while deceased was in the house of his former wife, quarreling with her, defendant went there and killed him. Under deceased was found an old, unused and unloaded pistol, which could not have been used; and defendant testified that when he shot deceased, the latter was down on him with a pistol, but he was contradicted by other witnesses. It was held that the court properly refused to set aside the verdict of murder in the first degree. *Watson v. Com.*, 87 Va. 608, 18 S. E. Rep. 22.

Provocation or Extenuating Circumstances.—Upon the refusal of the trial court to set aside a verdict finding defendant guilty of murder in the first degree, the evidence was certified pursuant to the Va. Code 1887, § 2484, to be considered as upon a demurrer to the commonwealth's evidence. The testimony of an eyewitness and decedent's dying declarations were to the effect that decedent was a youth, living in a store; that defendant's hired boy delivered to his master's wife a piece of paper, found on decedent's counter, bearing a note. The paper was not signed, and bore no address. Several days after defendant's wife had called at the store, and had been told by decedent the writing was not intended for her, and that he had never written her a line in his life, and that he was sorry she had thought so, defendant appeared at the store, and was given the same explanation; but he cursed and abused decedent, and declared, upon being requested to leave, that he would not go, whereupon decedent threw a two pound weight at him. Defendant then drew a pistol and shot decedent in the back, while he was crouching down behind the counter. Decedent subsequently shot at defendant as he was leaving the store, but without effect. It was also shown that defendant had threatened to shoot decedent on sight, and had inquired for him at the store several times before finding him. It was held by the supreme court that the lower court properly refused to set aside the verdict. *Gaines v. Com.*, 88 Va. 682, 14 S. E. Rep. 375.

(b) **Second Degree.**—In *Slaughter v. Com.*, 11 Leigh 681, the prisoner having conceived and declared a design to kill P, they met afterwards in front of the prisoner's house and a quarrel ensued, in which accused gave the first offence; P proposed a fight, upon which the accused retired for a brief time into his house, armed himself with a loaded pistol which he concealed in his pocket and instantly returned so armed to the scene of the quarrel; then P threw a brick bat at accused which did not hit him, but falling short of him broke, and a small fragment struck the child of the accused, standing within his own door, who cried out; and accused hearing his child crying, but without looking to see whether

he was hurt or not, exclaimed: "He has killed my child and I will kill him," advanced towards P, deliberately aimed and fired the pistol at him as he was retreating with his face towards accused; and the shot took effect and killed P. Upon trial of indictment against accused and a verdict of guilty in the second degree, it was held that the jury might well impute his killing to the previous malice and not to the sudden provocation of P's assault, therefore the verdict was right.

And where defendant and others were on the streets of a town at night, and deceased, who was not a police officer of the town, but a county constable without warrant or badge, arrested defendant, who resisted and denied deceased's right to arrest him, defendant broke loose from deceased, and retreated a short distance, fired at and killed deceased and fled, it was held that a verdict of murder in the second degree should not be disturbed. *Briggs v. Com.*, 82 Va. 554. See in this connection, *Shipp v. Com.*, 86 Va. 746, 10 S. E. Rep. 1065; *Hodges v. Com.*, 89 Va. 265, 15 S. E. Rep. 518; *Snodgrass v. Com.*, 89 Va. 679, 17 S. E. Rep. 238; *Vance v. Com.*, 1 Va. Dec. 830, 19 S. E. Rep. 785; *Robertson v. Com.*, 2 Va. Dec. 142, 23 S. E. Rep. 359.

(3) **Degree of Manslaughter.**—During an election, defendant accused deceased of fraud, whereupon a fight ensued; in two days thereafter deceased published a card in a paper edited by him, applying opprobrious epithets to defendant. The latter being informed of this, stated to several persons his intention to get even with deceased, saying that they could not live in the same town a day longer; not less than three hours before the shooting he stated that deceased would have to leave town, the "sooner the better." Defendant, seeing deceased in the office which he had entered went out, going up the street; and the deceased soon after left the office and went up the same street where he met the prisoner, and was shot by him. In a dying declaration the deceased said that he did not have a pistol, and had made no assault on the prisoner before the firing commenced. Four shots were fired and four chambers of the defendant's pistol were found empty. Defendant was found to be shot in the wrist and declared that the deceased did it, the latter denying that he had a pistol, and no weapon could be found on him. It was held that a verdict of manslaughter was justified. *Clark v. Com.*, 90 Va. 360, 18 S. E. Rep. 440. See *Byrd v. Com.*, 89 Va. 536, 16 S. E. Rep. 727; *Gray v. Com.*, 92 Va. 772, 22 S. E. Rep. 858.

(4) Assault with Intent to Kill.

Admissions and False and Improbable Statements Accompanied by Other Evidence.—While A and B were fighting and B was on top of A, the latter's son struck B with an iron weight and ran, and while running he was shot by defendant who remarked that he shot at the rascal to kill him. It was held that a verdict of guilty of an attempt to kill was justified. *Miller v. Com.*, 2 Va. Dec. 47, 21 S. E. Rep. 499.

p. Question for the Jury.—Whether a homicide is voluntary manslaughter or homicide in self-defence is a question of fact for the jury upon the evidence. *State v. Dickey* (W. Va. 1900), 37 S. E. Rep. 695.

So it is for the jury to consider and weigh all evidence tending to prove self-defence, whether introduced by the defendant or by the state, and all the evidence and circumstances in the case. *State v. Johnson* (W. Va.), 39 S. E. Rep. 665.

G. INSTRUCTIONS.

1. IN GENERAL.

It is not error for the court to instruct the jury on certain indictments, that under W. Va. Code 1899, § 22, ch. 159, they can acquit of the felony and find the prisoner guilty of an attempt to commit such felony. *State v. Meadows*, 18 W. Va. 658.

2. PROVINCE OF COURT AND JURY IN GENERAL.

Weight of Evidence.—On a trial for murder the court instructed the jury, that though they "should believe the prisoner committed a homicide under the influence of immediate intoxication, or the effects of the previous habits of intoxication upon his temper, yet if the intoxication or the effects were not such, or to such a degree as to wholly negative the legal inference of malice implied by law from the character and circumstances of the act, in the absence of or slightness of the provocation," they should find him guilty of murder in the second degree. This instruction upon the sufficiency and weight of evidence, was an error for which judgment against the prisoner was reversed. *Gwatkin v. Com.*, 9 Leigh 678.

3. INTENT, MALICE, DELIBERATION AND PREMEDITATION.

a. Intent.—It is error to instruct that, if defendant killed deceased, he is *prima facie* guilty of wilful, deliberate, and premeditated killing, and that the necessity rests on him to show extenuating circumstances, where the killing does not appear to have been wilfully and intentionally done. *State v. Cross*, 42 W. Va. 258, 24 S. E. Rep. 996.

b. Deliberation and Premeditation.—And, where the testimony shows that the deceased came to his death from a blow on the head caused by a rock thrown by the prisoner, but that immediately preceding the act of throwing this rock the prisoner had been knocked to his hands and knees by a blow in the back from a rock thrown by the deceased, it is error to instruct the jury that "if the prisoner, with a deadly weapon in his possession, without any, or upon very slight, provocation, gave to another a mortal wound, the prisoner is *prima facie* guilty of wilful, deliberate and premeditated killing." *State v. Dickey*, 46 W. Va. 319, 33 S. E. Rep. 231.

But in a prosecution for murder, it is proper for the court to instruct the jury that a mortal wound given with a deadly weapon in the previous possession of the slayer, without any provocation, or even with slight provocation, is *prima facie* wilful, deliberate, and premeditated killing, and throws on the prisoner the necessity of showing extenuating circumstances. *Longley v. Com.*, 99 Va. 807, 87 S. E. Rep. 339; *Horton v. Com.*, 99 Va. 848, 88 S. E. Rep. 184.

c. Malice—Sufficiency in General.—But it is not error in a court to refuse to instruct that "if the jury believe from the evidence that the deceased did any act, or that circumstances were brought about by him of such a character as to afford the accused reasonable grounds for believing that deceased designed to kill him, or to inflict on him great bodily harm, and that there was imminent danger of carrying such design into immediate execution, then the killing is excusable, although it may have turned out that the appearances were deceptive and no such design existed." *Brown v. Com.*, 86 Va. 466, 10 S. E. Rep. 745.

And where there was evidence that the prisoner grossly insulted the deceased, and made an assault on him, in which he struck the deceased a fatal blow with a rock as the latter was running away from him, an instruction that, if the first assault was

made on the deceased with the preconceived design to kill or to inflict great bodily harm, then the malice of the first assault, notwithstanding the violence, with which it was returned, communicates itself to the last act of the prisoner and the killing is murder, was supported by the evidence. *Jackson v. Com.*, 98 Va. 845, 36 S. E. Rep. 487.

4. MOTIVE.—Where there is no evidence of motive, it is prejudicial error to refuse to instruct the jury "that the absence of all evidence of an inducing cause or motive to commit the crime, when the fact is in reasonable doubt as to who committed it, affords a strong presumption of innocence." *Vaughan v. Com.*, 85 Va. 671, 8 S. E. Rep. 584. And such error is not cured by instructions to acquit, if upon the whole evidence there is a reasonable doubt of the defendant's guilt. *Vaughan v. Com.*, 85 Va. 671, 8 S. E. Rep. 584.

And an instruction telling a jury that if they find that no motive on the part of the prisoner existed for the commission of the crime, that itself is sufficient to raise a reasonable doubt of guilt, is bad. Because, while motive in the commission of a crime is a material element for a jury in considering it, yet it is not indispensable that it should be apparent to sustain a conviction. *State v. Morgan*, 35 W. Va. 260, 13 S. E. Rep. 385. See, in general connection, *Sutton v. Com.*, 85 Va. 128, 7 S. E. Rep. 333.

5. NATURE AND CIRCUMSTANCES OF THE ACT.

Commission of or Attempt to Commit Other Offence.—A subsequent instruction, leaving it entirely to the jury to say whether or not the arrest of defendant by deceased was legal, is reversible error, though, by the same instruction, the jury are told that a police officer who exceeds his powers in making an arrest is a trespasser, and that one may resist an unlawful arrest, but are not told what the police officer's powers are, except as in the former instruction. *Muscoe v. Com.*, 86 Va. 443, 10 S. E. Rep. 584.

And, as also held in this case, if the ordinance of the city of Charlottesville, providing that every policeman when an offence is committed in the town shall try to detect and arrest the offender, confers greater power on policemen in respect to arrests than is conferred by the general laws on constables, and authorizes them to arrest, without warrant, for misdemeanors not committed in their presence, it is void; and, on trial for murder in killing a police officer of that city who was trying to arrest defendant, without warrant, for an alleged past misdemeanor, an instruction based on such ordinance, that a police officer has no right to arrest without a warrant, except for offences committed in his presence, or where he has cause to suspect that a felony has been committed, "or in pursuance of legal ordinances of the city of whose police force he is a member," is misleading and erroneous.

6. NATURE OF MEANS OR INSTRUMENT USED.—Where it appears that deceased was killed by being struck, an instruction which separates the blow from the character of the instrument with which it was given and the intent accompanying it, is erroneous. *State v. Douglass*, 28 W. Va. 297.

7. CAPACITY AND RESPONSIBILITY.

Insanity or Intoxication.—An instruction that, to convict, the jury must find that the accused "was capable of knowing the nature and consequences of his act, and, if he did know, then that he knew that he was doing wrong, and that, so knowing," shot decedent, "with the wilful, deliberate and premeditated purpose of killing her," is not erroneous as charging the jury that sanity is shown by capac-

ity to distinguish right from wrong, regardless of the power to choose between right and wrong. *State v. Harrison*, 36 W. Va. 729, 15 S. E. Rep. 982.

And, where the indictment alleged that defendant "wilfully and deliberately murdered the decedent," an instruction, if the jury believe that the defendant committed the murder "as charged in the indictment, and had at the time sufficient power of mind to distinguish between the right and wrong of such act, although they may believe that he suffered from mental aberration as to other matters, the verdict ought to be 'guilty,'" is not erroneous. *State v. Maier*, 36 W. Va. 757, 15 S. E. Rep. 991.

So in a prosecution for murder, the court properly instructed the jury that drunkenness or involuntary intoxication is no excuse for crime, though it may be the result of long-continued and habitual drinking, without any purpose to commit crime, and may have produced temporary insanity, during the existence of which the act is committed, and that, in other words, a person, whether he be a habitual drinker or not, cannot voluntarily make himself so drunk as to become on that account irresponsible. *Longley v. Com.*, 99 Va. 807, 37 S. E. Rep. 339.

8. SELF-DEFENCE.

a. Nature of Plea.

Based on Necessity.—An instruction that the law of self-defence is the law of necessity, and necessity relied on to justify the killing must not arise out of the prisoner's own conduct, and that if the prisoner assaulted the deceased, and thereby brought about the necessity of killing him, then the prisoner could not justify the killing by a plea of necessity unless he were without fault in bringing that necessity on himself, was proper. *Jackson v. Com.*, 98 Va. 845, 36 S. E. Rep. 487.

In this case the court properly refused an instruction on the law of self-defence, where the prisoner and the deceased were engaged in a mutual combat, and the prisoner struck the deceased a fatal blow with a rock as the latter was running away from him.

b. Form and Language in General.—Where an instruction asked by defendant, that if deceased had threatened to kill him, and the threats were made known to him, and if, before the fatal shot was fired, deceased did some overt act from which defendant could reasonably infer that he intended to execute the threats, the killing would be excusable homicide, is modified by the insertion of the clause "and that defendant killed deceased to prevent him from killing him, or doing him great bodily harm," defendant cannot complain, since the modification could not injure him. *Watson v. Com.*, 87 Va. 608, 18 S. E. Rep. 22.

c. Confused, Misleading and Inconsistent Instructions.

Circumstances Excusing.—An instruction that "If the jury believe from the evidence that the deceased did any act, or that circumstances were brought about by him of such a character as to afford the accused reasonable grounds for believing that deceased designed to kill him, or to inflict on him great bodily harm, and that there was immediate danger of carrying such design into immediate execution, then the killing is excusable, although it may have turned out that the appearances were deceptive and that no such design existed," is proper. *Brown v. Com.*, 86 Va. 466, 10 S. E. Rep. 745; *Hash v. Com.*, 88 Va. 172, 18 S. E. Rep. 398.

d. Reasonable Doubt.—But it is proper to refuse an

instruction that if a reasonable doubt of any fact necessary to convict is raised in the mind of the jury by the evidence itself, or by the ingenuity of the counsel, or any hypothesis consistent therewith, that doubt is decisive of the defendant's acquittal as it is misleading. *Horton v. Com.*, 99 Va. 848, 38 S. E. Rep. 184.

e. Onus Probandi and Weight.—While the court may instruct the jury that the burden is on the prisoner to show by preponderance of evidence that the killing charged was in self-defence yet it should add thereto, in effect, that such defence should be fully sustained by the evidence of the state or by all the evidence and circumstances in the case. *State v. Manns* (W. Va. 1900), 37 S. E. Rep. 618.

f. Duty in Absence of Evidence.—On a trial for homicide, an instruction that, if the jury had a reasonable doubt as to whether defendant's plea of self-defence was made out, it was their duty to acquit him, is erroneous, where the circumstances and evidence do not preponderate in favor of self-defence. *State v. Abbott*, 8 W. Va. 741.

And a court may properly refuse to instruct the jury that timidity of disposition is to be taken in consideration in determining the existence of reasonable grounds of apprehension of bodily harm to support a plea of self-defence, where there was no evidence in the case to justify the instruction. *Hodges v. Com.*, 89 Va. 265, 15 S. E. Rep. 513. See also, *Hash v. Com.*, 88 Va. 172, 18 S. E. Rep. 398.

9. EVIDENCE.

Circumstantial Evidence—Weight.—In a prosecution for murder, a court properly instructed the jury that circumstantial evidence is legal and competent, and that, if it is of such character as to exclude every reasonable hypothesis other than that of the defendant's guilt, it is entitled to the same weight as direct testimony. *Longley v. Com.*, 99 Va. 807, 37 S. E. Rep. 339. See *State v. Staley*, 45 W. Va. 792, 32 S. E. Rep. 198.

10. DEGREE OF OFFENCE.

a. Murder.

Instructions as to Degrees Not in Issue or Unsupported by Evidence.—On a trial of an indictment for murder in the first degree, by poison, the clerk failed to charge the jury as to the different grades of homicide. It was held that, as the defendant was either guilty of murder in the first degree or another offence which could be punished under the indictment, it was sufficient to charge to that effect. *Thornton v. Com.*, 24 Gratt. 657.

Refusal to Instruct as to Degrees.—Where no provocation is shown for a homicide, refusal to give an instruction as to different degrees of provocation is not error. *Reed v. Com.*, 98 Va. 817, 36 S. E. Rep. 399.

As to What Constitutes Murder in First Degree.—In a prosecution for murder, the court properly instructed the jury that whoever kills a human being with malice aforethought, is guilty of murder, and that all murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, or premeditated killing, is murder in the first degree. *Longley v. Com.*, 99 Va. 807, 37 S. E. Rep. 339.

Degree Presumed from Mere Killing—Onus.—And it is proper to instruct the jury that every murder is presumed by law to be murder in the second degree, and in order to elevate the offence to murder in the first degree, the burden of proof is on the commonwealth, and in order to reduce the offence below murder in the second degree the burden is on the prisoner. *Longley v. Com.*, 99 Va. 807, 37 S. E. Rep. 339.

b. Manslaughter.

Necessity in General.—It is not necessary that the court should include involuntary manslaughter in his charge to the jury on a trial for murder. *McWhirt's Case*, 3 Gratt. 594.

11. CONVICTION.

Reasonable Doubt—What Constitutes.—In a trial upon an indictment for murder, it is error to give the following instruction: "The court instructs the jury that reasonable doubt, to warrant acquittal in criminal cases, is not a mere possible doubt, but is such a doubt as, after mature comparison and consideration of all the evidence, leaves the minds of the jurors in such a condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge, or for which reason can be given,"—it being uncertain whether the clause, "for which reason can be given," qualifies the word "doubt," or the word "conviction." *State v. Sheppard* (W. Va.), 39 S. E. Rep. 676.

Participation—Doubt as to Purpose—Effect on Verdict.—In a prosecution for being present, aiding, abetting and assisting in a murder, it was proper to refuse an instruction that if defendant participated in any way by word or act in a difficulty between the principal defendant and deceased, but there was a reasonable doubt as to whether such participation was for the purpose of aiding and abetting in the killing, defendant should be acquitted, since, if the principal was guilty of murder, and defendant was abetting and consenting to what he did, he is guilty of the offence charged. *Horton v. Com.*, 99 Va. 848, 38 S. E. Rep. 184.

12. PUNISHMENT.

Instruction as to Extent—Necessity of Request to Charge.—It is not error for a court to omit to instruct a jury that it may punish murder in the first degree with either death or confinement in the penitentiary, unless asked to do so, and, it is error to refuse to do so when asked, though not asked until the jury announce its verdict, but before its discharge, as the law does not fix any time for its discharge. *State v. Cobbs*, 40 W. Va. 718, 22 S. E. Rep. 810.

H. VERDICT.

1. STATUTORY PROVISIONS.

Finding on Indictment for Felonious Homicide.—On an indictment for felonious homicide, the jury may find the accused not guilty of felony, but guilty of involuntary manslaughter. And on any indictment for maliciously shooting, stabbing, cutting, or wounding a person, or by any means causing him bodily injury, with the intent to kill him, the jury may find the accused not guilty of the offence charged, but guilty of maliciously doing such act with intent to maim, disfigure or disable, or of unlawfully doing it, with intent to maim, disfigure, disable or kill such person. Va. Code 1887, § 4042; *Hoback's Case*, 28 Gratt. 923; *Canada v. Com.*, 22 Gratt. 899; *Livingston v. Com.*, 14 Gratt. 592; *Hardy v. Com.*, 17 Gratt. 592; W. Va. Code 1899, ch. 150, § 20; *Ex parte Garrison*, 36 W. Va. 686, 15 S. E. Rep. 417.

And if a person indicted for murder be found by the jury guilty thereof, they shall in their verdict find whether he is guilty of murder in the first or second degree. If they find him guilty of murder in the first degree, they may in their discretion find that he be punished by confinement in the penitentiary. *State v. Cobbs*, 40 W. Va. 718, 22 S. E. Rep. 810; *State v. Cain*, 8 W. Va. 720; *State v. Greer*, 22 W.

Va. 800; Va. Code 1887, § 4041; *Com. v. Williamson*, 2 Va. Cas. 211.

2. FORM AND REQUISITES.

Conformity to Indictment.—Since an indictment in the common-law form charges both degrees of murder, a verdict finding the accused guilty of murder in the first degree, as charged in the indictment, sufficiently conforms to the indictment. *Cluverius v. Com.*, 81 Va. 787.

3. SUFFICIENCY.—If the jury find the prisoner guilty of murder in the first degree, as charged in the indictment, without mentioning her name, but in the verdict as recorded and read to the jury, the name is inserted, the verdict is sufficient. *Thornton v. Com.*, 24 Gratt. 657.

And where defendant is charged as an accessory before the fact or principal in the second degree to the crime of murder, a verdict of guilty as charged in the indictment is sufficient in form. *Horton v. Com.*, 99 Va. 848, 38 S. E. Rep. 184.

4. SPECIFICATION OF GRADE OR DEGREE OF OFFENCE.

Necessity.—Where a person is tried upon an indictment for murder the verdict should specify the degree of the crime of which he is convicted. If it does not so specify, it is erroneous. *Com. v. Briggs*, 82 Va. 564; *Com. v. Williamson*, 3 Va. Cas. 211.

5. CONSTRUCTION AND OPERATION.

Special Verdict.—Where one count of an indictment charged accused with feloniously and maliciously cutting, striking and wounding a person with intent to maim and kill, and another charged him with assaulting such person and feloniously and maliciously wounding him, and the jury found the prisoner not guilty of the malicious cutting and wounding as charged in the indictment, but guilty of an assault and battery as charged in the indictment, the verdict amounted to an acquittal of the felony charged and a conviction of simple assault and battery. *Canada v. Com.*, 23 Gratt. 899.

XIII. NEW TRIAL.

1. RULE IN GRANTING.—The well-settled rule in Virginia in granting new trials, when asked for on the sole ground that the verdict is contrary to the evidence, is to grant them very cautiously and only when the verdict is manifestly wrong; great weight being due to a verdict rendered by a jury and approved by a judge, before whom the witnesses gave their evidence. *Lewis v. Com.*, 81 Va. 416. See *Reed v. Com.*, 98 Va. 817, 36 S. E. Rep. 399; *Finchim v. Com.*, 88 Va. 689, 3 S. E. Rep. 343; *Grayson v. Com.*, 7 Gratt. 613.

But mere accumulated evidence is not sufficient to authorize the granting of a new trial to a prisoner. *Baccigalupo v. Com.*, 33 Gratt. 807; *State v. Kohne* (W. Va. 1900), 37 S. E. Rep. 553.

In this connection several rulings of inferior courts and comments upon them by members of the bar, may be cited with profit, as they involve a question vital to the interests of justice, and one which seems as yet not to have been presented to the supreme court of appeals of Virginia or West Virginia for decision. The question referred to is, whether a trial judge is warranted, *ex mero motu*, or on motion of the accused, in setting aside the verdict of a jury, for the sole reason that the finding is one of guilty of the lesser degree of the same specie of offence as that charged in the indictment, when the evidence adduced at the trial shows affirmatively that the greater degree of the offence was committed, and there is no evidence tending to estab-

lish the commission of the lesser degree of offence as found by the jury. This question arose in the county court of Shenandoah county at Woodstock, Virginia, in 1896, JUDGE NEWMAN presiding. See 2 Va. L. R. 697. The facts were that Elmer A. Weatherholtz was tried for the murder of his wife, Minnie A. Weatherholtz, and found guilty of murder in the second degree. The circumstances of Mrs. Weatherholtz's death were, that on the morning of February 4, 1896, she went out into the barnyard to milk the cows. As she reached the gate, she was instantly killed by a load of No. 2 shot fired full into her face by some one concealed in the barn. Forty of the shot passed through her forehead, between the eyebrows and hair, and penetrated the brain. Her little boy was by her side, and she was singing when the report of the gun was heard, and she was seen to fall. The evidence showed that Elmer A. Weatherholtz, her husband, was guilty of this foul murder by "lying in wait." But the jury convicted him of murder in the second degree only, and fixed his punishment at eighteen years in the penitentiary. The prisoner's counsel refused to make a motion to have the verdict set aside. But the verdict was set aside by the presiding judge, on his own motion, as being contrary to the law and the evidence. The reasons for setting this verdict aside were, in brief, that if murder was committed, every particle of evidence introduced and every circumstance in the case showed that it was committed by some one "lying in wait"; that there was the absence of the slightest suspicion that murder was committed except by some one "lying in wait" with intent to commit the deed; and the Virginia Code of 1887, § 8662, provides in specific terms that "murder by lying in wait," is murder of the first degree. There was not, as the judge said in his opinion and order setting aside the verdict of the jury, a scintilla of evidence tending, even in the slightest degree, to create the slightest impression or suspicion of guilt of murder in the second degree against the prisoner or any other person. And as the jury acquitted the prisoner of being guilty of the crime of murder in the first degree, which the court thought him to be guilty of, and found him guilty of a crime of which he was manifestly not guilty, viz., murder in the second degree, the court deemed it to be its duty to set the verdict aside as being contrary to the law and the evidence. Accordingly, the verdict was set aside, and a new trial ordered in the case. On the second trial the counsel for the defendant presented an affidavit to the court asking a discharge from the indictment under which he had been convicted of murder in the second degree. "Here arose a conference between the counsel on both sides and the judge as to the next step to be pursued. The commonwealth's attorney announced that, while he had newer and stronger evidence against the prisoner to show the prisoner's guilt, he had none stronger than on the first trial to show murder in the first degree. It was then developed that, if Weatherholtz were tried for murder in the second degree, and in the trial the commonwealth left out all evidence to show that it was murder in the first degree, in order that the jury might bring in a verdict of murder in the second degree in conformity with the law and the evidence brought before it, yet the counsel for the prisoner might bring in evidence to show that it was murder in the first degree, if they chose, and not murder in the second degree as charged in the indictment, and thus have a verdict

for murder in the second degree set aside as contrary to the law and the evidence. Thus, as the prisoner could not be again tried for murder in the first degree, and, as a verdict for murder in the second degree would be set aside by the court, there was only one thing to do, dismiss the prisoner. The commonwealth hesitating to enter a *nolle*, the judge dismissed the indictment." The result was that the prisoner escaped punishment altogether for the murder of his wife. The action of the court in this case in setting aside the verdict on its own motion seems not to have been satisfactory to the bar of the state.

In 1889, the Taylor Case arose, in Accomac county, Virginia, involving the principle under consideration. See 2 V. L. R. 699. Mrs. Virginia A. Taylor was tried for the murder of her husband by poison. The jury found her guilty of murder in the second degree, and fixed her punishment at five years in the penitentiary, and the county court sentenced her upon the verdict. Upon writ of error this judgment was reversed by the circuit court, JUDGE GUNTER presiding, the verdict set aside, and the prisoner discharged.

A case similar on principle, arose in the county court of Loudoun, in September 1892. See 2 V. L. R. 870. The facts were that Charles J. Downs, a white man, was tried for rape upon a negro woman. As stated by JUDGE TEBBS, the trial judge, "his guilt was plain, but the woman was a notorious character, and the jury, in an effort to be merciful, very illogically found him guilty of an attempt to commit rape, as they might have done had the facts warranted it, under the Code, § 4044." The prisoner's counsel asked for a new trial, quoting JUDGE GUNTER's decision in the Taylor Case, and insisted that he was entitled to his discharge. The facts as established, clearly showed that there was absolutely no proof of an unaccomplished attempt, but everything tended to show that the accused had wholly succeeded in the accomplishment of his nefarious purpose. This was certified when the case was taken up. The court declining to follow the Taylor Case, refused to set aside the verdict, and award a new trial, on the ground that, though the verdict was illogical and the error manifest, yet it was not to the prejudice of the prisoner, and he could not be heard to complain of it. "A bill of exceptions, setting forth these facts, was at once taken, and a writ of error was asked from the circuit court, but was refused by JUDGE KEITH, then circuit judge. A writ of error to the court of appeals was then applied for, but was refused by JUDGE FAUNTLEBOY." These cases have furnished a subject for comment and speculation. None of them are binding as authority, yet the Downs Case would seem to be entitled to much weight, as a writ of error from the circuit court was refused by JUDGE KEITH, then presiding circuit judge, and from the supreme court of appeals by JUDGE FAUNTLEBOY.

A case in point, from another jurisdiction, presents itself in *State v. Lindsey*, 19 Nev. 47, 8 Am. St. Rep. 776. In this case Mrs. Lindsey was indicted for the murder of Robert Pitcher, by poison. The facts clearly established that the accused was guilty of murder in the first degree. The statute, under the authority of which the prisoner was indicted, was very similar in its provisions to Va. Code 1887, § 8662, and W. Va. Code 1899, ch. 144, § 1. The jury returned a verdict of guilty of murder in the second degree, and the lower court refused to set aside the verdict.

The appellate court affirmed the judgment of the lower court, holding that the jury have the power to fix crime as murder in the second degree when it ought, under the law and facts, to be fixed in the first degree. And further, if the jury fix the crime as murder in the second degree, in a case where the law and the facts make it murder in the first degree, it is an error in favor of the prisoner, of which the law will not take any cognizance, and of which the prisoner ought not to complain. See *Lane v. Com.*, 50 Pa. St. 375.

2. STATUTORY PROVISIONS.

Cannot Be Tried for Higher Offence Than He Was Convicted of at Former Trial.—If a person indicted for felony be by the jury acquitted of part and convicted of part of the offence charged, he shall be sentenced for such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor. If the verdict be set aside and a new trial granted the accused, he shall not be tried for any higher offence than that of which he was convicted on the last trial. Va. Code 1887, § 4040; *Briggs v. Com.*, 11 Law Jour. 189; *Kirk v. Com.*, 9 Leigh 627; *Hardy v. Com.*, 17 Gratt. 599; *Canada v. Com.*, 23 Gratt. 899; *Page v. Com.*, 26 Gratt. 943; *Stuart v. Com.*, 28 Gratt. 950.

XIV. APPEAL AND ERROR.

1. IN GENERAL.

Presumption in Appellate Court.—Where there has been a previous grudge and also an immediate provocation, it is for the jury to determine whether the shooting was induced by the previous grudge or the immediate provocation; and it is not for an appellate court to reverse their judgment; which the judge who tried the case, declines to set aside. *Read v. Com.*, 22 Gratt. 924; *Trim v. Com.*, 18 Gratt. 983; *Mitchell v. Com.*, 23 Gratt. 872.

It is likewise declared in *Howell v. Com.*, 26 Gratt. 995, that the jury having found the prisoner guilty of murder in the first degree, and the court of trial having refused to set aside the verdict and grant a new trial, the appellate court even if they had some doubt about the sufficiency of the evidence to convict the prisoner of murder in the first degree, they would not reverse the judgment.

2. REVIEW OF QUESTIONS OF FACT.—The question whether a particular homicide is murder in the first or second degree is one of fact for the jury. Where the jury has found a case to be one of murder in the first degree as in other cases, the court should not disturb the verdict, unless the finding of murder in the first degree be plainly and manifestly contrary to or without sufficient evidence. *State v. Welch*, 36 W. Va. 690, 15 S. E. Rep. 419. See *Reed v. Com.*, 98 Va. 817, 86 S. E. Rep. 899.

3. GROUNDS FOR REVERSAL.

Objection to Evidence—Irrelevancy.—If the only objection to the evidence was its irrelevancy, and it could not possibly have prejudiced the prisoner, then the judgment ought not to be reversed for the error in not excluding it; for to authorize the reversal of a judgment for admitting irrelevant evidence, not only must the evidence be irrelevant, but it must be of such a nature as that its admission may have prejudiced the prisoner. If he may have been so prejudiced, even though it be doubtful whether in fact he was so or not, that is sufficient ground for reversing the judgment. *Payne v. Com.*, 31 Gratt. 855; *Vaughan v. Com.*, 85 Va. 671, 8 S. E. Rep. 584; *Brown's Case*, 86 Va. 987, 11 S. E. Rep. 799; *Oliver's*

Case, 77 Va. 594; *Joyce's Case*, 78 Va. 287; *Kinney's Case*, 26 W. Va. 143.

Not Properly Admissible.—So in a trial for murder, a witness was allowed to testify that goods found in the prisoner's house when arrested for the homicide were stolen from him. It was held that while such evidence was not strictly admissible, the prisoner was not prejudiced thereby, as he had previously confessed that such were the facts. *Com. v. Brown*, 90 Va. 671, 19 S. E. Rep. 447.

Objection to Instruction.—And it is not ground for the reversal of the judgment that in giving an instruction in other respects right, it concluded as follows: "And if there be a reasonable doubt whether the prisoner had willed, deliberated and premeditated to kill the deceased, or to do him some serious and bodily injury which would probably have occasioned his death, the jury ought not to find him guilty of murder in the first degree." *Honesty v. Com.*, 81 Va. 281.

Improper Reference to Character by Prosecuting Attorney.—A motion in arrest of judgment on the ground that the commonwealth's attorney in his argument referred to the character of the accused, will not be sustained where no exception was taken thereto until after the verdict. *Puryear v. Com.*, 83 Va. 51, 1 S. E. Rep. 512.

4. THE WRIT.

When It Lies.—No writ of error lies to the judgment of a court of oyer and terminer, condemning a slave to death. *Peter, Slave, v. Com.*, 2 Va. Cas. 330.

Rule of Decision When Evidence Certified.—Upon a writ of error to a judgment overruling a motion to set aside a verdict and award a new trial on the ground that the verdict is contrary to the evidence, and the evidence and not the facts is certified in the bill of exceptions, this court will not reverse the judgment, unless, after rejecting all the conflicting oral evidence of the exceptor, and giving full faith and credit to that of the adverse party, the decision of the trial court still appears to be wrong. *State v. Flanagan*, 26 W. Va. 116; *State v. Baker*, 83 W. Va. 319, 10 S. E. Rep. 639.

XV. DISCHARGE.

Where, on indictment for murder, defendant's motion in arrest of judgment is overruled, and on the following day of the term the court, of its own motion, sets the verdict aside, and remands defendant for another trial, he is not entitled to his discharge, on the ground that his motion in arrest of judgment was sustained. *Curtis v. Com.*, 87 Va. 589, 18 S. E. Rep. 73.

XVI. SENTENCE.

Power of Courts in General.—A circuit superior court not adverting to the statute of 1833-34, ch. 19, § 2, sentenced a convict to solitary confinement to the penitentiary for one-sixth of the term of imprisonment fixed by the verdict; judgment was reversed for this cause; but the general court proceeded to enter judgment, that the solitary confinement shall be one-twelfth of the term, according to that statute. *Brooks v. Com.*, 4 Leigh 669.

XVII. PUNISHMENT.

1. IN GENERAL.—Confinement in the penitentiary for life is not too severe a punishment for a person who unlawfully, knowingly, and wilfully invades another's premises armed, and then shoots the owner who attempts in a lawful manner to remove him therefrom. *State v. Kohne* (W. Va. 1900), 37 S. E. Rep. 553.

2. MURDER.

a. First Degree.—Murder of the first degree shall be punished with death. Va. Code 1887, § 3663; W. Va. Code 1899, ch. 144, § 2.

b. Second Degree.—Murder in the second degree shall be punished by confinement in the penitentiary not less than five nor more than eighteen years. Va. Code 1887, § 3664; West Va. Code 1899, § 3. See *King v. Com.*, 2 Va. Cas. 78; *Lewis v. Com.*, 81 Va. 416.

3. MANSLAUGHTER.

a. Voluntary.—Voluntary manslaughter shall be punished by confinement in the penitentiary not less than one nor more than five years. Va. Code 1887, § 3665; W. Va. Code 1899, ch. 144, § 4. See *Bull's Case*, 14 Gratt. 618; *Poindexter's Case*, 33 Gratt. 766; *McWhirt's Case*, 3 Gratt. 504; *Stuart v. Com.*, 28 Gratt. 950; *Dock v. Com.*, 21 Gratt. 909.

b. Involuntary.—Involuntary manslaughter is a misdemeanor under the codes of Virginia and West Virginia and punishable at the discretion of the jury, by fine or imprisonment in jail, either or both. *Ex parte Garrison*, 36 W. Va. 686, 15 S. E. Rep. 417; Va. Code 1887, § 3666; W. Va. Code 1899, ch. 144, § 5.

XVIII. EXECUTION.**1. SENTENCE OF DEATH.**

In General.—The clerk of the court pronouncing a sentence, as soon as may be thereafter, shall deliver a certified copy thereof to the officer of the court, who shall cause the same, at the appointed time, to be executed by hanging the convict by the neck until he is dead. Va. Code 1887, § 4062.

If there is a yard of sufficient size enclosed by a wall around or adjoining the jail, the sentence shall be executed within such yard, unless the court direct otherwise. There shall be present at the execution besides the officers of the court, such other officers and such guards and assistants as the officer executing the sentence shall see fit. He shall request the presence of the attorney for the commonwealth and the clerk of the court, and of twelve respectable citizens including a physician or surgeon, and he shall permit the presence of the counsel of the convict, and of such ministers of the gospel as he shall desire, and of such of the convict's relations as the officer shall deem prudent. Va. Code 1887, § 4063.

By Act of April 2, 1879, it is declared that it, "shall not be lawful hereafter to execute the death penalty on any condemned criminal in a public manner, but within an enclosure, which shall exclude the public view, and in the presence only of such officers of the law as may be necessary to see that the sentence of the court is properly carried into effect." Acts 1877-78, p. 380; Va. Code 1887, § 4063; W. Va. Code 1899, ch. 160, § 9.

2. SENTENCE TO PENITENTIARY.—The officer of the court shall deliver the convict at the penitentiary as soon as may be. He may summon a guard of one person if he deem it necessary; and by order of the court, judge, or justice by whose judgment or order the prisoner is removed, a stronger guard may be provided. If the officer fail to deliver the convict within a reasonable time he forfeits one hundred

dollars. The clerk is also required under a similar penalty to transmit to the superintendent a full copy of the trial and conviction. Va. Code 1887, § 4065 *et seq.*

The rules prescribed for the government of the penitentiary may be seen, Va. Code 1887, §§ 4110-4173; Acts 1889-90, pp. 196-197; Acts 1891-92, pp. 508-511; W. Va. Code 1899, ch. 160, § 12.

3. TIME OF EXECUTION.—Sentence of death, except for insurrection or rebellion, shall not be executed sooner than thirty days after the sentence pronounced. W. Va. Code 1899, ch. 160, § 8; Va. Code 1889, § 4061.

4. MODE OF INFLECTING DEATH PENALTY.—Whilst punishment by death in England and in the United States until recently, has been inflicted by hanging, yet it is not contrary to the United States constitution to inflict it in another way, as by electricity, provided that mode is prescribed by statute before the accused is sentenced to death in another mode. Thus, in *Kemmler's Case*, 136 U. S. 436, 10 Sup. Ct. Rep. 980, it was held that the law of New York, N. Y. Code, 1888, ch. 489, providing that: "Punishment of death must in every case be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death," does not violate the constitution of the United States, amendment 14, which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law," by imposing a criminal punishment.

To change the mode of execution after conviction would make the law *ex post facto*, and therefore void. Thus, in *Medley's Case*, 134 U. S. 160, 10 Sup. Ct. Rep. 384, the act of Colorado, approved April 14, 1889, came before the supreme court of the United States for construction. It repealed all former acts in conflict with it, and provided that a person convicted of a capital crime and under sentence of death, shall be placed in the penitentiary, and there kept in solitary confinement until he is hung; and only certain persons shall be permitted to see him, and these only in accordance with the prison regulations; whereas, the acts repealed permitted such convict to be kept in the prison of the county where his friends resided, and where the sheriff and his attendants, and his religious advisers and legal counsel, might visit him without hindrance of law. The act further provided that the warden of the penitentiary shall fix the particular day and hour for execution of the sentence, and the prisoner be kept in ignorance of it; whereas, before the passage of the act the court fixed the day of execution, and it was made known to the prisoner. It was held that the act imposed further punishment than the acts repealed, and was therefore *ex post facto* as to crimes committed before it went into effect. See *In re Savage*, 134 U. S. 176, 10 Sup. Ct. Rep. 389.

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Bowles' ex'or v. Elmore's adm'r, 385

APPELLATE COURTS.

1. A writ of error coram vobis does not lie in the Supreme court of appeals.

Reid's adm'r v. Strider's adm'r, 76 690

*2. Where a party to a cause pending in the Supreme court of appeals, dies pending the appeal, it is not necessary to revive the cause in the name of his representative; but the case may be revived when it goes back to the Court below.

Idem, 76

3. The Court of appeals has no jurisdiction to grant a writ of error in a criminal case, or to a judgment upon an application for a writ of habeas corpus.

Bell v. The Commonwealth, 201

4. The judicial notice to be taken of private and local laws that appear to have been relied on in the Court below, is the same as that given to laws of a public nature; and has reference to the hearing of the cause in the appellate Court, whether decided before or after the commencement of the act. Code of 1849, ch. 51, § 1, p. 660.

Somerville v. Wimbish, 205

5. Upon an appeal to the Court of appeals, from a final judgment, decree or order, if the appeal bond is not given within five years from the date of said judgment, decree or order, the appeal will be dismissed.

Yarborough & wife v. Deshazo, 374

6. The proviso in the act for limitation of suits, as to rights existing when the Code took effect, ch. 149, § 19, p. 540, is restricted to actions and rights barred by that chapter; and does not extend to the law limiting and regulating appeals.

Idem, 374

7. The appellate Court will presume that a jury in a criminal case were discharged for sufficient cause, and that the defendant consented to, or acquiesced therein, unless the record shews that he objected.

Dye's Case, 662

APPELLATE JURISDICTION.

1. To the judgment of a County court refusing to permit a person named as executor in a will, to qualify without giving

security, an appeal demandable of right, lies to the Circuit court.

Fairfax *v.* Fairfax's ex'or, 36

2. A paper signed and endorsed in blank, is filled up as a common promissory note, and value paid for it. Pending an action against the endorser, the endorsement is filled up as a guaranty, but it is counted on both as an original promise and a guaranty. There is a judgment for the defendant on a case agreed, and on appeal the judgment is reversed, and a judgment given against him as an original surety, without sending the case back to have the endorsement erased and filled up as an original promise.

Orrick *v.* Colston, 189

3. The Court of appeals has no jurisdiction to grant a writ of error in a criminal case, or to a judgment upon an application for a writ of habeas corpus.

Bell *v.* The Commonwealth, 201

4. The act in the Code limiting appeals to the Court of appeals to \$200, applies to cases decided before the act went into effect, when the application for an appeal is made since.

M'Gruder *v.* Lyons, 233

5. If upon appeal from a final judgment, &c., the appeal bond is not given within five years from the judgment, &c., the appeal will be dismissed.

Yarborough & wife *v.* Deshazo, 374

6. The proviso in the act, ch. 149, § 19, p. 540, does not extend to the law limiting and regulating appeals. *Idem*, 374

7. A case in which there has been a final decree is not a pending suit in the sense of the Code, ch. 16, § 18, p. 101, and ch. 216, § 2, p. 800. *Idem*, 374

8. When the rejection of a second plea is not ground for reversing the judgment upon appeal. See Error, No. 2, and

Fleming *v.* Toler, 310

ARDENT SPIRITS.

1. Two persons may be jointly indicted or proceeded against by information, for retailing ardent spirits without a license.

Harris & Hickman's Case, 600

2. Upon their conviction there should be a separate fine of \$30 against each of them.

Idem, 600

3. In an indictment for retailing ardent spirits without a license, to be drank where sold, it is not error to use the word "or," in speaking of the various kinds of liquors charged to have been sold.

Morgan's Case, 592

691 *ARSON.

1. An indictment for arson according to the common law form, is sufficient in a case of arson in the day time.

Curran's Case, 619

2. But it is more appropriate to charge the burning in the day time.

Idem, 619

3. For the offence of burning at night, it seems the indictment must charge the burning in the night. *Idem*, 619

4. Quære: If the common law offence of arson is abolished. *Idem*, 619

5. The indictment charges the burning the dwelling house of E on the 11th of February 1850. The verdict is, "guilty of arson in the day time, on the 11th February 1850." The verdict is sufficiently certain. *Idem*, 619

ASSIGNEES.

Y the holder of a bond agrees to assign it to D to indemnify him for becoming his surety, but the bond not being present is not then assigned. Afterwards Y commits an act of bankruptcy, upon which he is duly declared a bankrupt. After the act of bankruptcy Y assigns the bond to D who collects the money. D is entitled to hold it as against the general assignee of the bankrupt.

Tucker *v.* Daly, assignee, 330

ASSUMPSIT.

See Indebitatus Assumpsit.

ATTACHMENTS—Foreign.

1. In a proceeding by foreign attachment, the home defendant having property of the absent defendant in his possession, for the keeping of which the absent defendant is indebted to him, is entitled to have his claim first satisfied out of the property as against the attaching creditor.

Williamson *v.* Gayle & als., 152

2. The attaching creditor having established his debt, is entitled to a personal decree against the absent debtor, though the whole property attached is exhausted in paying the debt of the home defendant.

Idem, 152

ATTORNEY AT LAW.

1. An attorney at law receives a claim for collection, on which he brings a suit and obtains a judgment. He then receives from the debtor, a bond on which he is to sue, and after deducting his fee and commission, is to apply the balance to the credit of the judgment. The attorney receives the money on the bond, but does not pay it over to the creditor. This is a valid payment by the judgment debtor.

Smith's adm'r *v.* Lamberts, 138

2. The powers of an attorney at law in the prosecution and collection of claims put into his hands for collection, considered and stated. *Idem*, 138

AUTREFOIS CONVICT.

A conviction for advising one slave to abscond is no bar to a prosecution for advising another slave to abscond; though the advising was to both at one time by the same words and acts.

B. Smith's Case, 593

BANKRUPTS.

Y the holder of a bond, agrees to assign it to D to indemnify him for becoming his

surety, but the bond not being present is not then assigned. Afterwards, Y commits an act of bankruptcy, upon which he is duly declared a bankrupt. After the act of bankruptcy Y assigns the bond to D who collects the money. D is entitled to hold it as against the general assignee of the bankrupt.

Tucker v. Daly, assignee, 330

BONDS.

1. How payments are to be applied in satisfaction of bonds where there are several due at successive periods. See Payments, No. 1, and

Ross's ex'or v. M'Lauchlan's adm'r & als., 86

Same v. Haden's adm'r, 86

2. When payments are to be applied to a judgment rather than to bonds. See Payments, No. 2, 3, and Idem, 86

692 *3. A voluntary bond executed for a specific purpose and upon an expressed precedent condition, if the purpose has been effected otherwise, the bond cannot be enforced by the obligee.

Columbian College v. Clopton's adm'r &c., 168

4. The penalty and condition of a bond for the payment of money are in the same sum. It is proper to treat it as a single bill, and to give judgment for the amount of the bond with interest from the time of payment.

Fleming v. Toler, 310

BURGLARY.

The only covering to an opening for a window is a cloth hung over two nails at the top and loose at the bottom. Quære: If the removing the cloth from one of the nails is a sufficient breaking to constitute burglary. Hunter's Case, 641

CHOSSES IN ACTION.

1. The wife's remainder in slaves is sold by her husband, who dies in the lifetime of the life-tenant, leaving his wife surviving. She is entitled to the slaves as against the purchaser for value from the husband.

Moore v. Thornton & als., 99

2. Though the purchaser from the husband acquires the interest of the life-tenant in one of the slaves, in the lifetime of the husband, yet the wife surviving is entitled to the slave. Idem, 99

COMMON CARRIERS.

A common carrier contracts to deliver a crop of wheat at an agreed price per bushel. A large proportion of the crop is delivered in good order; but from the unavoidable effects of a storm a small part is delivered in a damaged condition, and another small portion is lost. In an action by the common carrier for the freight, he is entitled to recover under the common indebitatus count, the agreed price for the whole quantity so delivered or lost.

Galt v. Archer, 307

CONCEALED WEAPONS.

A jury may well find an habitual or general wearing of concealed weapons, from evidence that the defendant was seen once wearing them under circumstances which satisfies the jury it was his general practice.

Hicks' Case, 597

CONDITIONS.

1. Quære: If a Court of equity will relieve against a condition precedent where the subject admits of compensation, or the parties can be placed in the same condition in which they would have been if the condition had been performed; and there has been a substantial performance of the condition.

Columbian College v. Clopton's adm'r, &c., 168

2. The penalty and condition of a bond for the payment of money, is in the same sum. It is proper to treat it as a single bill and to give judgment for the amount of the bond, with interest from the time of payment.

Fleming v. Toler, 310

CONFESSIONS.

What confessions of an accomplice in a felony are not competent evidence against a confederate. See Accomplices, No. 1, and Hunter's Case, 641

CONTRACTS.

1. What contracts of sale are not so perfected as to pass the property. See Sales, No. 1, and

Dixon v. Myers & Co., 240

2. What false representations will avoid a contract for the sale of stocks in a gold mining company. See Sales No. 2, 3, and

Crump v. United States Mining Company, 352

3. If the representations made by the vendors were true, and they suppressed no material fact, the subsequent failure of the mine in value and productiveness, does not impair the right of the vendors to enforce the contract. Idem, 352

4. When party to compromise may avoid it for mistake. See Mistake, No. 1, and

Ross' ex'or v. M'Lauchlan's adm'r & als., 86

Same v. Haden's adm'r, 86

CONVEYANCES—Fraudulent.

1. The grantor in an absolute conveyance of personal property, remaining in possession thereof, raises the presumption of fraud, and he must rebut it by proving the fairness and bona fides of the transaction.

Curd v. Miller's ex'ors, 185

2. W being largely indebted in proportion to his property, made a gift of slaves to his married daughter; and her husband remained in possession of them for eight years. Judgment having been recovered against W on some of these debts, and also

on debts contracted since the gift, B became the security of W in the forthcoming bonds, and was compelled to pay the money. He then recovered a judgment against W for the amount so paid by him; and all the property of W having been then sold, by the directions of B his executions were levied on the slaves given by W to his daughter, and upon their increase. The slaves were liable to satisfy the debt of B.

Wilson v. Buchanan, 334

3. When sheriff should sue to set aside fraudulent conveyances. See Insolvent Debtor, No. 1, and

Clough &c. v. Thompson, 26

CORPORATIONS.

1. In an action by a corporation, the question whether the corporation has forfeited its charter is not open for enquiry, unless the forfeiture has been ascertained by the sentence of a Court in a proper proceeding for the purpose.

Crump v. United States Mining Company, 352

2. The organization of a corporation may be proved by its records and parol proof, without the production of its list of subscribers. *Idem*, 352

3. The stockholders of a corporation having directed the directors to create new stock and sell it, and the directors having, instead of doing this, acquired original stock and sold it, their act may be subsequently ratified by the stockholders, so as to render the sales valid against the purchasers. *Idem*, 352

4. The president of a corporation is not ex officio the agent of the corporation to sell property which it may direct to be sold; and unless appointed the agent to sell, his representations will not affect the corporation. *Idem*, 352

5. A debt is due to a partnership, and the partners are afterwards incorporated, and the debt then becomes the debt of the corporation. It is competent to sue for it in the corporate name, in a Court of equity.

Griffin's ex'or & als. v. A. Macaulay's adm'r, 476

Dismal Swamp Land Co. v. Same, 476

COURTS.

Of appeals, see Appellate Courts.

Circuit courts, see Alexandria.

See Examining Courts.

COVENANTS.

1. Salt works are rented for two thirds of the salt manufactured, and the lessee covenants to make at least 60,000 bushels of salt in each year. For the failure to make the salt the proper action is for the damages occasioned thereby, and to the extent of such failure; and not for a specific rent of 40,000 bushels of salt.

Prestons v. M'Call, 121

2. During the first year the lessees with the assent of the lessors, assign their lease, and the assignees covenant to assume and

pay all the contracts, debts and liabilities of the lessees, relating to the salt making business: and the next day the assignees take a new lease, paying a money rent. The taking a new lease operated as a surrender of the first, and extinguished the liabilities of the assignees prospectively; and as assignees they were not liable for prior breaches of contract by the assignors.

Idem, 121

3. The assignees were liable by their contract, to the lessors for arrears of salt rent, whether the salt was then on hand or had been sold. *Idem*, 121

4. The surrender of the first lease before the end of the year prevented a breach of the covenant to manufacture 60,000 bushels of salt in each year. *Idem*, 121

5. Though the lessors were not parties to the assignment of the lease, yet as it was made with their assent, which by the 694 terms of the lease was *necessary, they have the right to enforce the contract of the assignees to pay the debts of the lessees, so far as they are concerned. *Idem*, 121

6. The contract between the lessees and assignees was not for an indemnity, but for their complete exoneration, by the engagement of the assignees to relieve them therefrom. *Idem*, 121

7. The maker of a note becomes the bail of the holder, and they enter into a covenant by which the maker is to hold the note until his liability as bail ceases, and then to return it. The note is not merged in the covenant.

Bowles' ex'or v. Elmore's adm'r, 385

CRIMINAL JURISDICTION AND PROCEEDINGS.

Misdemeanors.

1. A motion to quash a presentment for a misdemeanor because the constitutional conclusion is omitted, should be overruled, if the attorney asks that a rule for filing an information may be issued upon it.

Christian's Case, 631

2. The judgment of the Court overruling the motion to quash the presentment, affords no reason against giving leave to file the information. *Idem*, 631

3. The issuing process against the defendant to answer the presentment, furnishes no reason against granting leave to file the information. *Idem*, 631

4. Two persons may be jointly indicted or proceeded against by information, for retailing ardent spirits without a license.

Harris & Hickman's Case, 600

5. Upon their conviction there should be a separate fine of \$30 against each.

Idem, 600

6. If it does not appear on the record that the defendant objected, it will be presumed in the appellate Court, that the jury was discharged for sufficient cause, and with the consent of the defendant.

Dye's Case, 662

7. In cases of misdemeanor the Court has authority to discharge the jury without the consent of the defendant. *Idem*, 662

Felonies.

8. If the examining Court sits during the session of the Circuit court to which the prisoner is sent for further trial, that term of the Circuit court is not one of the two at which he is required to be indicted or be discharged from imprisonment.

Bell's Case, 646

9. An indictment having been quashed upon a demurrer to a defective replication to a plea, another indictment may be found for the same offence, without another trial before the examining Court.

Souther's Case, 673

10. Upon a joint indictment against several, the Commonwealth may elect to try them separately. *Curran's Case*, 619

11. The attorney for the Commonwealth allowed to recall a witness and ask him a question after the attorney had made his opening argument, and one of the counsel for the prisoner had spoken in his defence.

Armstead's Case, 599

12. If the jury come into Court and ask for an instruction upon a particular point, and the law is properly stated to them, even if it may seem to others to be an abstract question, it is no cause for setting aside the verdict. *Perkins' Case*, 651

13. Although as a general rule it is improper after a cause has been submitted to the jury, to introduce new testimony, or examine new witnesses; yet for good cause shewn it may be done. In such cases the Court must exercise a sound discretion; and when the circumstances of the case make it necessary, either party should be permitted to introduce new testimony or new witnesses. *Livingston's Case*, 658

DECREES.

1. In a suit by legatees against the administrator de bonis non, of the heir of the executor of the testator, under the circumstances a decree against the administrator de bonis non, conclusively establishes against the heir and all his representatives, the indebtedness of the executor's estate to the legatees of his testator, that they had a right to follow the *assets in the hands of the heir, that a sufficiency of such assets came to his hands, and that his representatives who had received his assets are accountable to said legatees for the assets so received.

Sheldon & als. v. Armstead's adm'r & als., 264

2. Under the circumstances the decree against the administrator de bonis non of the heir, was held conclusive against the prior executor of the heir, upon the question of the indebtedness of the executor of the testator to his estate, the right to follow his assets in the hands of the heir, the receipt of sufficient assets by the heir for the payment thereof, and the liability of his estate for the amount. *Idem*, 264

3. A marriage agreement, though not recorded, having been affirmed by a decree after the marriage and before the husband became indebted, is valid against the husband's creditors.

Dabney & wife & als. v. Kennedy, 317

4. It was not necessary to record the decree to make it valid against creditors of the husband. *Idem*, 317

5. After the husband's death the wife and children recover the property covered by the decree, in a suit against the administrator of the husband. Such recovery is conclusive against the administrator and creditors of the husband. *Idem*, 317

6. A case in which there has been a final decree is not a pending suit in the sense of the Code, ch. 16, § 18, p. 101, and ch. 216, § 2, p. 800.

Yarborough & wife v. Deshazo, 374

DEEDS.

1. Under the words in a deed of "all debts due to the grantor," the indebtedness of a partner of the grantor to the partnership will pass.

Griffin's ex'or & als. v. A. Macaulay's adm'r, 476

Dismal Swamp Land Co. v. Same, 476

2. Under these words a claim which the grantor has against a foreign government for damages for the detention of his ship, will pass. *Idem*, 476

DETINUE.

In an action of detinue for a female slave, the recovery may be not only for the slave named in the writ, but for her children born since the commencement of the action.

Morris v. Peregoy, 373

DEVASTAVIT.

1. What not a devastavit. See Executors and Administrators, No. 12, and *Sheldons & als. v. Armstead's adm'r & als.*, 264

2. What is a devastavit. See Executors and Administrators, No. 13, and *Idem*, 264

EQUITABLE DEFENCES.

1. In an action on a bond given for the purchase money of land, the act of 1831 does not authorize a plea of failure of consideration upon equitable grounds, which would require a rescission of the contract out of which the bond originated, and a reinvestment of the obligee with the interest in the land alleged to have been sold to the obligor.

Shiflett, &c. v. The Orange Humane Society, 297

2. In an action on a bond given for the price of a slave, a special plea under the act of 1831, may aver in general terms the unsoundness, and the knowledge and fraudulent concealment of the plaintiff; that on discovering the unsoundness the defendant offered to return the slave, and

demand a rescission of the contract, which plaintiff refused; laying the damage to the whole amount of the price or not laying any damage, and praying for judgment in bar of the action.

Fleming v. Toler, 310

3. If such special plea avers in general terms the unsoundness of the slave, and then adds a specific unsoundness, the defendant may, under this plea, prove any unsoundness, and is not confined to the specific unsoundness mentioned in the plea.

Idem, 310

4. When refusal to receive a second special plea is not ground of reversal. See Error, No. 2, and Idem, 310

696 *EQUITABLE JURISDICTION AND RELIEF.

1. A Court of equity will not lend its aid for the settlement and adjustment of the transactions of a partnership for gambling.

Nor will it give relief to either partner against the other founded on transactions arising out of such a partnership, whether for profits, losses, expenses, contribution or reimbursement.

Watson v. Fletcher, 1

Fletcher v. Watson, 1

Though the pleadings do not shew that the transactions sought to be settled and adjusted, arose out of a partnership for gambling, yet if this appears from the evidence taken before the commissioner who was directed to settle the accounts, it is proper for the Court to recommit the accounts, and direct an enquiry into the consideration on which the claims of the parties are founded. Idem, 1

3. Where an adm'r with the will annexed resorts to equity to establish and enforce claims against his testator's estate, and to set aside conveyances made by him, he places his whole trust and authority under the control of the Court, and he will be restrained by injunction from proceeding to sell the real estate before there is an adjudication of the matters in controversy between himself and the devisee and legatee. Idem, 1

4. A case of account which was proper for equity.

Prestons v. M'Call, 121

5. A case in which a vendor being entitled to relief on account of a fraudulent concealment of facts by the purchaser, under the circumstances, compensation, and not a rescission of the contract, was the mode of relief administered.

Armstead v. Hundley, 52

6. Equity will relieve against a compromise entered into by the party, in ignorance of important facts connected therewith.

Ross's ex'or v. M'Lauchlan's adm'r

& als., 86

Same v. Haden's adm'r, 86

7. In such case the party having paid more than he was originally bound to pay, may recover back the excess with interest from the time of payment. Idem, 86

8. When mistake as to the title to land is no ground of relief. See Mistake, No. 2, and

Sutton v. Sutton, 234

9. The principles on which equity will refuse relief where there has been delay in enforcing claims. See Laches and Lapse of Time, No. 1, 2, 3, and

Smith & als. v. Thompson's adm'r & als., 112

West's adm'r & als. v. Thornton & als., 177

ERROR.

1. What is error not to be corrected by appeal but by motion to the Court. See Amendments, No. 1, and

Snead v. Coleman & wife, 300

2. Where a plea under the act of 1831 is filed, and another is tendered, which only varies from the first in the amount of damages laid, or in asking to rescind the contract entirely, the rejection of this plea by the Court, is not ground for reversing the judgment upon appeal, where the verdict negatives the facts stated in both pleas.

Fleming v. Toler, 310

EVIDENCE.

1. In an action of debt against an adm'r, a paper signed by him in the lifetime of his intestate, referring to the bond sued on, not appearing to have been signed as agent of the intestate, is not competent evidence against the adm'r as the admission of a party on the record.

Gaines' adm'r v. Alexander, 257

2. The paper not purporting to be executed as agent of the intestate, is not of itself evidence of agency, so as to render it competent evidence. Idem, 257

3. A trust deed stating the amount of the different debts secured, is not conclusive as to the amount of a debt even against the grantor or his adm'r.

Griffin's ex'or & als. v. A. Macaulay's adm'r, 476

Dismal Swamp Land Co. v. Same, 476

4. Under the circumstances the books of the grantor in the deed of trust were proper evidence of the amount of the debts due to the creditors secured by the deed.

Idem, 476

5. Under the circumstances the answer of the assignor of a debt held to 697 *be competent evidence against his volunteer assignee, in a controversy between the assignee and third persons.

Idem, 476

6. The organization of a corporation may be proved by its records and parol proof, without the production of its list of subscribers.

Crump v. United States Mining Company, 352

7. What confessions of an accomplice are not competent evidence against his confederate. See Accomplices, No. 1, and

Hunter's Case, 641

EXAMINING COURTS.

An examining Court has no right to sign a bill of exceptions to any opinion or act of the Court; and if they do, it is no part of the record of the trial.

Souther's Case, 673

EXECUTORS AND ADMINISTRATORS.

1. To the judgment of a County Court refusing to permit a person named as ex'or in a will, to qualify without giving security, an appeal, as of right, lies to the Circuit Court.

Fairfax v. Fairfax's ex'or, 36

2. A testator appointed his wife and son ex'x and ex'or of his will, and directed that they should not be required to give security. Some years afterwards he, by codicil to his will, appointed a son-in-law an ex'or with his wife and son. He is not entitled to qualify without giving security.

Idem, 36

3. Quære: If in such case parol evidence is admissible to shew the intention of the testator.

Idem, 36

4. An adm'r who was the partner of the intestate, cannot question his title to a moiety of the partnership personal property, on the ground that it was bought and used for gambling purposes.

Watson v. Fletcher, 1

Fletcher v. Watson, 1

5. When an adm'r with the will annexed, resorts to equity to establish and enforce claims against his testator's estate, and to set aside conveyances made by him, he places his whole trust and authority under the control of the Court; and he will be restrained by injunction from proceeding to sell the real estate before there is an adjudication of the matters in controversy between himself and the devisee and legatee.

Idem, 1

6. An adm'r or ex'or is not bound to sue for the recovery of a debt due the estate where it is apparent the debtor is not able to pay it.

Mitchell's adm'r v. Trotter & wife, 136

7. Under the circumstances, an ex'or was held not to be responsible for a debt due the estate, and lost by the insolvency of the debtor, occurring after the testator's death.

Nelson's ex'or v. Page & als., 160

8. In a suit by residuary legatees against the ex'or for a distribution of the estate, the specific legatees should be parties, unless it satisfactorily appears that their legacies have been satisfied.

Idem, 160

9. Partial payments made by an ex'or to legatees from time to time, though they amount to more than the shares of some of the legatees does not constitute such a settlement of the ex'or's accounts as to take the demand for commissions out of the operation of the statute.

Idem, 160

10. When, and to what extent a decree

against an adm'r de bonis non of the heir of an ex'or in favour of the legatees of the testator, is conclusive against heir and all his representatives. See Decrees, No. 1, 2, and

Sheldon & als. v. Armstead's adm'r & als., 264

11. Quære: What would be the effect generally of a judgment against an adm'r de bonis non in establishing a debt against the estate, so as to conclude a former ex'or or adm'r, and thereby subject him to a devastavit.

Idem, 264

12. The prior ex'or having paid over the assets to the legatees of the heir with full notice of the claim of the legatees of the first testator, and after suit revived against him, such payment constituted a devastavit.

Idem, 264

13. A part of the assets of the heir's estate having been retained by the prior ex'or, and recovered by suit from his ex'or by the adm'r de bonis non of the heir, the prior ex'or is to be credited for the amount so recovered.

Idem, 264

*14. Legatees having obtained a decree ascertaining the rights of all, on another bill to enforce the decree, they seeking satisfaction out of a common fund, it is proper for all of them to unite in one suit to get the benefit of the former decree in their favour: And the bill is not multifarious.

Idem, 264

15. If the first decree was in favour of all, and on appeal this decree was affirmed, though the decree in the Court below, for some cause omits to decree in favour of one legatee, he may unite with the others in a bill to enforce the first decree.

Idem, 264

16. The personal representative of the prior ex'or having paid over the assets to the legatees of the prior ex'or without notice of the plaintiffs' claim, it was proper to subject them in the first instance instead of the personal representative.

Idem, 264

17. The amount paid over by adm'r of prior ex'or to adm'r de bonis non of heir, should be a credit to the prior ex'or on the principal of the debt due from the heir to the testator for which the prior ex'or is responsible.

Idem, 264

18. If some of the legatees abandon their claims, the liability of the defendants is diminished by the amount of their shares.

Idem, 264

19. Under the circumstances, plaintiffs should proceed first against the legatees of the heir, and should only recover from the legatees of prior ex'or, for so much as they cannot recover from legatees of heir.

Idem, 264

20. Husband of a legatee for life of the prior ex'or having no assets of his wife who died before the decree, is not liable for the life estate which had then terminated.

Idem, 264

21. Decree against adm'r de bonis non

appealed from and affirmed, as plaintiffs had no right to proceed against the prior ex'or's estate to have satisfaction of the decree until it was affirmed, the act of 1826 did not begin to run in favour of the prior ex'or's estate until then. *Idem*, 264

22. As the decree of the Court below in pursuance of the decree of the Court of appeals ascertained the right of the plaintiffs to proceed against the sureties of the adm'r de bonis non of the heir, the statute of 1826 began to run from that time in favour of his sureties. *Idem*, 264

23. An ex'or signs a note for a debt of his testator as ex'or; and there is an action thereon against him as ex'or, but the count is in the debet and detinet, and the breach is in the failure to pay. *Quære*: If upon a judgment by default it should be against him as ex'or or personally.

Snead v. Coleman & wife, 300

24. If it is error to render a personal judgment, it is a clerical error to be corrected on motion to the Court, and not by appeal. *Idem*, 300

25. When there is no hand to receive a legacy the ex'or should invest it in an interest bearing fund, or should bring it into Court to be so invested.

Lyon's adm'r v. Magagnos' adm'r, 377

FERRIES.

1. Ferry franchise in Virginia is the creature of the statute law; and the rights of the owner of the ferry is to be measured by the statute.

Somerville v. Wimbish, 205

2. Though a ferry has been established for any length of time across a river, it is competent for the Legislature to establish another ferry from the other side of the river, to pass along the same line used by the first; and this is no invasion of the ferry franchise of the owner of the first ferry. *Idem*, 205

3. The establishment of such a ferry confers upon the owner no title to any portion of the soil on the other side of the stream, and no easement there, beyond the incidental delegation of such as has been theretofore or may be thereafter acquired by the public as a highway. *Idem*, 205

4. *Quære*: If in such a case the ferry franchise will carry with it the privilege of using any public roads on the opposite land, for the purpose of landing or taking in passengers. *Idem*, 205

699 *5. The order of the County court directing the justices to be summoned to consider the verdict of the jury in ferry cases, may be executed by leaving a notice in the mode directed in the general law in relation to notices. *Idem*, 205

6. A person who signed a memorial to the Legislature for the establishment of a ferry is not thereby rendered incompetent to act on the jury. *Idem*, 205

FORGERY.

1. In an indictment for the forgery of a

negotiable note it is not necessary to set out the endorsements upon it.

Perkins's Case, 651

2. The paper does not cease to be a negotiable note because for some informality a bank would not discount it. *Idem*, 651

FRAUD.

1. A vendor is entitled to relief on account of the fraudulent concealment of facts by the purchaser. But under the circumstances, the proper mode of relief was held to be compensation for the injury, and not a rescission of the contract.

Armstead v. Hundley, 52

2. The grantor in an absolute conveyance of personal property, continuing in possession, raises the presumption of fraud as regards creditors of the grantor, and throws upon the grantee the burthen of proving the fairness and good faith of the transaction.

Curd v. Miller's ex'rs, 185

3. The surety of the grantor may direct the execution issued against grantor and himself, to be levied on the property, and set up the fraud in the conveyance.

Idem, 185

4. In written proposals for a sale of stock in a mining company, if the representations contained therein are false as to any material fact, by which the purchasers have been misled to their injury, and in which they are presumed to have trusted to the vendors, then the contract founded in such representations is void, whether the vendors knew the representations to be false at the time they were made or not, and whether made with a fraudulent intent or not.

Crump v. United States Mining Company, 352

5. In such case, the suppression from the written proposals of any fact known to the vendors, materially affecting the value of the thing to be sold, and inconsistent with the statements in the written proposals, vitiates the contract as fully as the false affirmation of any material facts, if the purchaser is injured thereby.

Idem, 352

6. If an agent for the sale of property makes false representations of its value and condition, the principal is affected thereby, and cannot enforce the contract for the sale of the property; and that, though the principal gives him a written description of the property. *Idem*, 352

7. A gift of slaves to a married daughter by a father largely indebted at the time in proportion to his property, is fraudulent as to his creditors, and may be subjected by a party becoming his surety in a forthcoming bond, more than five years after the gift.

Wilson v. Buchanan, 334

GAMBLING.

1. A Court of equity will not lend its aid for the settlement of the transactions of a partnership for gambling.

Watson v. Fletcher, 1

Fletcher v. Watson, 1

2. Though the pleadings do not shew the nature of the partnership, yet if it appears from the evidence taken before the commissioner, the Court will refuse to settle the gambling accounts. *Idem*, 1

3. One of the partners qualifies as the adm'r of the other, he cannot question the right of his intestate to a moiety of the property though bought and used for gambling purposes. *Idem*, 1

HABEAS CORPUS.

The Court of appeals has no jurisdiction to grant a writ of error to a judgment upon an application for a writ of habeas corpus. *Bell v. The Commonwealth*, 201

700 *HUSBAND AND WIFE.

1. Husband sells wife's remainder in slaves for value, and dies leaving the wife surviving him, before the life tenant. The wife is entitled to the slaves as against the purchaser from the husband.

Moore v. Thornton & als., 99

2. Though the purchaser buys the interest of the life tenant, yet if the husband dies in the lifetime of the life tenant, leaving the wife surviving, she is entitled.

Idem, 99

3. There being a charge upon the property of the wife, a part of which is in possession and sold so as to vest in the purchaser, the charge must be borne ratably by the purchaser and the wife.

Idem, 99

4. How the proportions are to be ascertained. *Idem*, 99

5. The husband of a legatee of a life interest, which terminates by the death of the legatee, before a decree to subject them for a devastavit of their testator, is not liable for the life estate so terminated.

Sheldon & als. v. Armstead's adm'r & als., 264

INDEBITATUS ASSUMPSIT.

Indebitatus assumpsit will lie by a common carrier to recover the amount of freight agreed upon, though part of the article to be carried was lost by the unavoidable effects of a storm.

Galt v. Archer, 307

INDICTMENTS AND INFORMATION.

1. In an indictment for lewd and lascivious cohabitation, the offence is charged from a day prior to that on which the statute punishing the offence, went into operation, but as continuing to a day after the commencement of the act. The indictment is good.

Nichols & Janes' Case, 589

2. In an indictment for retailing ardent spirits without a license, to be drank where sold, it is not error to use the word "or," in speaking of the various kinds of spirituous liquors charged to have been sold.

Morgan's Case, 592

3. An indictment for arson according to the form at common law, is sufficient for a case of arson in the day time.

Curran's Case, 619

4. For the offence of burning at night it seems the indictment must charge the burning in the night. *Idem*, 619

5. In an indictment for the forgery of a negotiable note, it is not necessary to set out the endorsements upon it.

Perkins' Case, 651

6. In an indictment for a malicious trespass it is not error to omit the words of the statute, "but not feloniously," these words not constituting any part of the description or definition of the offence.

Dye's Case, 662

7. A motion to quash a presentment for a misdemeanor, because the constitutional conclusion is omitted, should be overruled, if the attorney for the Commonwealth asks that a rule for filing an information may be issued upon it.

Christian's Case, 631

8. The judgment of the Court overruling the motion to quash the presentment, affords no reason against giving leave to file the information. *Idem*, 631

9. The issuing process against the defendant to answer the presentment, furnishes no reason against granting leave to file the information. *Idem*, 631

10. Two persons may be jointly indicted or proceeded against by information for retailing ardent spirits without a license.

Harris & Hickman's Case, 600

11. An indictment having been quashed upon a demurrer to a defective replication to a plea, another indictment may be found for the same offence without another trial before the examining Court.

Souther's Case, 673

INFORMATION.

See Indictments and Informations.

INJUNCTIONS.

1. When the title to land is clearly defective as to part, the vendee may enjoin the collection of bonds assigned in payment of the purchase money.

Clarke v. Hardgrove &c., 399

701 *2. When adm'r who has resorted to equity to establish his claims against his intestate's estate, will be enjoined from proceeding to sell the property of the estate. See Equitable Jurisdiction and Relief, No. 3, and

Watson v. Fletcher, 1

Fletcher v. Watson, 1

INQUISITION.

A person who signed a memorial to the legislature for the establishment of a ferry, is not thereby rendered incompetent to act on the jury of inquest.

Somerville v. Wimbish, 205

INSOLVENT DEBTORS.

1. Upon taking the oath of insolvency,

all the property and rights of the insolvent debtor are vested in the sheriff, who, as representing the creditor, is entitled to assert his legal and equitable rights, and to set aside fraudulent conveyances of the insolvent, and recover the property for the benefit of the creditor.

Clough, &c. *v.* Thompson, 26

2. The law does not permit the sale of the goods, chattels and estate of an insolvent debtor in the possession of a third person, until the same shall have been recovered in the mode prescribed by the statute. *Idem*, 26

3. The sheriff who is the trustee for all interested in the estate of an insolvent debtor, is not justified in selling the interest of the debtor in the estate surrendered in the schedule, or vested by law in the sheriff, when, owing to alleged incumbrances, the validity of which is controverted, or the extent thereof is not ascertained and uncertain, the property is not in a condition to be disposed of for its value. *Idem*, 26

4. The real estate of an insolvent debtor vests in the sheriffs of the counties in which it lies; and a sale thereof by the sheriff of the county in which the oath of insolvency is taken by the debtor, is without authority and void. *Idem*, 26

5. Debts due to the insolvent debtor, and slaves and other personal property not in the possession of the sheriff, or which is in such a condition that he cannot take possession without process, cannot be sold by him so as to vest the legal title in the purchaser. *Idem*, 26

6. Where a variety of property is embraced in a schedule, a sale, not of the property specifically, but of the schedule itself, is a violation of duty on the part of the sheriff; and the purchaser at such sale if he acquired the legal title, would, in a Court of equity, be treated as a trustee for the benefit of those interested. *Idem*, 26

7. To a bill to set aside fraudulent conveyances made by an insolvent debtor, the trustees, cestuis que trust in the deeds, the sheriffs of the counties in which the lands lie and the execution creditors interested in the property, should be parties. *Idem*, 26

INTEREST.

1. A party to a compromise entered into in ignorance of important facts connected therewith, binds himself to pay and does pay more than he was originally bound to pay. He is entitled to recover back the amount he has overpaid with interest from the time of payment.

Ross's ex'or *v.* M'Lauchlan's adm'r & als., 86

Same *v.* Haden's adm'r, 86

2. The penalty and condition of a bond for the payment of money, are in the same sum. It is proper to treat it as a single bill, and to give judgment for the amount

of the bond, with interest from the time of payment.

Fleming *v.* Toler, 310

3. A legacy bears interest from the end of the year, though there has been no hand to receive it for thirteen years.

Lyon's adm'r *v.* Magagnos' adm'r, 377

JUDGMENTS.

1. When payments shall be applied to judgments rather than to bond debts. See Payments, No. 2, and

Ross's ex'or *v.* M'Lauchlan's adm'r & als., 86

Same *v.* Haden's adm'r, 86

2. The act 1 Rev. Code, ch. 128, § 65, p. 505, in relation to a scire facias, to revive a judgment, is not repealed 702 *by the act of 29th March 1831, Supp. Rev. Code, ch. 197, § 2, on the same subject.

Williamson *v.* Crawford, 202

3. Upon a scire facias to revive a judgment, neither a declaration nor a rule to plead is necessary. And if the writ is made returnable to the rules, and the defendant makes default, there should be an award of execution, which, if not set aside at the next term, becomes a final judgment as of the last day of the term. *Idem*, 202

4. Quære: If a judgment quando acciderint is within the statute of limitations in relation to judgments.

Smith's adm'r *v.* Charlton's adm'r, 425

5. Quære: What would be the effect generally of a judgment against an adm'r de bonis non, in establishing a debt against the estate so as to conclude a former ex'or or adm'r, and thereby subject him to devastavit.

Sheldon & als. *v.* Armstead's adm'r & als., 264

6. An ex'or signs a note for the debt of his testator, as ex'or. There is an action thereon against him as ex'or, but the count is in the debet and detinet, and the breach is for the failure to pay. Quære: If upon a judgment by default it should be against him as ex'or or personally.

Snead *v.* Coleman & wife, 300

7. If it is error to give a personal judgment against him, it is an error to be corrected by motion to the Court, and not by appeal. *Idem*, 300

JURISDICTION.

See Alexandria, and

M'Laughlin *v.* The Bank of Potomac & als., 68

JURORS.

1. The entertaining a decided opinion of the prisoner's guilt formed on the testimony as published in the newspapers, is not a valid objection to a juror, if he thinks he can discard the opinion, and that it would not influence his judgment; and that he could give the prisoner a fair trial according to the law and the evidence submitted to the jury. Smith's Case, 593

2. The prisoner was charged with having advised, &c., two slaves to abscond, at the same time; a venireman summoned on the first trial was stricken from the panel by the prisoner. This is not a valid objection to him as a juror on the second trial.

Idem, 593

3. A person having expressed himself before the jury were empaneled, as determined to punish a prisoner if taken upon the jury, not from any malice towards him, but from an opinion of his conduct, is no ground for setting aside the verdict and granting a new trial.

Curran's Case, 619

4. The Code, ch. 208, § 10, p. 774, gives to all jurors sitting on criminal cases compensation at one dollar a day for each day he attends on such jury.

Souther's Case, 673

LACHES AND LAPSE OF TIME.

1. A party who comes into equity to enforce an equitable claim, must do so within a reasonable time; and he must not delay until, by his negligence, there can no longer be a safe determination of the controversy, and his adversary is exposed to the danger of injustice from loss of information and evidence, and means of recourse against others, occasioned by deaths, insolvencies and other untoward circumstances.

Smith & als. v. Thompson's adm'r & als., 112

2. The application of this equitable doctrine is for the sound discretion of the Court, and does not require the conviction of the Court against the original justice of the claim, or of any other specific ground of defence; but its belief that under the circumstances of the case, it is too late to ascertain the merits of the controversy.

Idem, 112

3. Cases in which the Court refused relief on the ground of laches and lapse of time.

Idem, 112

West's adm'r & als. v. Thornton & als., 177

4. A creditor not named in a deed of trust may shew by proof that he was intended to be secured under the provision for another creditor. And under the circumstances such creditor was not barred by the delay which had occurred from asserting
703 *his claim and obtaining relief.

Griffin's ex'or v. A. Macaulay's adm'r, 476

Dismal Swamp Land Co. v. Same, 476

LANDLORD AND TENANT.

See Rent.

LEGATEES AND LEGACIES.

1. When legatees will be entitled to increased value and must bear the loss of slaves divided by commissioners under an order of Court; the loss happening before the report is confirmed.

Moore v. Thornton & als., 99

2. Specific legatees should be parties to a suit by residuary legatees against the ex'or for distribution of the estate, unless it appears they have been paid.

Nelson's ex'or v. Page & als., 160

3. What is not a legacy. See Wills, No. 2, 3, and

Columbian College v. Clopton's adm'r &c., 168

4. What concluded by a decree against an adm'r de bonis non of the heir of the ex'or in a suit by legatees of the original testator. See Decrees, No. 1, 2, and

Sheldon & als. v. Armstead's adm'r & als., 264

5. When legatees may unite in a suit to enforce a decree in their favour. See Executors and Administrators, No. 14, 15, and
Idem, 264

6. When legatees should be subjected before the ex'or. See Executors and Administrators, No. 16, and
Idem, 264

7. When legatees for the heir should be subjected before the legatees of an ex'or. See Ex'ors and Adm'rs, No. 19, and
Idem, 264

8. Testatrix gives a legacy and directs it shall be paid within a year from her death. The legacy bears interest from the end of the year, though there is no hand to receive it.

Lyon's adm'r v. Magagnos' adm'r, 377

9. Where there is no hand to receive a legacy the ex'or should invest it in an interest bearing fund, or bring it into Court to be invested.
Idem, 377

10. The legatee having died shortly after the testatrix, and before a qualification on her estate in this country, and there having been no qualification on the estate of the legatee for twelve years, the act of limitations for 1826 does not bar the claim for the legacy.
Idem, 377

LIFE ESTATE.

A purchaser of a life tenant's interest in a slave sells her. He must account with the remaindermen for the value of the slave at the death of the life tenant unless they consented to the sale.

Moore v. Thornton & als., 99

LIMITATIONS—Statute of.

1. Decree against adm'r de bonis non appealed from and affirmed. As plaintiffs had no right to proceed against the prior ex'or's estate to have satisfaction of the decree until it was affirmed, the act of limitations of 1826, did not begin to run in favour of the prior ex'or's estate until then.

Sheldon & als. v. Armstead's adm'r & als., 264

2. When the act of limitations of 1826 will protect the sureties of an adm'r de bonis non. See Ex'ors and Adm'rs, No. 22, and
Idem, 264

3. A legatee having died shortly after the testatrix, who lived abroad, and before a qualification on her estate in this country,

and there having been no qualification on the estate of the legatee for twelve years, the act of limitations of 1826 does not bar the claim for the legacy.

Lyon's adm'r v. Magagnos' adm'r, 377

4. If upon appeal from a final judgment &c., the appeal bond is not given within five years from the judgment &c., the appeal will be dismissed.

Yarborough & wife v. Deshazo, 374

5. The proviso in the act, the Code, ch. 149, § 19, p. 540, does not extend to the law limiting and regulating appeals.

Idem, 374

6. Covenant between the maker and holder of a note, that the note is to be held by the maker until his liability as bail of the holder ceases, and that he then shall deliver it. The statute of limitations does not run

from the time the covenant was executed until the liability of the maker as bail ceased.

Bowles' ex'or v. Elmore's adm'r, 385

7. A judgment quando acciderint does not come within the operation of the statute of limitations in relation to judgments.

Smith's adm'r v. Charlton's adm'r, 425

8. A presentment for a misdemeanor is the commencement of the prosecution; and unless the prosecution is then barred by the statute of limitations, it will not be barred by the failure to file an information or indictment upon the presentment before the time of limitations runs out.

Christian's Case, 631

MALICIOUS TRESPASS.

The act of 1823 to punish malicious trespasses, was intended to apply to acts of trespass on the property of another, without colour of title or claim of right bona fide and not feigned for the occasion; and not to cases where there is a bona fide claim of right to the property.

Dye's Case, 662

MARRIAGE AGREEMENTS.

1. A marriage agreement though not recorded, having been affirmed by a decree after the marriage and before the husband became indebted, is valid as against the husband's creditors.

Dabney & wife & als. v. Kennedy, 317

2. An agreement made in contemplation of marriage though void as to creditors because not recorded, is valid between the parties; and the wife and children for whose benefit it is made, may call for a specific execution of the agreement, if there is no existing creditor or purchaser whose rights will be affected by it; though the marital rights of the husband have attached by a reduction of the property into his actual possession.

Idem, 317

3. It was not necessary to record the decree to make it valid against the creditors of the husband.

Idem, 317

4. After husband's death the wife and children recover the property covered by

the decree, against the adm'r of the husband. Such recovery is conclusive against the adm'r and creditors of the husband.

Idem, 317

5. Marriage settlement embraces slaves in possession of a life tenant, who also holds slaves in which husband has an interest. A contract between the husband and life tenant by which she surrenders a large number of slaves in consideration of a fee in other slaves of little more than the value of the husband's interest; his conveyance of the slaves to her must be considered as embracing his interest in the slaves; and her title is not affected by the husband's selling some of the slaves surrendered to him in disregard of the marriage articles.

Tabb's adm'r v. Archer's adm'r & als., 408

6. The arrangement being clearly beneficial to the beneficiaries under the marriage articles, the small amount given to the life tenant above the husband's interest in the slaves, is a proper charge upon the trust estate.

Idem, 408

MISDEMEANOR.

1. On a prosecution under the act of 1847-8, ch. 10, § 24, for punishing a free person, who, by speaking or writing shall maintain that owners have no right of property in their slaves, it is incumbent on the Commonwealth to shew that in the alleged speaking the defendant denied the right of owners to property in their slaves, and also to shew that that denial was maintained by him. The language must plainly express the denial, or in its plain meaning necessarily imply it.

Bacon's Case, 602

2. A presentment for a misdemeanor is the commencement of the prosecution; and unless the prosecution is then barred by the statute of limitations, it will not be barred by the failure to file an information or indictment on the presentment before the time of limitations runs out.

Christian's Case, 631

3. In cases of misdemeanor the Court has authority to discharge the jury without the consent of the defendant.

Dye's Case, 662

705

*MISTAKE.

1. A party to a compromise entered into in ignorance of important facts connected therewith, will not be held to be bound by it.

Ross's ex'or v. M'Lauchlan's adm'r & als., 86

Same v. Haden's adm'r, 86

2. A mistake in respect to the title to land is no ground for relief to a purchaser, where he purchased the land without agreement express or implied, for a conveyance with warranty of title.

Sutton v. Sutton, 234

3. The object of a trust being to sell for what the property will bring, and there

being no warranty by the grantor of either title or quantity, the purchaser is not entitled to relief for a mistake in the estimated quantity of land. *Idem*, 234

MULTIFARIOUSNESS.

See Executors and Administrators, No. 14, 15, and
Sheldon & als. v. Armstead's adm'r & als., 264

MURDER.

1. A new trial granted to a prisoner convicted of murder in the first degree, after two concurring verdicts, approved by the judge who presided at the trial, the evidence being wholly insufficient to sustain the verdict and judgment.

Grayson's Case, 613

2. The killing of a slave by his master, by wilful and excessive whipping, is murder in the first degree, though it may not have been the intention of the master to kill the slave.

Souther's Case, 673

NEW TRIALS.

1. A new trial granted to a prisoner convicted of murder in the first degree, after two concurring verdicts approved by the judge who presided at the trial, the evidence being wholly insufficient to sustain the verdict and judgment.

Grayson's Case, 613

2. A venireman having expressed himself before the jury were empaneled as determined to punish a prisoner if taken upon the jury, not from any malice towards him, but from an opinion of his conduct, is no ground for setting aside the verdict and granting a new trial.

Curran's Case, 619

NOTICE.

The order of a County court directing justices to be summoned to consider of a verdict in ferry cases, may be executed by leaving a notice in the mode prescribed in the general law in relation to notices.

Somerville v. Wimbish, 205

PAROL TESTIMONY.

Quære: If parol testimony is admissible to shew whether or not a testator intended his ex'or should qualify without giving security.

Fairfax v. Fairfax's ex'or, 36

PARTIES.

1. To a bill to set aside fraudulent conveyances made by an insolvent debtor, the trustees and cestuis que trust in the deeds, the sheriffs of the counties in which the lands lie, and the execution creditors interested in the property, should be parties.

Clough &c. v. Thompson, 26

2. In a suit by residuary legatees against the ex'or for a distribution of the estate, the specific legatees should be parties, unless it appears that their legacies have been paid.

Nelson's ex'or v. Page & als., 160

3. When a corporation may sue in equity for a debt. See Corporations, No. 5, and *Griffin's ex'or v. A. Macaulay's adm'r*, 476
Dismal Swamp Land Co. v. Same, 476

PARTNERS.

1. A Court of equity will not lend its aid for the settlement and adjustment of the transactions of a partnership for gambling. Nor will it give relief to either partner against the other, founded on transactions arising out of such partnership, whether for profits, losses, expenses, contribution or reimbursement.

Watson v. Fletcher, 1

Fletcher v. Watson, 1

706 *2. Although the pleadings do not shew the nature of the partnership, yet if this appears from the evidence before the commissioner directed to settle the accounts, the Court should recommit them, and direct an enquiry into the consideration on which the claims of the parties are founded.

Idem, 1

3. One of the partners qualifies as adm'r of the other, he cannot question the title of his intestate to one moiety of the personal property bought and used for the partnership purposes.

Idem, 1

4. The whole and not a moiety, of the personal property belonging to the partnership must be sold, and the proceeds divided between the living partner and the estate of the deceased partner.

Idem, 1

5. The surviving partner, adm'r, files a bill to set aside conveyances made by his intestate, and to have his claims upon the estate adjusted; and he then advertises for sale, his intestate's undivided moiety of the real estate held by them jointly. *Held*. By his bill he placed his whole trust and authority under the control of the Court; and it was an abuse of his fiduciary relation to proceed to sell the real estate before an adjudication of the matters in controversy; and the sale was properly restrained by injunction.

Idem, 1

6. Under the circumstances of the case and after the time which had elapsed, the Court refused to enquire into errors which were alleged to appear upon the face of a final settlement of a partnership between the former partners.

Ross's ex'or v. M'Lauchlan's adm'r

& als., 86

Same v. Haden's adm'r, 86

7. In a suit by the ex'or of one partner against the ex'or and sureties of the other partner, under the circumstances, the sureties not allowed to set up a credit which had been set up by the partner, and again by the ex'or, and had been disallowed by the Court in both instances.

Idem, 86

8. A partner in two firms one of which is debtor to the other, after the dissolution, was authorized, under the circumstances, to transfer the debt due from the one firm to the other to a creditor of the latter firm.

Peyton & als. v. Stratton & als., 380

PAYMENTS.

1. A debtor by four bonds payable at successive periods, makes payments which, upon a settlement after the death of the debtor, are ascertained to amount to more than the first bond. The creditor not allowed to apply the surplus to the fourth bond; but the Court will apply it to the second bond in relief of a party bound as surety for that bond.

Ross's ex'or *v.* M'Lauchlan's adm'r & als., 86
Same *v.* Haden's adm'r, 86

2. A creditor by two judgments and a bond files a bill against the ex'or of the debtor, and obtains a personal decree against the ex'or for the whole amount. Upon an execution which issued upon this decree a part of the money is made. The judgments being debts of highest dignity, the money so made is to be applied as a payment upon them in relief of a party who is bound as surety for the judgments. *Idem*, 86

3. In this case the ex'or sells lands of his testator, and pays the proceeds to the creditor. As the judgments were liens upon the lands, the payment is to be applied as a credit upon the judgments. *Idem*, 86

PLEADINGS.

1. When pleadings will be amended. See Amendments, No. 2, and

Bowles' ex'or *v.* Elmore's adm'x, 385

2. What ground of equitable defence to a bond will not be allowed at law under the act of 1831. See Equitable Defences, No. 1, and

Shiflett &c. *v.* The Orange Humane Society, 297

3. What a good plea of unsoundness in a slave and fraudulent concealment by vendor, under the act of 1831. See Equitable Defences, No. 2, and

Fleming *v.* Toler, 310

4. There may be an averment of general unsoundness, and then an averment of a specific unsoundness; and under this plea defendant may prove any unsoundness. *Idem*, 310

5. A conviction for advising one slave to abscond is no bar to a prosecution
707 *for advising another to abscond; though the advising was to both at one time by the same words and acts.

Smith's Case, 593

PRACTICE AT COMMON LAW.

1. The penalty and condition of a bond for the payment of money are in the same sum. It is proper to treat it as a single bill, and to give judgment for the amount of the bond with interest from the time of payment.

Fleming *v.* Toler, 310

2. Judgment by default against an ex'or de bonis propriis: If erroneous it should be corrected by motion to the Court and not by appeal.

Snead *v.* Coleman & wife, 300

3. Replication to a plea allowed to be amended as to matter of form, after demurrer thereto sustained.

Bowles' ex'or *v.* Elmore's adm'x, 385

4. When the rejection of a second plea is not ground for reversing a judgment in the appellate Court. See Error, No. 2, and Fleming *v.* Toler, 310

PRACTICE IN CRIMINAL CASES.

See Criminal Jurisdiction and Proceedings.

PRACTICE IN CHANCERY.

1. Under the circumstances of the case it was error to dissolve the injunction before the cause was matured and came on for a final hearing.

Gray *v.* Overstreet & als., 346

2. Vendee of land enjoins the collection of the purchase money for a clear defect of title to part of the land. Vendor should be directed to perfect the title by a day specified by the Court. And if he fails to do so, a commissioner should be directed to ascertain the relative value of the part of the tract to which the title is defective.

Clarke *v.* Hardgrove &c., 399

3. The Court will recommit an account to a commissioner with directions to enquire what items of it originated in a partnership for gambling, tho' the pleadings state nothing about such a partnership.

Watson *v.* Fletcher, 1

Fletcher *v.* Watson, 1

4. When a Court of equity will control and direct an adm'r in the administration of the estate, who has come into equity to set up his claims against it. *Idem*, 1

PRESENTMENTS.

1. A presentment for a misdemeanor is the commencement of a prosecution.

Christian's Case, 631

2. A presentment is a good foundation for an information, though technically defective. *Idem*, 631

3. It should not be quashed for such technical defect, if the attorney for the Commonwealth asks for a rule for an information. *Idem*, 631

PRINCIPAL AND AGENT.

1. The president of a corporation, is not ex officio the agent of the corporation to sell property, which it may direct to be sold; and unless appointed to sell, his representations are not binding on the corporation.

Crump *v.* United States Mining Company, 352

2. An agent to sell property, is furnished by his principals with written proposals containing the terms of sale and a description of the property. If the agent makes other representations of the value and condition of the property which are false, and thus induces persons to buy, the principals, though they neither authorized or were in-

formed of these representations, are bound by them, and the contracts are void.

Idem, 352

PRIVATE ACTS.

What judicial notice is to be taken of private statutes in an appellate Court. See Appellate Courts, No. 4, and

Somerville v. Wimbish, 205

PROMISSORY NOTES.

1. A paper signed in blank, and endorsed in blank, may be filled up either as a common promissory note or a negotiable note; and the person who endorsed it in blank will be liable on his endorsement to a holder for value.

Orrick v. Colston, 189

2. In such a case if the paper is filled up as a common promissory note to a third person who advances the money for it to the makers, he may treat the endorser as an original surety or as a guarantor of the note. Idem, 189

3. If after the note is filled up and delivered to the payee, the holder fills up the blank endorsement with a guarantee, he may afterwards erase it and proceed against the endorser as an original surety.

Idem, 189

4. When note not merged in a covenant. See Covenant, No. 7, and

Bowles' ex'or v. Elmore's adm'x, 385

RATIFICATION.

Act of directors of a corporation subsequently ratified, valid.

Crump v. United States Mining Company, 352

RENT.

1. Salt-works are rented for two thirds of the salt made, and the lessees covenant to make at least sixty thousand bushels of salt in each year. The landlord is not entitled to distrain or sue for forty thousand bushels; but only two thirds of the quantity actually made.

Prestons v. M'Call, 121

2. For the failure to make sixty thousand bushels in one year, the proper action would be for the damages occasioned thereby, and to the extent of such failure; and not for a specific rent of forty thousand bushels of salt.

Idem, 121

3. During the first year the lessees with the assent of the lessors, assign their lease, and the assignees covenant to assume and pay all the contracts, debts and liabilities of the lessees relating to the salt making business. On the next day the assignees take a new lease paying a money rent. The taking a new lease operated as a surrender of the first, and extinguished the liabilities of the assignees prospectively; and as assignees they were not liable for prior breaches of contract by the assignors.

Idem, 121

4. The assignees were liable by their

contract to the lessors for arrears of salt rent, whether the salt was then on hand or had been sold. Idem, 121

5. The surrender of the first lease before the end of the year prevented a breach of the covenant to manufacture sixty thousand bushels of salt a year. Idem, 121

6. Though the lessors were not parties to the assignment of the lease, yet as it was made with their assent, which by the terms of the lease was necessary, they have the right to enforce the contract of the assignees to pay the debts of the lessees so far as the lessors are concerned. Idem, 121

SALES.

1. When a contract is made for the purchase of an article thereafter to be delivered and paid for, so long as any act remains to be done by the vendor in order to put it in a state of readiness for delivery, or the amount of the purchase money remains yet to be ascertained, by enumeration, measurement or weighing of the article, the general rule is, that the property does not pass to the buyer, but remains at the risk of the seller.

Dixon v. Myers & Co., 240

2. In written proposals for a sale of stock in a mining company, if the representations embraced therein are false as to any material fact by which the purchasers have been misled to their injury, and in which they are presumed to have trusted to the vendors, then the contract founded on such representations is void, whether or not the vendors knew the representations to be false at the time they were made; and whether or not made with a fraudulent intent.

Crump v. United States Mining Company, 352

3. In such case the suppression from the written proposals of any fact within the knowledge of the vendors, materially affecting the value of the thing sold, and inconsistent with the statements in the written proposals, vitiates the contract as fully as the false affirmation of any material facts, if the purchaser is injured thereby. Idem, 352

*4. If in such case the representations contained in the written proposals were in all material respects true, and no fact within the knowledge of the vendors materially affecting the value of the thing sold, was suppressed to the injury of the purchasers, the subsequent failure of the mine in value and productiveness does not impair the right of the vendors to enforce the contract. Idem, 352

5. When false representations of agent to sell will bind the principal. See Principal and Agent, No. 2, and Idem, 352

SCIRE FACIAS.

1. The act 1 Rev. Code, ch. 128, § 65, p. 505, in relation to a scire facias to revive a judgment, is not repealed by the act of March 20th, 1831, Sup. Rev. Code, ch. 197, § 2, on the same subject.

Williamson v. Crawford, 202

2. Upon a scire facias to revive a judgment, neither a declaration nor a rule to plead is necessary: And if the writ is made returnable to the rules, and the defendant makes default, there should be an award of execution, which if not set aside at the next term, becomes a final judgment as of the last day of the term. *Idem*, 202

SHERIFFS.

1. Upon taking the oath of insolvency, the property and rights of the insolvent debtor vest in the sheriff, and he, as representing the creditor, may assert his rights, and set aside fraudulent conveyances of the insolvent, and recover the property for the benefit of the creditor.

Clough &c. v. Thompson, 26

2. When sheriff not authorized to sell property of insolvent debtor. See *Insolvent Debtor*, No. 3, and *Idem*, 26

3. The real estate of an insolvent debtor vests in the sheriffs of the counties where it lies, and the sheriff of the county where the oath is taken is not authorized to sell it. *Idem*, 26

4. When it is illegal and improper for a sheriff to sell property of an insolvent debtor. See *Insolvent Debtor*, No. 5, 6, and *Idem*, 26

5. A high sheriff may farm the sheriffalty, and authorize the party farming it to superintend and manage the office as his agent, so that the acts of this agent in directing and controlling the other deputies will be binding upon the high sheriff.

Holland v. Helm's adm'r, 245

6. Such a contract does not and cannot divest the high sheriff of the power to dismiss any of the deputies employed in the office, or to refuse to permit any person selected by the farmer of the sheriffalty to qualify as deputy. *Idem*, 245

7. The farmer of the sheriffalty required the other deputies to pay over the moneys collected on executions to him, and one of the deputies having done so, though he might in some cases be liable to the creditor in the execution, he is not liable to the high sheriff. *Idem*, 245

SLAVES.

1. In an action of detinue for a female slave, the recovery may be not only for the slave named in the writ, but for the children born since the commencement of the action.

Morris v. Peregoy, 373

2. What constitutes a violation of the act of 1847-8, ch. 10, § 24, as to property of owners in their slaves. See *Misdemeanor*, No. 1, and *Bacon's Case*, 602

3. The killing of a slave by his master by wilful and excessive whipping, is murder in the first degree; though it may not have been the intention of the master to kill the slave. *Souther's Case*, 673

SPIRITUOUS LIQUORS.

See *Ardent Spirits*.

STATUTES.

1. The act, the Code, ch. 51, § 1, p. 660, as to private and local acts, construed in *Somerville v. Wimbish*, 205

2. The act limiting appeals to the Court of appeals to \$200, construed in *M'Gruder v. Lyons*, 233

3. The act, the Code, ch. 182, § 17, p. 686, for limitations of appeals, construed in *Yarborough & wife v. Deshazo*, 374

*4. The acts, the Code, ch. 16, § 18, p. 101, and ch. 216, § 2, p. 800, as to suits pending when the Code went into effect, construed in *Idem*, 374

5. The proviso in the act, the Code, ch. 149, § 19, p. 594, for limitation of suits, construed in *Idem*, 374

6. The act, 1 Rev. Code, ch. 128, § 65, p. 505, and the act Supp. Rev. Code, ch. 197, § 2, in relation to scire facias to revive judgments, construed in

Williamson v. Crawford, 202

7. The act, 1 Rev. Code, ch. 128, § 5, p. 487, in relation to limitations to judgments, construed in

Smith's adm'r v. Charlton's adm'r, 425

8. The act, Sess. Acts 1847-8, ch. 27, § 2, p. 164, repealing prior acts, construed in *Cregor's Case*, 591

SURETIES.

1. In a suit by the ex'or of one partner against the ex'or and sureties of the other partner, under the circumstances, the sureties not allowed to set up a credit which had been set up by the partner and again by the ex'or, and had been disallowed by the Court in both cases.

Ross's ex'or v. M'Lauchlan's adm'r & als., 86

Same v. Haden's adm'r, 86

2. The surety of a grantor in a fraudulent conveyance, against whom and the grantor a judgment has been recovered, may direct the execution to be levied on the property, and set up the fraud in the conveyance.

Curd v. Miller's ex'ors, 185

3. A paper signed in blank and endorsed in blank, may be filled up either as a common promissory note or a negotiable note; and the person who endorsed it in blank will be liable on his endorsement to a holder for value.

Orrick v. Colston, 189

4. In such a case if the paper is filled up as a common promissory note to a third person who advances the money for it to the makers, he may treat the endorser as an original surety, or as a guarantor of the note. *Idem*, 189

TRUSTS AND TRUSTEES.

1. A trustee to sell, selling such property and such title only, as is vested in him, according to the terms prescribed, and without warranty or fraud, incurs no responsibility to the purchaser.

Sutton v. Sutton, 234

2. The object of the trust being to sell for what the property will bring, and there being no warranty by the grantor in the deed of either title or quantity, the purchaser is not entitled to relief for a mistake in the estimated quantity of the land.

Idem, 234

3. A person named a trustee in a deed to secure debts, unites in sales necessary in the execution of the trust, and other formal acts, but he receives none of the trust funds, they being received by his co-trustee, and he is guilty of no fraud in relation thereto. He is not responsible for the misapplication or waste of the funds by his co-trustee.

Griffin's ex'or v. A. Macaulay's adm'r, 476

Dismal Swamp Land Co. v. Same, 476

4. A trust deed to secure creditors reciting the amount of the debts due to the different creditors, is not conclusive even against the grantor and his adm'r, of the amount of the respective debts.

Idem, 476

5. A trustee not responsible for estimated rents when he had received none, where his delay in selling the property arose out of the difficulty of finding a purchaser.

Idem, 476

6. A creditor of a grantor in a deed of trust to secure creditors, may shew by proofs that his debt was intended to be secured under the provision for another creditor.

Idem, 476

7. Under the words in the deed of "all debts due the grantor," the indebtedness of a partner of the grantor to the partnership, and also a claim which the grantor has on a foreign government for damages for the detention of a ship, will pass.

Idem, 476

VENDOR AND PURCHASER.

1. A vendor is entitled to relief on account of the fraudulent concealment of facts by a purchaser. But under the circumstances the proper mode of relief is by compensation for the injury, and not a rescission of the contract.

Armstead v. Hundley, 52

2. When trustee to sell not responsible to purchaser. See Trusts and Trustees, No. 1, and

Sutton v. Sutton, 234

3. When purchaser from trustee not entitled to relief for mistake in estimated quantity of land. See Trusts and Trustees, No. 2, and

Idem, 234

4. A mistake in respect to the title to land is no ground of relief to a purchaser, when he purchases the land without any agreement express or implied, for a conveyance with warranty of title.

Idem, 234

5. There is a sale of land and conveyance with general warranty, and the vendee assigns bonds of a third person in payment of the purchase money. The title to a part of the land being clearly defective, the

vendee may enjoin vendor from collecting so much of the bonds as will compensate him for the land to which the title is defective.

Clarke v. Hardgrove &c., 399

6. Vendee entitled to compensation according to the relative value of the land to which a good title cannot be made.

Idem, 399

7. Vendor should be directed to perfect the title by a day specified by the Court. And if he fails to do so, a commissioner should be directed to ascertain the relative value of the part of the tract to which the title is defective.

Idem, 399

VERDICT.

The indictment charges the burning the dwelling house of E on the 11th of February 1850. The verdict is "guilty of arson in the day time, on the 11th February 1850." The verdict is sufficiently certain.

Curran's Case, 619

WILLS.

1. A executed a bond for a certain sum to aid in paying the debts of C. college, upon condition that like pledges to the whole amount of the college debt were obtained, and that this fact should be announced by a committee, of which he was one. He dies before the announcement by the committee, and by his will says, he is bound and willing to pay his bond, provided the pledges given shall appear to be indubitably valid, and the whole amount pledged shall first be paid. The will does not contemplate the payment of the bond for any other object than the discharge of the college debts; but adds another condition to the payment, and does not give any additional force to the bond.

Columbian College v. Clopton's adm'r &c., 168

2. The provision of the will is not a bequest of the amount of the bond to the college.

Idem, 168

3. A by his will says, if C. college should fail, I will that the sum pledged to that shall be given to N. institution. This is not a bequest by implication to C. college.

Idem, 168

WITNESSES.

When attorney for the Commonwealth allowed to recall a witness and examine him further. See Criminal Jurisdiction and Proceedings, No. 11, and

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WRIT OF ERROR.

1. The Court of appeals has no jurisdiction to grant a writ of error in a criminal case.

Bell v The Commonwealth, 201

2. A writ of error coram vobis does not lie in the Court of appeals.

Reid's adm'r v. Strider's adm'r, 76

REPORTS OF CASES
DECIDED IN THE
SUPREME COURT OF APPEALS,
AND IN THE
GENERAL COURT
OF
VIRGINIA.

BY PEACHY R. GRATAN.

VOLUME VIII.

FROM JULY 1, 1851, TO JULY 1, 1852.

Entered according to the Act of Congress, this twenty-second day of December,
one thousand eight hundred and fifty-two, for the

COMMONWEALTH OF VIRGINIA,

In the Clerk's Office of the District Court of the Eastern District of Virginia.

JUDGES
OF THE
COURT OF APPEALS
DURING THE TIME OF THESE REPORTS.

WILLIAM H. CABELL, PRESIDENT.
JOHN J. ALLEN. BRISCOE G. BALDWIN.
WILLIAM DANIEL. RICHARD C. L. MONCURE.

Attorney Generals :

SIDNEY S. BAXTER.
WILLIS P. BOCOCK.*

*Elected under the constitution of 1851, and went into office on the 22d day of January 1852.

JUDGES
OF THE
GENERAL COURT
DURING THE TIME OF THESE REPORTS.

RICHARD H. FIELD.
JOHN T. LOMAX.
WILLIAM LEIGH.
LUCAS P. THOMPSON.
BENJAMIN ESTILL.

PREFACE.

With this volume the report of the decisions of the Court of appeals under the constitution of 1829, and of the General court are completed. The first Court is succeeded by the Supreme Court of appeals under the constitution of 1851. In this Court is vested the criminal as well as the civil appellate jurisdiction; and the General court has been abolished. The General court was one of the earliest Courts established in the province of Virginia, and was then held by the Governor and council. It received its name of General court in 1661-2, and then had general jurisdiction of all causes civil and criminal. After the revolution and the establishment of the Supreme Court of appeals, the jurisdiction of the General court was confined to the appellate criminal jurisdiction, cases connected with the revenue, and to the taking probat of wills and granting administration upon intestate's estates, in which its jurisdiction was concurrent with the District and afterwards the Circuit, County and Corporation courts throughout the State. After an existence of one hundred and ninety years under the same name, it has at length been abolished; leaving to us only the memory of its faithful and pure administration of justice.

Until the constitution of 1851 went into operation, the judges of the Supreme Court of appeals and of the General court held their offices for life; and the advocates of an independent judiciary looked forward with some apprehension to the working of that provision of the constitution of 1829 which authorized the General Assembly, by a concurrent vote of two thirds of both houses, to remove a Judge. It however was never acted on during the existence of that constitution. By the constitution of 1851 the Judges are elected by the people; the Judges of the Supreme Court of appeals for twelve years, and the Judges of the Circuit courts for eight years: And they are all re-eligible after their term of service is expired.

Although there have been complaints of the delay of justice in Virginia, delays arising rather from the defects in our judicial system than from any defect in the persons who filled the office, the public mind has ever reposed with an unquestioning confidence in the purity of its administration. And although an unfortunate suitor might well believe that human judg-

ment is fallible, none ever questioned the integrity of the decision. How much of this judicial integrity and public confidence was due to the system, and how much was due to the men who administered the justice of the country, or what influence the system exerted upon the men, it were vain now to enquire. Certainly the selections for these offices were generally most fortunate, if not most sagacious and patriotic: And every Virginian will recall with an honest and honourable State pride, the many names enrolled in the list of our judicial worthies, who in all respects, as men, as citizens, as gentlemen and as Judges, were the ornament and the pride of the country.

What will be the working of the present system, time the wisest of all things, must determine. Certainly no apprehension can be felt of any immediate failure of those qualities which have honoured the bench of justice, and secured to it the public confidence. Integrity in a Judge, and purity in the administration of justice, is so thoroughly a part of the moral sense of the public and the individual man, that years must pass under the influence of the worst system that could be devised, before a Judge in Virginia can realize that it is not a necessity of his position, that his judicial conduct shall be above suspicion; and it will probably require a still longer period for the public mind to be reconciled to entertain a doubt on that subject. If indeed the people shall realize the truth that every power is a trust, the abuse of which, from the necessity of its nature, carries with it its own punishment; and the proper discharge of which elevates whilst it prospers, then may we well anticipate the happiest results from this experiment. And although the wisdom of experience may excite fears, we are to remember that we are not any other people; and all our past history teaches that we are not to be measured by their capacities. What we can do we must learn from ourselves; and the duty and the business of every man is, not to excite doubts of success, or apprehensions of failure, in a matter upon which the people have determined; but to unite with all his heart in the effort to accomplish a successful result. Believing that our past history affords many evidences of the guardian providence of God over us as a people, we go forward with an abiding confidence in the same kind care in the future.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Minor v. Minor's Adm'r.

July Term, 1851, Lewisburg.

(Absent CABELL, P.)

1. Executors and Administrators—Actions by—Set-Off

—Case at Bar.—In an action of *assumpsit* by an adm'r for a debt due his intestate in his lifetime, defendant cannot set off a debt due him for money paid as the surety of the intestate since his death.

2. Pleading and Practice—Assumpsit—Bill of Particulars*—Case at Bar.—The court in an action of *assumpsit* by an adm'r, is for money had and received, and the bill of particulars merely states an account in which the defendant is debtor to the adm'r for money received, stating a sum certain. The count and the bill of particulars are not sufficient to admit proof of an admission by the defendant that he had received from a third person a certain sum belonging to the estate of the plaintiff's intestate.

This was an action of *assumpsit* brought in the Circuit court of Monongalia county by A. W. Tenant, adm'r of John Minor, against Samuel Minor. The declaration contained two counts for money had and received; the first for money had and received to the use *of the plaintiff's intestate in his lifetime, the other for money had and received to the use of the plaintiff, as administrator of John Minor. The bill of particulars filed with the declaration, was:

Samuel Minor,	
To John Minor for money received,	\$ 300.
Samuel Minor,	
To plaintiff as adm'r, for money received,	\$ 300.

The defendant appeared and pleaded the general issue, and also a plea of set off to the first count, and the statute of limitations, on which issues were made up. He also offered a plea to the second count of the declaration which is called the defendant's third plea, in which he alleged that the plaintiff, as the administrator of John Minor deceased, before and at the commencement of the action, was indebted to the defendant in the sum of 1500 dollars, for money by the defendant paid as the security of John Minor, since his death,

***Pleading and Practice—Assumpsit—Bill of Particulars.**—In *Mann v. Perry*, 8 W. Va. 581, it is said: "The count was upon an account stated for 600 dollars, without a bill of particulars. The evidence excluded was to prove an account stated for 500 dollars. Under the ruling in the case of *Minor v. Minor*, 8 Gratt. 1, it was properly excluded as irrelevant to the issue under the pleadings as they were."

which exceeded the damages complained of in the declaration, and out of which money the defendant was willing and offered to set off and allow to the plaintiff as administrator as aforesaid, the full amount of the said damages. This plea the plaintiff moved the Court to reject, which motion the Court sustained, and the defendant excepted.

On the trial of the cause the plaintiff offered evidence tending to prove that the defendant admitted in March 1846, that he received from one Lancaster Minor in the spring of that year, 250 dollars belonging to the estate of John Minor deceased, the plaintiff's intestate; to the introduction of which evidence the defendant objected upon the ground that neither the declaration nor the bill of particulars filed therewith, gave to the defendant sufficient notice of any such claim. But the Court overruled the objection and admitted the evidence; and the defendant again excepted. There was a verdict and judgment for the plaintiff for 250 dollars, with interest

3 *from the 31st of March 1846: whereupon the defendant applied to this Court for a supersedeas, which was allowed.

A. F. Haymond, for the appellant.
Guy R. C. Allen, for the appellee.

ALLEN, J., delivered the opinion of the Court.

It seems to the Court here, that the Circuit court did not err in rejecting the plea No. 3, tendered by the plaintiff in error, and set forth in the bill of exceptions taken to the decision of the Court rejecting the same. But it further seems to the Court here, that the Court erred in overruling the objection of the plaintiff in error to the introduction of evidence offered by the defendant in error, as tending to prove the particular item or claim sought to be recovered as set forth in the bill of exceptions taken by the plaintiff in error at the trial to the decision of the Court admitting said testimony: This Court being of opinion, that neither the declaration or bill of particulars gave the plaintiff in error sufficient notice of any such claim or item. Reversed with costs, verdict set aside, and cause remanded for a new trial; upon which, under the pleadings as they now stand, and unless another bill of particulars be filed describing the claim or item with sufficient certainty, such evidence offered and objected to is not to be admitted.

4 *Hogue v. Davis & als.

July Term, 1851, Lewisburg.

(Absent CABELL, P., and BALDWIN, J.)

Negotiable Paper—Accommodation Endorsers—Order of Liability.*—Where several endorsers of negotiable paper have endorsed it for the accommodation of the maker, they are responsible in the order of their endorsements, unless there has been an agreement among them to be jointly and equally bound: And the burden of proving such an agreement is upon the prior endorser who seeks the benefit of it.

This was a motion in the Circuit court of Monongalia county by James T. Davis, Waitman Davis and three others, against Bushrod Q. Hogue, to recover from him the amount which they had been compelled to pay as subsequent endorsers upon a note made by Robert Davis to Bushrod Q. Hogue, and discounted at the bank in Morgantown. The note bore date July 29th, 1844, and was for 250 dollars, payable in ninety days, at the Lancaster Bank in the State of Pennsylvania, and was endorsed by all the parties for the accommodation of Robert Davis. Before the note fell due, Robert Davis absconded.

The ground of defence was, that all the endorsers were to be jointly and equally bound. The only witnesses who spoke to the making of the note, were John Davis, a brother of two of the plaintiffs, and Albert G. Davis a cousin. According to their testimony Hogue boarded with Robert Davis, and endorsed the note at Davis's house, in the absence of the other endorsers; and Robert Davis then took the note to obtain other endorsers upon it. That he applied to his father Thomas Davis to endorse it, who declined to do it, when Robert Davis

5 told him there was no danger as both he and Hogue *would have to fail

***Negotiable Paper—Indorsers—Order of Liability.**—In *Willis v. Willis*, 42 W. Va. 524, 26 S. E. Rep. 515, it is said: "1 Daniel, Neg. Inst. § 703, says: 'When several persons indorse a bill or negotiable note in succession, the legal effect is to subject them, as to each other, in the order they indorse. The indorsement imports a several and successive, not a joint, obligation, whether the indorsements be made for accommodation, or for value received, unless there be an agreement *aliunde* different from that evidenced by the indorsements. When the successive indorsements are for accommodation of other parties, the indorsers for accommodation may make an agreement to be jointly and equally bound, but whoever asserts such agreement must prove it. In cases, therefore, in which no such agreement is proved, the indorsers are not bound to contribution amongst themselves, but each and all are liable to those who succeed them.' This clear statement is sustained by authority in almost all quarters, including authority binding us. *Hogue v. Davis*, 8 Gratt. 4; *Bank v. Beirne*, 1 Gratt. 265; *Bank v. Vanmeter*, 4 Rand. 553; *Shields v. Reynolds*, pt. 2, 9 W. Va. 483; *Hoge v. Vintroux*, 21 W. Va. 1, pt. 2."

For further information on this subject, see monographic note on "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 622.

before said Thomas Davis could be liable. Albert G. Davis stated that Hogue informed him he had furnished Robert Davis money to buy cattle, and intended to do so as long as he wanted to do business, and that he was to have a share of the profits arising from the business. That this was before said Davis absconded, and after the witness had understood they had gotten money out of the bank at Morgantown.

It was proved that after the note was protested and returned to the bank at Morgantown several of the endorsers, including Hogue, came to the bank for the purpose of making arrangements for its payment. They first proposed to give a bond for the whole amount, and the bond was prepared and some of them signed it.

They arranged to borrow some four or five hundred dollars from a Mr. Hanway to aid them in the payment; and a note was prepared and taken away by them but was not returned; and they all left the bank without making arrangements to take up the original note. Shortly afterwards some of the sureties informed Mr. Hanway they had ascertained that the note was not of such a character as they had supposed; and that they would not be liable as they believed, until the property of Bushrod Q. Hogue was exhausted; and that they declined taking the loan. On the same day they were at the bank, James T. Davis, one of the endorsers, had a conversation with the cashier of the bank, and that officer understood from him that although they might not be legally bound to pay any part of the note, yet they were joint endorsers with Hogue, or something to that effect, and did not intend to take any advantage of him; and that they considered themselves equally bound with Hogue as the cashier understood him. It seems probable that neither Hogue or the endorsers knew the difference between the note payable as it was and a joint endorsement of it.

6 *The Circuit court gave the plaintiffs a judgment against the defendant for 1179 dollars and 38 cents, with interest from October the 6th, 1846, until paid, that being the balance due upon the note, after applying thereto the proceeds of certain property of Robert Davis, which the plaintiffs had been compelled to pay. And thereupon Hogue applied to this Court for a supersedeas, which was allowed.

A. F. Haymond, for the appellant.

Grattan, for the appellees, referred to *Chalmers v. McMurdo*, 5 Munf. 252; *Farmers Bank v. Vanmeter*, 4 Rand. 553; *Bank U. S. v. Beirne*, 1 Gratt. 234; *McDonald v. Magruder*, 3 Peters' R. 470.

By the Court. The judgment is affirmed.

Cales v. Miller & al.

July Term, 1851, Lewisburg.

(Absent CABELL, P.)

1. Evidence—Commissioner's Deed—What Must Be Offered with Deed.*—A party offering in evidence a

*Evidence—Commissioner's Deed—What Must Be

deed purporting to be executed by a commissioner under the decree of a Court, and conveying land, must offer with it so much of the record of the cause in which the decree was made, as will show the authority of the commissioner to convey the land described in the deed.

2. Deeds—Foreign Acknowledgment before Mayor.—

A deed executed in 1799 which shows upon its face that the parties to it resided out of the State of Virginia, was properly acknowledged before the mayor of a city in another State, and the certificate of the mayor, describing himself as such, and purporting to be under the seal of the city, was a sufficient authentication of the deed to authorize its admission to record.

3. Same—Same—Certificate as Evidence of Grantor's Residence.†—

In such a case the certificate of the acknowledgment of the deed by the grantor before the mayor of the city, is sufficient evidence

7 that the grantor, for the time being, resided in the said city; though the deed on its face described him as being a citizen of another State.

4. Deeds—Acknowledgment—What Residence Sufficient.—

It seems that a residence, however temporary, is sufficient to authorize the acknowledgment of a deed there, by a non-resident of Virginia, under the act of 1792, ch. 90.

5. Depositions—Caption.‡—

The caption of a deposition describing it as taken in a proceeding of forcible entry and detainer, is sufficiently accurate to authorize the reading of the deposition, though the proceeding is for an unlawful detainer.

6. Bonds—Condition to Convey Land—No Title in Obligor—Effect.—

A bond with condition to convey land of which the obligor had neither title or possession, passes nothing. And a decree in a cause between the parties, for a conveyance of the land by a commissioner, and his conveyance, passes

Offered with Deed.—See principal case cited in *Ketchum v. Spurlock*, 34 W. Va. 603, 12 S. E. Rep. 834; *Waggoner v. Wolf*, 28 W. Va. 825.

Same—Deeds.—See principal case cited in *Mason v. Bridge Co.*, 20 W. Va. 237. The Virginia and West Virginia cases on this subject are collected in a monographic note on "Deeds" appended to *Flott v. Com.*, 12 Gratt. 564.

†Deeds—Certificate of Acknowledgment as Evidence of Grantor's Residence.—In *Hassler v. King*, 9 Gratt. 120, the principal case was cited with approval to the point that the acknowledgment by the grantor of a deed before the mayor of a city affords sufficient evidence that said grantor, for the time being, dwelt in that city; and that this is true though the deed on its face described him as being a citizen of another state. The principal case was also cited on this point in *Shue v. Turk*, 15 Gratt. 263. See further on this subject, monographic note on "Acknowledgments" appended to *Taliaferro v. Pryor*, 12 Gratt. 277.

‡Depositions—Notice—What It Should Indicate.—Notice to take depositions should indicate to the adverse party, with reasonable certainty, when, where, and in what cause the depositions are to be taken. *Bowyer v. Knapp*, 15 W. Va. 293, citing the principal case.

On all matters pertaining to depositions, see monographic note on "Depositions" appended to *Field v. Brown*, 24 Gratt. 74.

§Bonds.—See monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

nothing; none of the parties ever having had either title or actual possession.

On the 29th day of February 1848, John Miller and Joel McPherson made complaint before a justice of the peace of the county of Greenbrier, that James Cales had unlawfully turned them out of possession of a certain cabin and tenement containing about forty acres, on the end of Chesnut mountain, part of a survey or tract of eleven hundred acres, in the county aforesaid; whereof they prayed restitution. A warrant was thereupon issued by the justice, directing the sheriff to summon a jury for the 18th of March, and to give notice to two justices at least, to attend at that time. This was done, and the cause was regularly continued from that time until June 1848, when it came on to be tried.

In the progress of the trial the plaintiffs introduced as evidence a deed from Jacob Maddy to John Miller, bearing date in the year 1846, by which in consideration of 40 dollars, Maddy conveyed to Miller one moiety of a tract of eleven hundred acres of land, lying in the county of Greenbrier, on New river, above and below the falls of the river. The plaintiffs also offered in evidence two decrees, which purported to be decrees of the Circuit court of Greenbrier, the first made at its May term 1842, in a cause therein depending, in which Jacob

8 Maddy and Richard Thomas were plaintiffs and *Samuel Fox was defendant. This decree after directing the defendant to pay to the plaintiffs certain sums of money therein specified, being for the purchase money of the land thereafter mentioned, provided that if the money was not paid within ninety days, a commissioner named should proceed to sell the tract of land mentioned in the bill, &c.; and that he report his proceedings to the Court. The second decree was made at the May term 1843, and came on upon the papers formerly read and the report of the commissioner appointed to sell the land. This report was confirmed and Thomas C. Burwell was appointed a commissioner to convey the land to the purchasers.

The plaintiffs also offered in evidence a deed dated the 26th of October 1843, executed by the commissioner Thomas C. Burwell to Jacob Maddy and Joel McPherson, whereby after reciting the foregoing decrees, he conveyed to them the land referred to in said decrees. To the introduction of these decrees and the deed from Burwell, the defendant objected, upon the ground that it was incumbent on the plaintiffs to shew by evidence that a suit existed authorizing such decrees and deed: And for this purpose it was necessary that the whole record should be produced to the Court and jury. But the Court overruled the objection and admitted the evidence; and the defendant excepted.

In the further progress of the cause the defendant introduced in evidence a patent from the Commonwealth to David Morton, bearing date the 13th day of March 1798, for

the land in controversy; and he then offered in evidence an office copy of a deed bearing date the 1st of August 1799, purporting on its face to be from David Morton, of the borough of Wilmington, in the State of Delaware, to John Morton, of the City of Philadelphia, in the State of Pennsylvania, by which the tract of eleven hundred acres mentioned in the aforesaid patent was conveyed to John Morton.

9 *Upon this deed was endorsed a certificate of Robert Wharton, who styled himself mayor of the City of Philadelphia, that the above named David Morton personally appeared before him and acknowledged the above written indenture to be his act and deed, and desired the same as such might be recorded according to the laws of the State of Virginia. This certificate purports to be under the seal of the City of Philadelphia, and bears date the 1st of August 1799; and upon this certificate the deed was admitted to record in the District court held at the Sweet Springs, on the 19th of May 1800. To the introduction of this copy of the deed as evidence, the plaintiffs objected, and the Court sustained the objection, and excluded the evidence on the ground that the original deed was not duly authenticated for record. And the defendant again excepted.

The defendant also offered in evidence the deposition of Benjamin Willard. On this deposition the plaintiffs' counsel had endorsed two exceptions. The first was, "because there is no warrant or action of forcible entry, &c., depending in Greenbrier County court, between the parties in the cause mentioned therein." The affidavit by the defendant which was the foundation of the motion for permission to take the deposition of the witness, the commission, and notice to the plaintiffs, spoke of the proceeding depending in the County court of Greenbrier, between the plaintiffs and defendant, as a writ of forcible entry and detainer. It was therefore, of course, that the justice who took the deposition, described it as a deposition to be read as evidence on the trial of a writ of forcible entry and detainer. The Court sustained the exception, and excluded the deposition; whereupon the defendant again excepted.

The jury found a verdict for the plaintiffs, which the defendant moved the Court to set aside, on the ground that it was contrary to the evidence; but the Court overruled the motion, and rendered a judgment for the plaintiffs; whereupon the defendant again excepted: and the facts were stated on the record.

10 In addition to the evidence hereinbefore stated to have been introduced on the trial, the plaintiffs introduced a patent from the Commonwealth to themselves, for eleven hundred acres of land, including the land in controversy, bearing date the 29th of February 1848. They also proved that a certain Abraham Bragg occupied a portion of the tract of eleven hundred acres, known as the "old bottom," for some ten years. That he took possession of the old bottom

about the year 1831, and resided there without claiming the land. That he sold his improvements at the "old bottom" to the plaintiff, Jacob Maddy, together with two hundred acres of land for which he had the legal title; and when he was about to give a title bond to Maddy, the latter requested him to make him a title bond for the whole of the eleven hundred acre tract. That Abraham Bragg at first refused to do it, stating to Maddy that he did not own the land, and had only sold his improvements on it, and that the land was claimed by Joseph Willard; and that if he gave such title bond his brother, Daniel Bragg, who lived on the mountain place at the time, would be displeased; but Maddy said to him, as he was going off it would make no difference. Abraham Bragg then consented to give, and did give, a title bond to Maddy for the eleven hundred acre tract. That Maddy at the time he traded with Abraham Bragg, knew that Joseph Willard claimed the tract of land embracing the improvements on the "old bottom." That Maddy afterwards sold the tract of land he purchased of Abraham Bragg to Richard Thomas, and passed to him Bragg's title bond. That Thomas sold the same land to Samuel Fox and passed to Fox the same bond; and that Thomas only sold to Fox, Bragg's improvements at the "old bottom," and two hundred acres aforesaid.

11 *The defendant in addition to the patent to David Morton, which it was proved covered the same land embraced in the patent to the plaintiffs, proved that in the year 1815 or 1816 Jeremiah Meadows took possession of the land embraced in the grant to Morton, under and as the tenant and agent of Joseph Willard, who claimed said land; and Meadows agreed to hold the land for Willard and pay the taxes that might accrue thereon. That Meadows as such tenant, held the land for two or three years, paying the taxes during that time, and residing thereon at the place called "the old bottom." That Meadows in 1820 or 1821 placed Daniel Bragg in possession of said tract of eleven hundred acres of land on a small improvement on another part of the same tract called the "mountain place." Daniel Bragg agreeing to hold and occupy the land as tenant of Willard, and pay the taxes as they should accrue thereon, and give possession to Willard when it should be demanded. That Daniel Bragg cleared some forty or fifty acres on the mountain, and resided there until 1838 or 1839, paying the taxes, when by an agreement between him and Thomas Bragg he gave possession to the latter, who was to occupy the land in the same manner in which Daniel Bragg had occupied it. That Thomas Bragg held the possession until the fall of 1847, and then gave it up, and the defendant went into possession of the mountain place.

The defendant further proved that Abraham Bragg at the time he took possession of "the old bottom," agreed to pay the taxes on the Willard tract, but failed to do so.

And he also proved that the eleven hundred acre tract was entered upon the commissioner's books of Greenbrier county, in the name of Joseph Willard, in 1816, and continued thereon in his name to the time of the trial; and that the taxes on said land had all been paid.

12 *The defendant applied to the Circuit court of Greenbrier county for a supersedeas to the judgment, which was awarded; but when the cause came on to be heard in that Court, the judgment of the County court was affirmed. Whereupon the defendant applied to this Court for a supersedeas, which was granted.

Reynolds, for the appellant.

William Smith and Price, for the appellees.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion that as the decrees offered in evidence merely directed the commissioners thereby appointed to sell and convey the tract of 1100 acres referred to in the bill, such a general description of the land did not satisfactorily prove the authority of the commissioner, Thomas C. Burwell, to convey the particular tract of land in Greenbrier county described in his deed of the 26th October 1843, to Jacob Maddy and Joel McPherson; and it was incumbent on the parties claiming under such deed, to have shewn by the record of the suit referred to in the decrees and deed, what specific tract of land the commissioner was authorized to sell and convey.

The Court is therefore of opinion that the County court erred in permitting said deed to be read in evidence as set forth in the first bill of exceptions taken by the plaintiff in error, without the production of the record of the suit therein referred to, or so much thereof as would have shewn the particular tract of land the commissioner was empowered to sell and convey.

The Court is further of opinion, that as it appears upon the face of the deed dated the 1st of August 1799, between David Morton, of the State of Delaware, of the one part, and John Morton, of the State of Pennsylvania, of the other part, and

13 set forth in the 2d *bill of exceptions filed by the plaintiff in error, that the parties to said deed resided without the jurisdiction of this State, the acknowledgment by the non-resident grantor before the mayor of the City of Philadelphia, afforded sufficient evidence that said grantor, for the time being, dwelt in said City of Philadelphia, and said deed was duly authenticated for record; and the Court is therefore of opinion the County court erred in rejecting a copy of said deed as evidence, because the same had not been properly authenticated for record.

The Court is further of opinion, that the said County court erred in excluding the deposition of Benjamin Willard, offered to be read as evidence by the plaintiff in error as set forth in his third bill of exceptions,

on the ground of a misdescription of the complaint in the notice, commission and caption of the deposition. The general description of the action as contained in the act under which the proceeding was had, is "an act to explain and amend an act reducing into one the several acts concerning forcible entries and detainers;" and though the form of complaint was modified to suit the particular injury complained of, the description of the action was sufficient to give notice to the parties of the controversy in which the deposition was intended to be used. Whether the evidence would have been proper if not excluded for the cause aforesaid, would have depended upon the fact that the plaintiff in error had in some way connected his possession with said Joseph Willard; for though it would not have been competent to prove a transmission of the title alleged to have been vested in David Morton the patentee to said Joseph Willard, by such parol evidence, the evidence in connexion with other evidence tending to prove that said Joseph Willard had entered into said land by himself or his agents, held possession thereof by his tenants and agents, and had the same assessed in his own name and paid the taxes thereon; and also shewing the dura-

14 tion *of such possession so taken and held, would have been proper to shew the intent with which said Willard entered and held possession, whether as a claimant of the land as owner or as a mere intruder; and if as owner of the land, whether such possession so taken and held had not continued for a sufficient length of time to protect said Willard and those holding under him against any adverse claimant.

And the Court is further of opinion, that upon the facts certified as proved upon the trial of the complaint, the County court erred in overruling the motion of the plaintiff in error to set aside the verdict and grant him a new trial, on the ground that the verdict was contrary to evidence. The defendants in error had not shewn either a possession or a right to the possession of the tenement in the complaint mentioned. If they claimed under the alleged contract and title bond of Abraham Bragg, it does not appear he was ever in possession of the tenement in question. On the contrary it appears that at the time of such alleged sale by Abraham Bragg, the tenement in question was in the actual occupation of Daniel Bragg as tenant of Joseph Willard, and that the defendants in error, or those under whom they claim, never had possession thereof. The deed executed to the said Maddy and McPherson by the commissioner of the Court, Thomas C. Burwell, and the deed from Maddy to John Miller, one of the complainants, passed neither possession or right of possession; it not appearing that any of the parties connected therewith ever had title to the land conveyed; nor is any possession of any part of the land conveyed, shewn to have been ever actually held by any of them, except Abraham Bragg, and his possession was as tenant of

said Joseph Willard, and did not extend to or embrace the tenement in controversy.

If the defendants in error claimed under their patent of the 29th day of February 1848, the patent of itself *vested them with no title or seisin actual or constructive, the whole title thereto having passed out of the Commonwealth by the prior grant of the same land to the said David Morton, and there is no evidence proving any actual entry of the defendants in error claiming under and by virtue of their junior grant. The plaintiff in error had entered into possession of the tenement in question prior to the date of the patent of the defendants in error, and held the same at the date thereof; their patent bearing even date with their complaint before the justice. His entry may have been unlawful as regarded Morton or Willard claiming under him, but could not have been so as to the defendants claiming under a patent bearing date after such entry, and which of itself in the absence of all proof of actual possession thereunder, conferred no title whatever, as the land had been previously granted to another.

It is therefore considered, that the judgment of the Circuit court, affirming the judgment of the County court, is erroneous; and the same is reversed, with costs to the plaintiff in error. And this Court proceeding to render such judgment as the Circuit court should have done, it is further considered, that the judgment of the County court is erroneous; and the same is reversed, with costs to the plaintiff in error; and the verdict is set aside, and the cause is remanded to the County court for a new trial, upon which the County court will be instructed to govern itself by the principles above declared and adjudged.

16 *Newbrough v. Walker.

July Term, 1851, Lewisburg.

[51 Am. Dec. 127.]

(Absent CABELL, P.)

Damages—Measure of—Speculative Profits.*—In an action of covenant for the failure to deliver to the plaintiff possession of a mill which he had rented of the defendant, the plaintiff not having sustained any special damage, he is entitled to recover only

***Damages—Measure of—Speculative Profits.**—In *Grubb v. Burford*, 98 Va. 500, 37 S. E. Rep. 4, it is said: "Profits, which are the difference between the agreed price of something contracted for and its ascertainable value or costs, are recoverable, as in the case of the *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. Rep. 525. But where the profits are dependent upon future bargains or states of the market, they are not, as a general rule, subjects of recovery. *Newbrough v. Walker*, 8 Gratt. 16; *Peshine v. Shepperson*, 17 Gratt. 472, 486; 1 *Sedgwick on Damages*, §§ 174, 176." See, in accord, citing the principal case, *Peshine v. Shepperson*, 17 Gratt. 486; *Robrecht v. Marling*, 29 W. Va. 771, 772, 775, 2 S. E. Rep. 800, 831, 832; *Hare v. Parkersburg*, 24 W. Va. 559; *Mitchell v. Adams*, 8 W. Va. 575.

the difference between the rent contracted to be paid, and a fair rent for the time when it should have been delivered. A conjectural estimate of the profits which might have been made, is no legitimate basis upon which to fix the damages.

This was an action of covenant brought in August 1846, in the Circuit court of Frederick county, by Robert S. Walker against Joshua Newbrough. The declaration set out a covenant by which Newbrough agreed to rent to Walker his mill in the county of Frederick, for two years from the first of July 1846, for the rent of 300 dollars a year, payable every three months. And the plaintiff averred that the defendant had broken his covenant in this, that although the plaintiff was ready and willing and offered to comply with the same on his part, and had requested the defendant to permit him to take possession as tenant as aforesaid of the said Newbrough's mill in the said covenant mentioned, viz: on the first day of July, at the county aforesaid, the defendant positively refused; and forbid said plaintiff from so taking possession. And that said defendant, after the making of said agreement, and before giving possession of the premises, or any part thereof, to the plaintiff, viz: on the day of July 1846, rented, demised and leased the said premises to a certain Benjamin Ford, and put said Ford in 17 possession of the same; *whereby the plaintiff was prevented from entering upon and enjoying the said leased premises. Wherefore the plaintiff avers he sustained damage to the amount of 500 dollars.

The defendant appeared and demurred to the declaration; but the demurrer was overruled. He then filed two pleas, one a general, and the other a special plea of non est factum; on which the plaintiff took issue. Upon the trial the jury found a verdict for the plaintiff for 250 dollars damages; whereupon, the defendant moved the Court for a new trial, on the ground, first, that the verdict was contrary to the evidence; and second, that the damages were excessive. But the Court overruled the motion, and rendered a judgment upon the verdict; and the defendant excepted. The material facts of the case are as follows.

The plaintiff was a young man with a family dependent on his labour. He had been employed previous to the first of July 1846, by a Mr. Hollingsworth, as his head miller; and his time with him expired on the 13th of July. The covenant was executed some days before the 1st of July. Whilst the scrivener was preparing it the plaintiff proposed to give security for the payment of the rent, but the defendant declined it. After it was signed by the parties the plaintiff again proposed to give security for the payment of the rent, to which the defendant then assented, and a clause was added to the covenant to be signed by the sureties, by which they bound themselves for the true performance of the contract by Walker; and he took the agreement to have it signed by the sureties; and

when so signed it was to be left with the person who had prepared it for safe keeping; and it was signed and delivered accordingly before the 1st of July.

It appears that the plaintiff went to take possession of the mill on the 1st of 18 July; that he took with him *the agreement signed by the sureties, and also a copy of it which was not signed, and shewed them to the defendant, who said that the agreement was correct, and requested the plaintiff to get the copy signed by the sureties, or to leave the original with a Mr. Bowles.

It appears that on the second and third of July, the plaintiff expressed himself doubtfully about taking the mill. On the 4th, Ford applied to the defendant to rent it; but defendant declined to rent it to him, and sent a messenger to the plaintiff informing him that Ford wanted to rent the mill, and that he must come and take possession of it. To this message the plaintiff replied that he would come over that day, and attend to it; but he failed to go. On the 6th of July, Ford was again at the house of the defendant to rent the mill, when the defendant again sent a messenger to inform the plaintiff that there was a person there who wished to rent the mill, and that the plaintiff must come over and fix the papers and take possession of the mill, or he would rent it to Ford. The plaintiff not coming, it was on that evening rented to Ford for 275 dollars a year, on the same terms in other respects, as it had been rented to the plaintiff. Some eight or ten days afterwards, Ford, hearing that the plaintiff was dissatisfied at not getting the mill, went to him and told him, that if he wanted it he could still have it on the same terms on which Ford had gotten it; but the plaintiff declined to take it.

It appeared further, that the plaintiff was continued in the service of his previous employer, upon the same terms as before; and that 300 dollars was a fair rent for the property, though one witness stated that he had offered the plaintiff 100 dollars for his lease; and another witness thought the plaintiff might have cleared three or four hundred dollars during the first year.

The defendant applied to this Court for a supersedeas to the judgment, which was awarded.

19 *Cooke, for the appellant.

There was no counsel for the appellee.

MONCURE, J., delivered the opinion of the Court.

The Court is of opinion, that the Circuit court did not err in overruling the demurrer to the declaration; but did err in overruling the motion for a new trial. On the facts proved and certified in the cause, the jury was warranted in finding a verdict for the plaintiff in the Court below; but the damages awarded were excessive. The defendant in the Court below seems to have acted in good faith, and his breach of con-

tract for which the suit was brought seems to have been the result of misunderstanding on his part. He derived no benefit from such breach, but on the contrary rented out the property for twenty-five dollars less than the plaintiff was to have given him. It was not averred in the declaration or proved on the trial that the plaintiff sustained any special damage by reason of the defendant's breach of contract. The plaintiff did not lose his situation; but continued in the same business in which he was engaged when he entered into the contract. The tenant to whom the property was rented offered, a few days after the renting and before he had received or purchased any wheat, to let the plaintiff have it on the same terms on which said tenant had rented it; but the plaintiff declined to accept the offer. Under these circumstances the plaintiff was entitled only to general damages, and the measure of such damages is the difference between the rent contracted to be paid and a fair rent for the property at the time when it should have been delivered to him. It was proved that 300 dollars, the rent stipulated in the lease to the plaintiff, was a fair rent for the property. On the other hand, it was proved by a witness that he offered the plaintiff one hundred dollars for his lease which he refused to take. If upon this

evidence the jury had found a verdict 20 for *one hundred dollars damages, this Court would not have disturbed the verdict. But there is nothing in the case which warrants a verdict for greater damages than one hundred dollars. The evidence of a witness that during the first year of the lease the plaintiff could have cleared three or four hundred dollars was necessarily speculative and conjectural, and furnished no legitimate basis on which to estimate the damages. It is therefore considered by the Court that the judgment of the Circuit court be reversed and annulled, with costs to the plaintiff in error; that the verdict of the jurors be set aside; and that the cause be remanded to the Circuit court for a new trial to be had therein.

Lyle v. Overseers of the Poor of Ohio County.

July Term, 1851, Lewisburg.

(Absent CABELL, P.)

Parent and Child—Putative Father—Support of Bastard Child*—Case at Bar.—The County court made an order that the putative father of a bastard child, the mother of which was a married woman who had been deserted by her husband, should pay to the Overseers of the poor a certain sum annually for six years commencing from the birth of the child, if it should live so long. And this held to be proper.

This was a proceeding in the County court of Ohio county, by the Overseers of the

*See monographic note on "Parent and Child" appended to Armstrong v. Stone, 9 Gratt. 102.

poor of that county against James Lyle, for the purpose of charging him with the support of a bastard child. It appeared from the evidence, that the mother of the bastard child was a married woman. She had been married in March 1843, but her husband left her in the fall of that year, *and had not returned. Since that time she had lived with her father; and the child was born in October 1847. It appeared that the mother was entitled to an interest worth about 200 dollars in a small tract of land. This proceeding was commenced on the 29th of April 1848. The case came on to be heard before the County court at the September term of that year, when the Court made an order that the defendant Lyle be charged with the annual payment of 25 dollars to the Overseers of the poor of the county for the space of six years from the birth of said child, to wit: for six years from the 18th day of October 1847, if the child shall live so long. Lyle obtained a supersedeas to this judgment, from the Judge of the Circuit court of Ohio county; but when the case came on to be heard in that Court, the judgment of the County court was affirmed: whereupon he applied to this Court for a supersedeas, which was awarded.

Price, for the appellant, and
Jacob, for the appellees, submitted the case.

By the Court. The judgment is affirmed.

22 *Bell & al. v. Calhoun.

July Term, 1851, Lewisburg.

(Absent CABELL, P.)

1. **Bonds — Assignment — Usury* — Case at Bar.**— In December 1842 C assigned to B a bond on E, who was in doubtful circumstances, for 529 dollars and 6 cents, due on 26th October 1838, and subject to a credit of 15 dollars paid 1st October 1842; for which B gave him 494 dollars and 25 cents; and C at the same time, executed a deed of trust on property with condition that if the bond with its interest was not paid in twelve months, the trustee should sell and pay the amount to B. This was usurious.

***Bonds — Assignment.**— See monographic note on "Bonds" appended to Ward v. Churn, 18 Gratt. 801; monographic note on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 409.

Usury—Deeds of Trust to Secure Debt—Measure of Relief.—In Marks v. Morris, 4 H. & M. 463, it is held that, in cases of usury the borrower filing a bill in equity is entitled to relief, not against the contract entirely but to the amount of all but the principal money, the lender being entitled to receive his principal without any interest. This case was subsequently overruled in Bank of Washington v. Arthur, 8 Gratt. 173; Bell v. Calhoun, 8 Gratt. 22. In which latter case it is held that, on a bill to enjoin a sale under a deed of trust to secure an usurious debt the proper relief is, not to perpetuate the injunction for the whole amount of the bond and its interest due; but only for the amount of the usurious premium. But see sec. 10, ch. 141, Code 1849, where the doctrine in

2. **Usury—Deed of Trust to Secure Debt—Measure of Relief.**—On a bill to enjoin a sale under the deed of trust, the plaintiff says he has proof and does not wish a discovery, but that the sale may be enjoined until the validity of the deed can be tried at law. Upon an issue directed by the Court, the jury find the usury; and that the usurious premium is the difference between the sum advanced by B to C and the bond with interest to that time subject to the credit for 15 dollars. HELD: That the proper relief is, not to perpetuate the injunction for the whole amount of the bond and its interest due; but only for the amount of the usurious premium.

In March 1844, George A. Calhoun applied to the Judge of the Circuit court of Augusta county, for an injunction to restrain a sale of slaves under a deed of trust. In his bill he alleged in substance, that in December 1842, he ascertained that he would be compelled to raise a sum of money of over four hundred dollars by the first or second of January 1843. That he finally made an arrangement with Samuel H. Bell and William Crawford, whereby he assigned to them a bond which he held on John Edmondson for 529 dollars and 6 cents, due on the 26th of October 1838, subject to a credit of 15 dollars, paid the 1st of October 1842, for which he *received the sum of 494 dollars and 25 cents; and he at the same time in pursuance of the agreement between them, executed a deed of trust, a copy of which was exhibited with the bill, whereby he conveyed to Littleton Waddell four slaves, upon trust, that if within twelve months from that date the bond so assigned with interest should not be paid to said Bell and Crawford, then the trustee should sell the slaves at public auction for cash, and pay the whole amount of said bond to Bell and Crawford. He charged that this arrangement was not a sale of the bond, but a usurious agreement, whereby Bell and Crawford agreed to lend to the complainant 494 dollars 25 cents for twelve months, for which he was to pay the full amount of Edmondson's bond amounting to about 693 dollars 43 cents, something over thirty-three per cent.

The bill as originally prepared, after making Waddell, Bell and Crawford parties, called upon them to answer the bill upon oath, and asked that they might be restrained from selling under the deed of trust; that the deed might be declared usurious and void; or if not, that the plaintiff might at least be relieved from the payment of all over the sum with its interest which he had received. Afterwards but before the bill was filed, a clause was added

Marks v. Morris, was given the form and force of statutory law. The usurious laws of Virginia are discussed in the following cases, which cite the principal case: Brockenbrough v. Spindle, 17 Gratt. 26; Munford v. McVeigh, 92 Va. 452. 28 S. E. Rep. 85; Davis v. Demming, 12 W. Va. 270, 274, 275, 276. See sec. 2821, Code 1887; Poll. Suppl., sec. 2823; also, monographic note on "Usury" appended to Coffman v. Miller, 26 Gratt. 698.

by which the complainant alleged that he could prove all the allegations of the bill going to establish the usury charged therein, and that he did not require a discovery of the usury from the defendants by their answers; and he asked for an injunction to restrain the sale of the trust property until the validity of the deed could be tried at law. The injunction was granted.

The defendants Bell and Crawford answered the bill. They alleged that Edmondson was insolvent at the time, and the bond referred to in the bill was secured by a deed of trust; but there were so many

24 other debts secured by the same deed, having priority to this, that it *was very doubtful whether it would be paid. That the agreement between the complainant and themselves was, that he should assign the bond to them at a discount of twenty five per cent.; and secure them for the money they should advance to him by a deed of trust on negroes. That accordingly on the same day, the defendant Waddell, at the instance and under the directions of the complainant, prepared the trust deed; and on the same day the bond was assigned to them, and they advanced to the complainant the sum of 494 dollars 25 cents.

They aver that their understanding of the contract at the time, and ever since, has been, that they had a right to the whole amount of the bond on Edmondson, if they could collect it of him. Of this however they had considerable doubt; and if they failed, then that they had a right to look to the trust deed executed by the complainant, as a security for the money actually advanced to him, with the legal interest accruing thereon. And they aver that they never have claimed or demanded under said deed of trust more than the said sum of 494 dollars 25 cents, with legal interest thereon.

The deed of trust recites, that its object is to secure to Bell and Crawford the full payment of the bond assigned, with interest thereon; and it provides, that if it is not paid in twelve months, the trustee shall, at the request of Bell and Crawford, or their assigns, sell for cash so much of the trust property as may be necessary to make the amount which may be then due upon said bond; which amount he shall pay over to those entitled.

At the June term 1844, the cause came on to be heard on a motion by the defendants to dissolve the injunction; whereupon the Court overruled the motion, and ordered that an issue be made up between the parties and tried at the bar of that Court, before a jury, to ascertain whether the assignment of the bond of Edmondson

25 *by the plaintiff to Bell and Crawford, and the deed of trust of the same date, were founded on a corrupt and usurious agreement or not; and if upon a usurious agreement what was the amount of the usurious premium reserved on said contract. Upon the trial of this issue the jury found

that the assignment of the bond and the deed of trust were founded in a usurious agreement; and that the usurious premium amounted to the difference between the sum of 494 dollars 25 cents and the sum of 529 dollars with interest thereon from the 8th of May 1838 to the 31st of December 1842, the date of the deed of trust, subject to a credit of 15 dollars, as of the 1st of October 1842.

The cause came on to be finally heard at the June term 1847, when the Court approved the verdict of the jury; and being of opinion that the measure of relief consequent on the verdict, upon the authority of Marks v. Morris, was the annulment of the trust deed and assignment, and forfeiture by the defendants of the entire debt, perpetuated the injunction with costs. From this decree, Bell and Crawford applied to this Court for an appeal, which was allowed.

The cause was argued by Fultz, for the appellants, and Michie, for the appellee, but as the authorities are all cited in the case of the Bank of Washington v. Arthur, 3 Grattan 173, it cannot be necessary to refer to them here.

BALDWIN, J., delivered the opinion of the Court.

The Court is of opinion that there is no error in so much of the decree of the Circuit court as approves the verdict of the jury, ascertaining that the assignment and trust deed in the bill and proceedings mentioned, were founded in a corrupt and usurious agreement and contract between the appellants and the appellee, and ascer-

26 taining the amount of usurious premium reserved on *said agreement and contract. But that the said decree is erroneous in holding that the proper measure of relief consequent upon the verdict of the jury, is the forfeiture by the appellants of the entire debt, and in wholly perpetuating the injunction which had been granted to the appellee to restrain proceedings under said trust deed; this Court being of opinion that the proper measure of relief to the appellee, is a credit for the amount of the usurious premium found by the verdict of the jury, against the principal money and interest secured by said assignment and trust deed, and a further credit against the same for the sum of 15 dollars mentioned in said verdict; and that the said assignment and trust deed ought to stand as securities for the balance of the principal money and interest thereby secured, and payment thereof enforced if necessary, by a sale under the direction of the Court, of the property conveyed by said trust deed. It is therefore adjudged, ordered and decreed, that so much of the said decree as is above declared to be erroneous, be reversed and annulled, and the residue thereof affirmed, with costs to appellants. And the cause is remanded to the Circuit court, to be proceeded in according to the principles above declared.

Decree reversed.

27

Bourland v. Eidson.

July Term, 1851, Lewisburg.

(Absent CABELL, P.)

1. **Slander—Mitigation of Damages—Use of Slanderous Words by Plaintiff.**†—It is no defence in an action of slander, even in mitigation of damages, that previous to the speaking the slanderous words laid in the declaration, the plaintiff had used equally offensive and insulting words towards the defendant.

2. **Same—Same—Plea of Not Guilty—What Defendant May Prove.**—In an action of slander, under the plea of not guilty, the defendant may in mitigation of damages, prove any facts as to the conduct of the plaintiff in relation to the transaction which was the occasion of the slanderous language complained of, which tend to excuse him for uttering the words, provided the facts do not prove or tend to prove the truth of the charge complained of; but in fact relieve the plaintiff from the imputation involved in it.

This was an action of slander in the Circuit court of Augusta county, brought by William Eidson against James Bourland. The declaration contained but one count, in which the slander alleged to have been uttered was stated to be, "that the plaintiff was a rogue, and had stolen from the defendant an order on Stofer, and that the plaintiff had sworn to a lie in Court."

The defendant pleaded "not guilty." And on the trial of the cause, he offered to prove in mitigation of damages, that at and about the time of speaking the words set out in the declaration, the plaintiff and defendant were engaged in an angry and exciting controversy in the Court in which this case was then on trial, and that they were both in the habit of using towards and concerning each other violent and abusive language; and that about that time, although not at the time when the words set out in the declaration were spoken, the plaintiff had used to and about the

28 defendant language "equally offensive and insulting as that set out in the declaration. But the Court being of opinion that such evidence was inadmissible for any purpose, refused to admit the evidence: And the defendant excepted.

In the further progress of the trial, the defendant, as to the words set out in the declaration, as imputing to the plaintiff a theft of an order on Stofer, offered evidence to prove the circumstances under which the plaintiff became possessed of the order on Stofer, and his whole conduct in relation thereto; and to shew that, although not justifying the speaking of the words as

*For monographic note on Libel and Slander, see end of case.

†**Slander and Libel—Privileged Communications.**—In *Chaffin v. Lynch*, 83 Va. 118, 1 S. E. Rep. 803, it is held: "While it is true that one insult cannot be set off against another (*Bourland v. Eidson*, 8 Gratt. 27), yet if a man is attacked in a newspaper, he may reply; and if his reply is not unnecessarily defamatory of his assailant, and is honestly made in self-defence, it will be privileged."

importing theft, these circumstances and the conduct of the plaintiff, were in themselves, highly improper, and such as were calculated justly to excite the defendant and arouse his suspicions. But the Court being of opinion that such evidence was inadmissible under the plea of "not guilty," which was the only plea in the cause, refused to admit the evidence: And the defendant again excepted. This exception does not state that the plaintiff had introduced any evidence upon the charge of theft in stealing the order on Stofer, or indeed that he had introduced any evidence, unless as that may be inferred from what is hereinbefore stated.

The jury found a verdict in favour of Eidson for 900 dollars; upon which the Court rendered a judgment. Whereupon Bourland applied to this Court for a super-seedeas, which was awarded.

Hugh Sheffey and Michie, for the appellant, insisted, 1st. That the evidence referred to in the first bill of exceptions should have been admitted, not for the purpose of offsetting one slander by another, but for the purpose of shewing the provocation under which the appellant spoke the words attributed to him. And they referred to *Watts v. Fraser*, 32 Eng. C. L. R. 544; *Judge v. Berkeley*, Id. 545, in note; *Tarpley v. Blaby*, Id. 555; *Fraser v. Berkeley*, Id. 658.

29 *2d. That the evidence referred to in the second bill of exceptions should have been admitted. They said that if the bill of exceptions was improperly taken the Court for that reason would reverse the judgment and send the cause back for a new trial. *Brooke v. Young*, 3 Rand. 106; *Raines v. Philips' ex'or*, 1 Leigh 483; *Thompson v. Cummins*, 2 Id. 321. But that the Court would construe the exceptions so as to get at the merits. *Trimyer v. Pollard* 5 Gratt. 460.

They insisted further that whilst the defendant would not be allowed under the plea of "not guilty," to prove the charge, yet that it was admissible to prove the circumstances which justly excited the suspicions of the defendant, together with other circumstances not then known to the defendant, which shewed that the plaintiff was not guilty of the offence imputed to him. And they referred to *Leicester v. Walter*, 2 Camp. R. 251; *East v. Chapman*, 12 Eng. C. L. R. 268; *Rigden v. Wolcott*, 6 Gill & John. 413; *Minesinger v. Kerr*, 9 Penn. R. 312; *Gilman v. Lowell*, 8 Wend. R. 573; *Updegrove v. Zimmerman*, 13 Penn. R. 619; *Alderman v. French*, 1 Pick. R. 1; *Larned v. Buffinton*, 3 Mass. R. 546; *Van Ankin v. Westfall*, 14 John. R. 233; *Bradley v. Heath*, 12 Pick. R. 163; *Williams v. Miner*, 18 Conn. R. 464; *Cooke on Defam.* 286; 53 Law Libr. citing *The King v. Halpin*, 17 Eng. C. L. R. 332; *Knobell v. Fuller*, Peake's Evi. 287, 288, Appendix 92; recognized in *Bailey v. Hyde*, 3 Conn. R. 463; in *Leicester v. Walter*, 2 Camp. R. 251; in *East v. Chapman*, 12 Eng. C. L. R. 268, and in

Buford v. McLuny, 1 Nott. & McC. 268; Hart v. Reed, 1 B. Munroe's R. 166; Eagan v. Gantt, 1 McM. R. 468; Cooper v. Barber, 24 Wend. R. 105; Petrie v. Rose, 5 Watts & Serg. 364.

Fultz, for the appellee.

On the first point said the law did not authorize a set off in slander; and he referred to McAlexander v. Harris, 6 Munf. 465.

2d. He insisted, first, that it did not appear that the plaintiff had introduced any proof as to the charge of having stolen the order from Stofer, and therefore it did not appear that the evidence offered and rejected was relevant. McDowell v. Burwell, 4 Rand. 317; Rowts' adm'r v. Kile's adm'r, 1 Leigh 216; Carpenter v. Utz, 4 Gratt. 270.

3d. That the evidence offered was not admissible under the plea of not guilty. And he said the distinction was between the cases where the action was maintainable without proving special damage, and those where special damage must be proved in order to sustain the action. In the latter he admitted that any facts might be proved under the general issue which disproved the malice: And such he said were the cases of Leicester v. Walter, 2 Camp. R. 251; Smith v. Spooner, 3 Taunt. R. 246; Watson v. Reynolds, 22 Eng. C. L. R. 231; Rowe v. Roach, 1 Mau. & Sel. 304; Wyatt v. Gore, 3 Eng. C. L. R. 111; Sims v. Kinder, 11 Eng. C. L. R. 392. But that where the words were actionable without proof of special damage, the rule was that such evidence was not admissible under the general issue. And he referred to Vessey v. Pike, 14 Eng. C. L. R. 420; Dance v. Robson, 22 Id. 311; Waithman v. Weaver, 16 Id. 412; Van Ankin v. Westfall, 14 John. R. 233; Shepard v. Merrill, 13 John. R. 475; Wormouth v. Cramer, 3 Wend. R. 395; Henry v. Norwood, 4 Watts R. 347; Petrie v. Rose, 5 Watts & Serg. 364; Purple v. Horton, 13 Wend. R. 9; Cooper v. Barber, 24 Wend. R. 105; Eagan v. Gantt, 1 McM. R. 468; McGee v. Lodusky, 5 J. J. Marsh. R. 185; Hart v. Reed, 1 B. Munroe's R. 166; Buford v. McLuney, 1 Nott & McC. 268; Cheatwood v. Mayo, 5 Munf. 16; McAlexander v. Harris, 6 Id. 465; Moseley v. Moss, 6 Gratt. 534.

31 *BALDWIN, J. I shall treat this case, in the first place, as if it were exclusively an action for slander at common law.

The case was tried upon the general issue, and the questions presented by the record are in reference to evidence offered by the defendant, and rejected by the Court, in mitigation of damages.

The authorities in regard to the evidence proper under the general issue in mitigation of damages, are numerous, and a good deal conflicting; and the difficulties which have embarrassed the Courts seem to have arisen out of opposing considerations entirely proper in themselves, but often hard to be reconciled; the propriety and justice,

on the one hand, of submitting to the jury the ungarbled merits of the controversy, so as to enable them to give to the plaintiff the full damages he ought to recover, and no more; and on the other hand, the policy and necessity of excluding evidence irrelevant to the substance of the grievance, or to the issue joined between the parties.

It is obvious that the purposes of justice require us to look as far as practicable to the conduct and motives of both parties in connection with the subject matter of the grievance, in order to estimate fully and fairly the amount of damage sustained by the one, and of retribution which ought to be made by the other. If the plaintiff has been free from blame, and has been made the victim of the defendant's cool and deliberate malice, the case presented is widely different from one where the plaintiff has by his own misconduct occasioned or provoked the injurious imputation, or where the defendant, though subject to the legal inference of malice from the criminality of the imputed act, and the falsehood of the charge, has been prompted in making it by a plain mistake, without his default, as to the nature of the plaintiff's conduct. And the soundness of any mere technical reasoning may be questioned which, *against the plain dictates of common sense, would place cases so dissimilar in complexion upon the same footing as to the quantum of damages.

The elements of redress in the action for defamation are the wrong done to the plaintiff, and the malice or vicious intent of the defendant: these modify each other, and are modified by circumstances, so as to allow much scope for the judgment and discretion of the jury, upon a subject somewhat indefinite in its very nature, the amount of pecuniary compensation which ought to be paid for an injury of such a character. Whatever, therefore, tends to throw light upon the question ought, within fair and reasonable limits, to be brought in some form or shape, to the consideration of the jury.

It is of course under the general issue that evidence must be offered which presents no bar to the action but tends only to mitigate the damages. At one period, indeed, the idea seems to have prevailed to a considerable extent, that whenever the defendant's evidence answered the whole ground of the plaintiff's action, it was admissible under the general issue, and therefore (I presume) that as some occasions of speaking or publishing defamatory words divested them of the essential of legal malice, so proof of their truth took away the equally essential ingredient of their alleged falsehood. And so the truth of the defamatory words was so repeatedly admitted in evidence under the plea of not guilty, as to become in the opinion of the Judges of England a mischief in practice requiring correction. Accordingly, in the case of Underwood v. Parks, 2 Strange 1200, in which the defendant pleaded not guilty, and offered to prove the words to be true

in mitigation of damages, the Chief Justice refused to permit it, saying that at a meeting of all the judges upon a case that arose in the Common Pleas, a large majority of them had determined not to allow it for the future, but that it should be pleaded,

33 whereby the plaintiff might be prepared to *defend himself, as well as to prove the speaking of the words: That this was now a general rule amongst them all, which no Judge would think himself at liberty to depart from; and that it extended to all sorts of words, and not barely to such as imported a charge of felony. The rule thus adopted has since been recognized both in England and in this country, is sustained by numerous authorities; and I believe has never been denied by any judicial decision.

But although the rule of *Underwood v. Parks*, has been thus universally admitted, yet its spirit had, as I conceive, been often broken in upon by decisions and dicta, both in England and in this country. It has been repeatedly said and held that, under the general issue, evidence may be given in mitigation of damages, which stops short of a complete justification. Now this surely cannot be considered as an exception to or modification of the rule of *Underwood v. Parks*, but is in effect, though not so designed, a practical negation of it; for where is the line to be drawn between perfect and imperfect proof of the plaintiff's guilt; and upon what principle is light evidence to be preferred to that which is cogent and conclusive? What is the admission of such evidence but an invitation to the jury to act upon suspicion instead of proof? and indeed that aspect is given to the proposition by some of the authorities, which assert that circumstances of suspicion may be received in mitigation of damages. The rule which excludes proof of the truth of the words, must of necessity exclude evidence tending to prove it, or the rule itself is rendered nugatory or merely mischievous. And so is the preponderance of authority both English and American. See the cases referred to in 3 *Stephens' Nisi Prius* 2255-6, 2253, 2519; 2 *Stark. Ev.* 877-8; 1 *Stark. Sland.* 413, n.; 2 *Id.* 78 to 89; American editions of those works; 34 *Root v. King*, 7 *Cow. R.* 613; **Gilman v. Lowell*, 8 *Wend. R.* 573; in which most of the cases are reviewed.

Indeed, nothing but an anxiety to get at the supposed merits of the case could have misled some Judges into so obvious a deviation from the principle of *Underwood v. Parks*; and it is remarkable that others, while condemning and overruling such departure, have at the same time received other evidence of the same general nature, but still more objectionable. I allude to the admission of evidence to prove that the plaintiff laboured under a general suspicion of having been guilty of the charge, or of rumors imputing to him such criminal acts. It may be easily seen that the effect of such evidence, when a party comes into Court for the purpose of establishing his inno-

cence, and so putting down false rumors of his guilt, may be to crush him under the weight of those very rumors. And yet the current of English authority allows the introduction of such evidence, upon the supposition, it seems, that it goes to the character of the plaintiff, though it surely does not in the legal acceptance of the term, if general character be meant. On the other hand, the weight of American authority, with better reason, it seems to me, excludes such evidence. See the cases pro and con, referred to in 2 *Stark. Ev.* 877; *Phillips' Ev.*, vol. 3, p. 249, 250; 2 *Stark. Sland.* 96-7; American editions of those works.

It seems to me, therefore, that evidence is not admissible under the general issue, in mitigation of damages, which proves, or tends in any form or shape to prove, the truth of the words.

On the other hand, I cannot doubt that where the defamatory words point to a specified act of the plaintiff, and the evidence offered in mitigation of damages neither proves, nor tends to prove, or upon the whole negatives, the truth of the words, it is admissible where it serves to shew improper conduct of the plaintiff in
35 reference *to the particular transaction calculated to vex, harass, aggrrieve or provoke the defendant.

In such cases, it is often important that the jury should have some information of the transaction to which the words refer, in order to understand correctly their true import and meaning, and the design with which they were spoken. The defendant may, through ignorance or excitement, misapprehend the plaintiff's conduct, or use inappropriate language and epithets in the expression of his indignation or resentment; and yet that conduct may have been wholly unwarranted, or extremely injurious or provoking. The aggravation of a fraud or a trespass into a felony, whether from ignorance or exasperation, surely stands upon a different footing in regard to the quantum of damages, from a sheer fabrication. Thus if a party should obtain the money of another by a fraudulent contrivance, or dishonest breach of trust, or his property by open violence under a false claim of title, and the party injured in speaking of the transaction should designate it, in the former case as a theft, or in the latter as a robbery, a recovery of heavy damages in an action of slander would not be so much for actual defamation, as of inaccurate phraseology. And if a plaintiff, without moral guilt, but to disport himself with the fears or feelings of the defendant, has misled or provoked him to the use of defamatory words, this should be made known to the jury, otherwise the plaintiff, to a greater or less extent, would recover damages for his own misbehaviour.

In the cases mentioned, the defendant could not protect himself from heavy damages under the plea of justification, inasmuch as the evidence would not prove or tend to prove the truth of the words; and yet, for that very reason, and because they

were begotten, as it were, by the plaintiff's own misconduct, the evidence is proper under the general issue in mitigation of damages. Of this the plaintiff has no
36 right to complain, for he suffers *no injustice, nor is he taken by surprise, the particular transaction being pointed to by the words themselves, and the defendant not having declined any privilege of pleading the matter specially, inasmuch as such pleading was beyond his competency.

The admissibility of evidence such as above mentioned in mitigation of damages is warranted by the spirit of familiar doctrines. Thus the defendant may prove, as a complete defence under the general issue, that the publication of the defamatory words was procured by the contrivance of the plaintiff for the purposes of the action. 2 Stark. Ev. 876; King v. Waring, 5 Esp. Cas. 13. So in an action for a libel, the defendant may give in evidence a former publication of the plaintiff to which the libel was an answer, to explain the subject matter, occasion and intent of the defendant's publication, and in mitigation of damages. 2 Stark. Ev. 877; Hitchcoss v. Lathrop. And in 2 Stark. Sland. 95, n., it is mentioned with approbation, that the counsel for the defendant in Leicester v. Walter, 2 Camp. R. 351, said arguendo, that in a case before Le Blanc, J., at Worcester, that learned Judge received evidence under the general issue of attempts of the plaintiff to commit the crime which the defendant had imputed to him. In Gilman v. Lowell, 8 Wend. R. 573, in an action for charging the plaintiff with false swearing in relation to the existence of a deed, the defendant was allowed to prove in mitigation of damages, that after diligent search of the registry, before the speaking of the words, the deed could not from a defect of the index be found. And in Grant v. Hover, 6 Munf. 13, in an action for charging the plaintiff with perjury, the defendant was permitted to prove under the general issue what the plaintiff did swear to, though not its falsity.

In the case before us, the declaration, consisting of a single count, comprises two distinct allegations of defamation; one imputing to the plaintiff that he stole
37 from *the defendant an order on Stofer; the other that he had committed perjury in a Court of Justice. As to the former, the defendant on the trial, as appears from the second bill of exceptions, offered evidence to prove the circumstances under which the plaintiff became possessed of the order on Stofer, and his whole conduct in relation thereto, and to shew that although not justifying the speaking of the words in the declaration mentioned as imputing theft, those circumstances and the conduct of the plaintiff were in themselves highly improper, and such as were calculated justly to excite the defendant, and to arouse his suspicions: But the Court being of opinion that such evidence was inadmissible under the plea of not guilty, which was the only plea in

the cause, refused to admit the evidence. In this decision I think the Circuit court erred.

It seems to me that it was entirely competent for either party to give evidence of the existence, the custody, the contents, the nature, and the value of the order on Stofer, to explain the subject, matter, occasion and intent of the speaking of the words. Without such evidence, the jury could not but be very much in the dark in regard to the very subject of the defamation. There is nothing in the declaration, nor any part of the record, to shew by or in whose favour, or for what purpose the order was drawn, or whether it could have been of any substantial benefit to either of the parties, and if the defendant could prove that the plaintiff obtained possession of the order without authority, though not *lucri causa*, to vex, harass, provoke or injure the defendant, and that the latter consequently, without deliberate malice, but from the exasperation or misapprehension of the occasion, spoke the words in question, these were matters perfectly proper for the consideration of the jury upon the question of damages.

The 1st bill of exceptions presents another question which occurred at the trial
38 in relation to the exclusion *of evidence offered by the defendant in mitigation of damages, as well it seems in reference to the imputation of perjury, as to that of theft. The defendant offered to prove in mitigation of damages, that at and about the time of speaking the words in the declaration mentioned, the plaintiff and defendant were engaged in an angry and exciting controversy in the Court, and that they were both in the habit of using towards and concerning each other violent and abusive language, and that about that time, although not at the time when the words charged in the declaration were spoken, the plaintiff had used to and about the defendant language equally offensive with that in the declaration mentioned. But the Court being of opinion that such evidence was inadmissible for any purpose, refused to permit evidence of slanderous, defamatory or insulting words spoken by the plaintiff to, of or concerning the defendant, at other times or on different occasions from the times and occasions on which the words charged in the declaration were spoken. In this decision of the Circuit court, it seems to me there was no error.

It is certain that mutual defamations cannot be made a matter of account and set off against each other, and a balance struck in favour of the most injured or least culpable of the parties: and such would be the effect of allowing evidence of reciprocal criminations unconnected except by a general spirit of hostility and revenge. The only principle upon which defamatory words spoken by the plaintiff can be proved in mitigation of damages is that he has thereby brought upon himself, at least to some extent, the grievance of which he complains. This cannot be conceded with any propriety or

safety, unless where such provocation occurs, or is referred to, in the same conversation with the defamation by the defendant, or is communicated to him at that time. I need not consider whether there may not be exceptions to this restriction, there being no foundation of or any in the present case.

39 *It will be seen in this case, that the whole structure of the declaration indicates an action for defamation at common law, except that the words are charged to be insulting as well as slanderous; which word insulting would seem to have been introduced for the purpose of enabling the plaintiff to recover for an insult under the 8th section of the act to suppress duelling, Supp. Rev. Code, p. 284, if his evidence should fail on the trial to make out a case of common law slander. This mode of declaring in one and the same count of the declaration for a common law defamation and an insult under the statute, is not allowable, *Moseley v. Moss*, 6 Gratt. 534, and therefore open to demurrer. But the defendant having failed to avail himself of the misjoinder by demurrer, a question might occur whether the plaintiff might not recover, for an insult, though he should fail to establish a common law defamation; and if so, whether the defendant would not be at liberty to prove any mitigating circumstances which would be allowable in an action founded upon the statute. These, however, are questions which do not require consideration in this particular case: for in regard to the evidence stated in the 2d bill of exceptions, the same being admissible in an action for common law defamation, it would be at least equally so in an action founded upon the statute; and in regard to the evidence stated in the 1st bill of exceptions, the reasons for excluding it are equally strong, whether in an action for a slander, or in an action for an insult.

ALLEN, J. The declaration charged the speaking and publishing of words actionable at common law; the issue was not guilty; and at the trial the defendant tendered two bills of exceptions to opinions of the Court rejecting evidence offered by him in mitigation of damages. By the first bill of exceptions it appears that the defendant

40 offered evidence to prove in mitigation of *damages, that at and about the time of speaking the words in the declaration mentioned, the parties were engaged in an angry and exciting controversy in Court; that they were both in the habit of using towards and concerning each other, violent and abusive language; and that about the time, though not at the time, when the words charged in the declaration were spoken, the plaintiff had used to and about the defendant language equally insulting and offensive with that in the declaration mentioned. The Court deeming such evidence inadmissible for any purpose, excluded it from the jury. Evidence of all that occurred at the time of speaking the

words, being part of the *res gestæ*, and tending to explain the words spoken, and the intent of the party in making the charge, would be admissible; but it is not competent for the defendant to set off one slander against another, uttered by the plaintiff concerning the defendant, at a different time. And it was accordingly held by this Court in the case of *McAlexander v. Harris*, 6 Munf. 465, that such evidence was improper. It, therefore, seems to me, there was no error in rejecting the evidence referred to in the first bill of exceptions.

The second bill of exceptions sets forth in substance that the defendant, as to the charge imputing to the plaintiff a theft of an order on Stofer, offered evidence to prove the circumstances under which the plaintiff became possessed of the order, and his whole conduct in relation thereto, to shew that, although not justifying the speaking of the words as importing theft, those circumstances and the conduct of the plaintiff, were in themselves highly improper, and such as were calculated justly to excite the defendant and to arouse his suspicions. The Court deeming the evidence inadmissible under the issue joined, rejected it. The rule established in the case of *Underwood v. Parks*, Strange 1200, requires of the defendant, if he intends to justify the speaking of the words, that

41 he should file a plea of justification, *in order that the plaintiff may know what defence he is to meet. Whether it is competent for the defendant in mitigation of damages, to introduce evidence proving the truth, or tending to prove the truth, of the words spoken, has been a controverted question both in England and our sister States. The cases are variant and conflicting, and cannot perhaps be reconciled. In this State the rule of *Underwood v. Parks* has been fully recognized and acted upon in the cases of *Cheatwood v. Mayo*, 5 Munf. 16; and *McAlexander v. Harris*, 6 Munf. 465. These decisions have never been questioned in this Court since; but on the contrary, the principles established by them, so far as respects words actionable at common law, were approved in the more recent case of *Moseley v. Moss*, 6 Gratt. 534. It becomes necessary therefore to ascertain what was the precise point established in each of those cases.

In the first case of *Cheatwood v. Mayo*, the defendant offered in mitigation of damages, and not by way of justification, to prove facts which, if they did not altogether, almost established the truth of the charge. He could not offer such evidence in bar of the action, because he had failed to file the plea of justification. But if permitted to introduce it in mitigation of damages, the same impression would be made on the minds of the jury, and the plaintiff could not know what defence he was to meet. The case therefore establishes that evidence falling short of a full justification, but tending to prove the truth of the words charged, and leaving that impression

on the minds of the jury, is inadmissible, notwithstanding the declaration that it is offered in mitigation of damages, and not by way of justification. In the case of *McAlexander v. Harris*, the evidence was offered, not as amounting to actual proof of the plaintiff's guilt, or a complete justification of the defendant, but as shewing a probable ground of suspicion, in litigation of damages. The character

42 of the *evidence is not stated, but if it shewed a probable ground of suspicion, it must have been evidence of circumstances tending to prove the guilt, or proving a link in the chain of facts necessary to make out the guilt of the plaintiff; which if it shewed probable ground or suspicion on the part of the defendant when speaking the words, was equally calculated to make and leave a similar impression on the minds of the jury if unexplained; and so the character of the plaintiff might be destroyed by a defence of which the pleadings gave him no notice.

Where, however, the defendant relies upon evidence not implying the truth of the charge, or evidence not tending to prove a fact, which might constitute a link in the chain of facts establishing the guilt of the plaintiff; but on the contrary, evidence which of itself disproves the truth of the words spoken, and shews the plaintiff's innocence of the charge imputed to him, such evidence, though it might shew improper conduct in the plaintiff, or a mistake on the part of the defendant, would, it seems to me, be proper evidence under the plea of not guilty, to repel the presumption of malice, and in mitigation of damages, in every action for slander at common law. By such evidence the plaintiff cannot be surprised or injured, for it disproves the truth of the charge, and so relieves his character from the imputation complained of; and it is evidence which, though bearing materially on the question of malice, and so affecting the damages, the defendant could not rely on under the plea of justification, because it would disprove it. If the evidence in the case under consideration had been testimony to prove that the plaintiff, in a mischievous spirit, or to provoke or irritate the defendant, had possessed himself of the order in the presence of others, avowing his motives at the time; and that defendant, in ignorance of these facts, had spoken the words in the declaration

43 mentioned; such evidence, or *evidence of a like character, might have had an important influence upon the jury in fixing the amount of damages. But it would neither prove, or tend to prove, the charge of guilt, or leave any suspicion of the truth of the charge on the mind of the jury, because it would shew that there was no felonious intent in the act of becoming possessed of the order; and though it would or might shew improper conduct on the part of the plaintiff, he should not be permitted to avail himself of his own misconduct, to the prejudice of the defendant, by exclud-

ing evidence bearing upon the presumption of malice, when such evidence shewed his innocence of the charge complained of. If, therefore, the bill of exceptions had set forth the purport of the evidence offered, so as to disclose whether it was of such a character, it would, under the restrictions aforesaid, have been admissible to repel the presumption of malice, and in mitigation of damages. But this is not shewn by the bill of exceptions. It sets forth that the defendant offered to prove the circumstances under which the plaintiff became possessed of the order, and to shew that those circumstances, though not justifying the speaking the words as importing theft, were improper, and calculated to arouse suspicion in the defendant. The evidence rejected might not have amounted to a justification; it could not be offered in justification, for that would have been in bar of the plaintiff's action, and there was no such plea; but the circumstances relied on might, as in the case of *Cheatwood v. Mayo*, have amounted almost to full proof of the words in the declaration mentioned; or, as in the case of *McAlexander v. Harris*, have left on the minds of the jury a suspicion of the plaintiff's guilt, in the absence of explanatory evidence shewing there was no just ground for such suspicion.

The bill of exceptions may have been designed to shew that the evidence 44 offered, whilst it disproved the *truth of the charge, merely tended to prove such improper conduct on the part of the plaintiff, and mistake in the defendant, as would have been proper evidence in mitigation of damages, according to the views before presented. But it would have been equally competent, according to the statement of the bill of exceptions, to have offered evidence similar to the proof offered in the case of *Cheatwood v. Mayo*, and *McAlexander v. Harris*, and there decided to be inadmissible.

The bill of exceptions is therefore, I think, too imperfect to enable this Court to determine what was the precise question intended to be raised and decided; and for this reason the judgment should be reversed.

DANIEL, J., concurred in the opinion of Allen, J.

MONCURE, J., concurred in reversing the judgment.

The judgment was as follows:

It appears from the first bill of exceptions, that at the trial "the defendant offered evidence to prove, in mitigation of damages, that at and about the time of speaking the words in the declaration mentioned, the plaintiff and defendant were engaged in an angry and exciting controversy in the Court, and that they were both in the habit of using towards and concerning each other violent and abusive language, and that about that time, although not at the time when the words charged in the declaration

were spoken, the plaintiff had used to and about the defendant language equally offensive and insulting with that in the declaration mentioned. But that the Court being of opinion that such evidence was inadmissible for any purpose, refused to permit evidence of slanderous, defamatory and insulting words spoken by the plaintiff to, of, or concerning the defendant, at other times or on different occasions from the times and occasions on which the words charged in the declaration *were spoken." In this decision of the Circuit court, it seems to this Court there is no error.

It further appears from the second bill of exceptions, that at the trial "the defendant as to the words in the declaration mentioned as imputing to the plaintiff a theft of an order on Stofer, offered evidence to prove the circumstances under which the plaintiff became possessed of the order on Stofer, and his whole conduct in relation thereto, and to shew that, although not justifying the speaking of the words in the declaration mentioned as importing theft, those circumstances and the conduct of the plaintiff were in themselves highly improper, and such as were calculated justly to excite the defendant and to arouse his suspicions: But that the Court being of opinion that such evidence was inadmissible under the plea of not guilty, which was the only plea in the cause, refused to admit the evidence." And it seems to this Court, that if this bill of exceptions is to be understood as importing that the evidence offered as therein mentioned, neither proved nor tended to prove that the plaintiff was guilty of stealing the order on Stofer, but upon the whole relieved him before the jury from all imputation of such guilt, then that the Circuit court erred in rejecting said evidence. But if, on the contrary, the bill of exceptions is to be understood as importing that the evidence so offered did prove or tend to prove that the plaintiff was guilty of such theft, so as to leave him before the jury unrelieved from all imputation of that crime, then that said evidence was properly rejected by the Court. And while some of the members of this Court are of opinion that the bill of exceptions justly bears the former interpretation, others think that the evidence offered is not set forth with sufficient certainty to free it from the latter, and therefore that the bill of exceptions is too imperfect to enable us to determine what was the precise *question intended to be presented, and that the judgment ought for that reason to be reversed.

It is therefore considered by the Court, that the said judgment of the Circuit court be reversed and annulled, and the verdict of the jury set aside with costs to the plaintiff in error. And the cause is remanded to the Circuit court for a new trial to be had therein, which new trial is to be governed, so far as applicable, by the principles above declared.

LIBEL AND SLANDER.

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XII. Pleading and Practice.

I. DEFINITIONS.

Definition of Insult.—To insult, says Webster, is "to leap upon, to treat with abuse, insolence or contempt; to commit an indignity upon, as to call a man a liar." But, as a general rule, each case must be governed by its own circumstances and surroundings, and the chief circumstance to be considered is the *animus* of the defendant in using the words complained of. It is often difficult to determine what is an insult, as it may depend upon a variety of circumstances. *Chaffin v. Lynch*, 83 Va. 106, 116, 1 S. E. Rep. 808; *Brooks v. Calloway*, 13 Leigh 466; *Moseley v. Moss*, 6 Gratt. 534; *Corr v. Lewis*, 94 Va. 24, 26 S. E. Rep. 385.

Definition of Defamation.—All common-law defamations are insults, and many of them sometimes more. The term "defamation" is used indiscriminately to designate both libel and slander. *Payne v. Tancil*, 98 Va. 262, 35 S. E. Rep. 725; *Moseley v. Moss*, 6 Gratt. 547.

Definition of Libel.—It is sufficient to constitute a libel, that the language tends to injure the reputation of the party, to throw contumely, or to reflect shame and disgrace upon him, or to hold him up as an object of scorn, ridicule or contempt, and it is not necessary that the writing should contain the imputation of an offence which may be indicted or punished; and, provided the meaning is plain, it is not necessary that the libelous utterances be in the form of positive assertion, but it is equally libelous if they are in the form of insinuation. The publication may be either by writing, printing or pictures. *Adams v. Lawson*, 17 Gratt. 250, 255; *Chaffin v. Lynch*, 83 Va. 115, 1 S. E. Rep. 808; *Johnson v. Brown*, 13 W. Va. 71, 122; *State v. Aler*, 39 W. Va. 549, 20 S. E. Rep. 588; 4 Min. Inst. (4th Ed.) 470, 471.

"Lynch Law"—"Judge Lynch."—For the meaning and definition of "Lynch Law" and "Judge Lynch," see *State v. Aler*, 39 W. Va. 549, 20 S. E. Rep. 585.

Difference between Slander and Libel.—Slander is not a public offence, but only a civil injury; but libel is both a civil injury and a public offence. It is deemed a public offence because it endangers the public peace by the bad passions it engenders, and also because the means adopted for its publication render it more injurious to the party wronged, and demonstrate a more deliberate and malignant intent in the offender. 4 Min. Inst. (4th Ed.) 469.

II. WHAT IS DEFAMATORY—ACTIONABLE QUALITY OF WORDS.

1. **DISTINCTION BETWEEN ORAL AND WRITTEN WORDS.**—Words spoken, as distinguished from words written, which are actionable at common law, are classified as follows: 1. Words falsely spoken of a person, which impute to him the commission of some criminal offence, involving moral turpitude, for which, if the charge is true, he may be indicted and punished. 2. Words falsely spoken of a person, which impute that he is infected with some contagious disease which, if the charge is true, would exclude him from society. 3. Defamatory words, falsely spoken of a person, which impute to him unfitness to perform the duties of an office, or employment of profit, or want of integrity in the discharge of the duties of such an office or employment. 4. Defamatory words falsely spoken of a person, which prejudice such person in his or her trade or profession. 5. Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion such person special damage. *Womack v. Circle*, 29 Gratt. 198; *Moseley*

v. Moss, 6 Gratt. 534; *Hoyle v. Young*, 1 Wash. 150, 1 Am. Dec. 446.

An action may lie for written words (as being a libel) which, if spoken only, would not be actionable. 4 Min. Inst. (4th Ed.) 465 *et seq.*

2. **DISTINCTION BETWEEN WORDS ACTIONABLE PER SE AND PER QUOD.**—It is a settled rule of the common law that every publication of language which *naturally* and *necessarily* tends to injure another in his office, trade, or employment is, if without justification, libelous or slanderous, as the case may be, and actionable *per se*. Thus to speak or write of a trader that he is insolvent, or of an innkeeper that his house is infected with a contagious disease, or to impute dishonesty or incapacity to one in his business, is actionable, without any proof of special damage, since, in all such cases, the law implies damage from the nature of the language used. When, however, the language does not import such defamation as will of course be injurious, and is therefore actionable only because it occasions special damage to the plaintiff, *i. e.*, damage which, though the natural and immediate, is yet not the necessary result of the language used, there damage must be both alleged and proved. *Moore v. Rolin*, 89 Va. 107, 15 S. E. Rep. 520; *Harman v. Cundiff*, 82 Va. 239; *Moseley v. Moss*, 6 Gratt. 534; *Hansbrough v. Stinnett*, 25 Gratt. 495; *Hoyle v. Young*, 1 Wash. 150.

General Nature of Words Actionable Per Se.—The common law does not give reparation for all derogatory or disparaging words. To make such words actionable, unless special damage be shown, they must impute some offence against the law, punishable criminally; or the having a contagious disorder tending to exclude from society; or which may affect one injuriously in his office or trust, or in his trade, profession or occupation; or which, in the case of a libel or written slander, tend to make the party subject to disgrace, ridicule or contempt. Words spoken that are merely vituperative, or insulting, or imputing only disorderly or immoral conduct, or ignoble habits, propensities or inclinations, or a want of refinement, delicacy or good breeding, are not regarded by the common law as sufficiently substantial injuries to call for redress in damages. *Moseley v. Moss*, 6 Gratt. 534.

3. WORDS IMPORTING CRIME.

a. **WRITTEN WORDS.**—Written words charging anyone whatever with the commission of any crime, whether it be a felony or a misdemeanor, are actionable without allegation or proof of special damage. *Sweeney v. Baker*, 13 W. Va. 158; *Johnson v. Brown*, 13 W. Va. 71; *Com. v. Morris*, 1 Va. Cas. 175.

b. **ORAL WORDS.**—It is well settled that slanderous words are actionable *per se*, when they impute a criminal offence involving moral turpitude, and no averment or proof of special damage is necessary to the recovery. *Harman v. Cundiff*, 82 Va. 239; *Womack v. Circle*, 29 Gratt. 192; *Shroyer v. Miller*, 8 W. Va. 158; *McClagherty v. Cooper*, 39 W. Va. 813, 19 S. E. Rep. 415; *Moseley v. Moss*, 6 Gratt. 534; *Payne v. Tancil*, 98 Va. 262, 35 S. E. Rep. 725.

Kind of Offence Necessary.—In order for words imputing a crime to be actionable *per se* at common law, they must impute guilt of some offence, for which the plaintiff, if guilty, might be indicted in the temporal courts, and punished as for an infamous crime, at least punishable with imprisonment. *Hansbrough v. Stinnett*, 25 Gratt. 495.

Misdemeanor.—In an action of trespass on the case, the count, without any special averments, charges

that the defendant falsely and maliciously charged that the plaintiff attempted to bribe a negro woman to burn a wheat stack on his land, and the court held that the statute, Code of 1878, ch. 188, sec. 5, makes the malicious burning of a wheat stack a felony, moreover, to solicit another to commit a felony, though the felony be not afterwards committed, is a misdemeanor at common law, indictable and punishable, and also involves moral turpitude, therefore the charge of such a misdemeanor is actionable *per se* at common law. *Womack v. Circle*, 29 Gratt. 192.

C. AS RESPECTS PARTICULAR CRIMES.

Fornication—Adultery.—See *post* this note, "Words Imputing Unchastity."

Embezzlement.—Where a party, with the intention to injure the reputation of a person who is at the time a merchant, falsely and maliciously says of him, that "he has received more tobacco than he has accounted for to the house," meaning the mercantile house of which the plaintiff and defendant were partners, is liable in an action for slander, without any colloquium being laid, these words being *per se* actionable, not only because they impute the crime of embezzlement, but because they tend to injure the plaintiff in his business. *Hoyle v. Young*, 1 Wash. 150.

False Pretenses—Embezzlement.—To write that the plaintiff, who was general superintendent of a certain corporation, used the money, means and credit of the company for his own private use, and that he used the company's money to pay his own employees, and other similar expressions, are not libelous in themselves, as meaning necessarily that the plaintiff embezzled the money of the company, and an innuendo giving them such a meaning improperly extends and enlarges the meaning of words, which it is not the office of the innuendo to do. *Johnson v. Brown*, 13 W. Va. 71. See *Argabright v. Jones*, 46 W. Va. 144, 82 S. E. Rep. 995.

Forgery.—Words charging another with forgery are actionable. *Donaghe v. Rankin*, 4 Munf. 261. This case, however, went off on a question of pleading; the declaration containing no direct charge that the words were spoken by the defendant.

Larceny—Oral Words—Sheep Thief.—To call one a thief, to say of him that he stole sheep, or he stole my sheep, are words which impute a punishable offence, and are actionable. *Harman v. Cundiff*, 82 Va. 239. See *Bourland v. Eldson*, 8 Gratt. 27; *M'Alexander v. Harris*, 6 Munf. 465.

Horse Thieves—Landlord and Tenant.—A charge that the plaintiff, in an action for slander, and all his sons, are horse thieves and make their living by that means, and that they frequently harbored that kind of men, are actionable words, and the fact that the communication was made by a landlord to his tenant does not rebut the presumption of malice or bring it within the class of privileged communications, as there is no duty resting on a landlord to make such a communication. *Dillard v. Collins*, 25 Gratt. 343.

"He Killed My Beef."—A charge that the defendant has "killed my beef" is not such a slanderous charge as is actionable *per se* at common law, unless the averment of extrinsic facts and the colloquium concerning them show that the defendant imputed to the plaintiff a felonious killing with an *animus furandi*. *Hansbrough v. Stinnett*, 25 Gratt. 495.

He is a Hog Thief.—It is actionable *per se* at common law to say of a man that he is a hog thief, as it clearly imputes to him the crime of larceny. *Cheatwood v. Mayo*, 5 Munf. 16.

Charge That Plaintiff Has Killed Another's Wild Hogs.—To charge a plaintiff with killing wild hogs, and advising him to pay the owner for them is libelous, and an innuendo is unnecessary to explain the meaning of these words. *Adams v. Lawson*, 17 Gratt. 250. See also, *Sweeney v. Baker*, 13 W. Va. 158.

"Wouldn't Trust Him in Your Hen-Coop."—To charge that a certain candidate for office is such a person, as you wouldn't trust in your hen-coop, conveys, in clear terms, an accusation that the party is a thief, and is actionable even when spoken of a candidate for office. *Sweeney v. Baker*, 13 W. Va. 158.

Larceny Not Charged—Injury to Reputation.—In case of libel, however, although the writing does not charge the crime of larceny, still it will be actionable, if the language tends to injure the reputation of the party, or to reflect shame and disgrace upon him. *Adams v. Lawson*, 17 Gratt. 250; *Sweeney v. Baker*, 13 W. Va. 158.

"You Are a Rogue."—A charge that plaintiff is a rogue, and has stolen, is actionable. *Bourland v. Eldson*, 8 Gratt. 27.

Charge That Plaintiff Has Stolen.—To charge a plaintiff with stealing is actionable, without any averment or colloquium, as it clearly imputes a criminal offence. *Harman v. Cundiff*, 82 Va. 239.

Charge That Plaintiff Is a Thief.—Both oral and written words, charging a plaintiff with being a thief, and with stealing, have been held actionable *per se*, as imputing the crime of larceny. *Harman v. Cundiff*, 82 Va. 239; *Bourland v. Eldson*, 8 Gratt. 27; *Johnson v. Brown*, 13 W. Va. 71; *Sweeney v. Baker*, 13 W. Va. 158; *Dillard v. Collins*, 25 Gratt. 343.

Oral Words Charging Perjury.—It is perfectly well settled that an oral charge of perjury is actionable *per se* at common law, without any allegation or proof of special damage, because it imputes a crime for which the plaintiff can be indicted and punished, if guilty. *Shroyer v. Miller*, 3 W. Va. 158; *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. Rep. 415; *Bourland v. Eldson*, 8 Gratt. 27; *Hinchman v. Lawson*, 5 Leigh 695; *Kirtley v. Deck*, 3 H. & M. 388; *Lincoln v. Chrisman*, 10 Leigh 338; *M'Nutt v. Young*, 8 Leigh 542; *Grant v. Hover*, 6 Munf. 13. See also, *Donaghe v. Rankin*, 4 Munf. 261; *Brooks v. Calloway*, 13 Leigh 466, which was an action under the statute of insulting words to suppress duelling.

Oral Charge of False Swearing.—To maintain an action at common law upon a charge of false swearing, the declaration must show not only the judicial proceeding in which the evidence was given, but that the charge of the defendant had reference to the evidence of the plaintiff in that case. *Hogan v. Wilmoth*, 16 Gratt. 80.

"Perjured Rascal."—To accuse another of being a "perjured rascal" is actionable, as it implies that the plaintiff has been swearing falsely in a judicial proceeding, where he was called on to depose the truth according to his lawfully administered oath. *Grant v. Hover*, 6 Munf. 13.

Written Charge of False Swearing.—To write to another, saying, "I hope you will stop swearing lies about the trees," and, "I will close this letter by advising you either to quit lying or preaching one," are libelous, because they tend to injure the reputation of the party, to throw contumely or to reflect shame and disgrace upon him, or hold him up as an object of scorn, although they do not necessarily impute the crime of perjury for which he may be indicted and punished. *Adams v. Lawson*, 17 Gratt. 250.

Perjury—Materiality—Common Law.—"I am not aware that it has ever been held, in an action for slander at common law, upon a charge of perjury, that it must be averred in the declaration that the facts sworn to by the plaintiff were *material* to the proceedings pending at the time of the alleged false swearing; or that it was indispensable to set out and charge all the facts constituting such offence with the same technical strictness as would be required in an indictment for the same offence." **BERKSHIRE, J.** Shroyer v. Miller, 3 W. Va. 158. See also, Hogan v. Wilmoth, 16 Gratt. 80; Kirtley v. Deck, 3 H. & M. 388.

"Loss of Ears"—Statutory Perjury—Materiality.—Now as the loss of ears is no part of the punishment of perjury at common law, and is a part of the punishment under the statute of 5 Eliz. a charge of false swearing, for which the plaintiff ought to have "lost his ears," is a charge of statutory perjury, and the materiality of the matter sworn to must be shown. Kirtley v. Deck, 3 H. & M. 388.

Test of Materiality.—Whether a matter is material to the issue depends on the question whether its truth or falseness would affect the issue; and, if not, it is not material. McClaugherty v. Cooper, 30 W. Va. 313, 19 S. E. Rep. 415.

Solicitation to Commit Crime.—To solicit another to commit a felony, although the felony be not afterwards committed, is a misdemeanor at common law, indictable and punishable, hence to say that the plaintiff solicited a negro woman to burn a stack of wheat is actionable *per se*. Womack v. Circle, 29 Gratt. 192.

4. WORDS NOT IMPORTING COMMISSION OF CRIME.

a. WRITTEN WORDS.—Although the writing does not contain the imputation of a punishable or indictable offence, yet it may be actionable, as where the language tends to injure the plaintiff's reputation, or hold him up as an object of scorn, ridicule or contempt. Adams v. Lawson, 17 Gratt. 250; Moseley v. Moss, 6 Gratt. 534; Moore v. Rolin, 89 Va. 107, 15 S. E. Rep. 520.

b. ORAL WORDS.—Opprobrious epithets, such as cheat, villain, rascal, are not actionable at common law, without proof of special damage, or unless there is a colloquium to show that they were used in such a way, and under such circumstances, as to impute the commission of a crime to the plaintiff. Harman v. Cundiff, 82 Va. 239; Hansbrough v. Stinnett, 25 Gratt. 495; Womack v. Circle, 29 Gratt. 192; Moseley v. Moss, 6 Gratt. 534.

Exceptions.—But oral words are actionable *per se* at common law if they impute the having of a contagious disease, tending to exclude from society; or which may affect one injuriously in his office or trust, or in his trade, profession or occupation, although no crime is charged. Moseley v. Moss, 6 Gratt. 534; Moore v. Rolin, 89 Va. 107, 15 S. E. Rep. 520. See also, Hoyle v. Young, 1 Wash. 152.

c. STATUTORY PROVISIONS.

Insulting Words—Statute to Suppress Duelling.—Statutes have been enacted in Virginia and West Virginia for the purpose of suppressing duelling, and to give an action for such insulting words as were not actionable at common law. They provide that "All words which, from their usual construction and common acceptance, are construed as insults, and tend to violence and breach of the peace, shall be actionable. No demurrer shall preclude a jury from passing thereon." Va. Code 1887, sec. 2897; W.

Va. Code, ch. 103, sec. 2. See 18 Am. & Eng. Enc. Law, p. 908.

Applies to Written as Well as Spoken Words.—The anti-duelling act has been held to apply to written as well as spoken words. Chaffin v. Lynch, 83 Va. 106, 1 S. E. Rep. 803; Rolland v. Batchelder, 84 Va. 664, 5 S. E. Rep. 695; Sweeney v. Baker, 13 W. Va. 158.

Insults to Another's Wife within the Statute.—A letter written to a married woman, the wife of a neighbor, artfully and falsely asserting that in response to a letter from her, he is ready to meet her in an appointed place, is within the meaning of the statute of insulting words, as it tends to violence and breach of the peace, on account of the natural impulse of a woman to communicate this proposal to her husband, and send him to meet the would-be seducer. Rolland v. Batchelder, 84 Va. 664, 5 S. E. Rep. 695.

May Proceed at Common Law or under the Statute.—A statutory suit for insulting words can be brought, though the words used were such, as would sustain a suit at common law, and though they were published or written. Sweeney v. Baker, 13 W. Va. 158; Hogan v. Wilmoth, 16 Gratt. 80; Moseley v. Moss, 6 Gratt. 534.

Although the words spoken are actionable at common law, they may also be declared on under the statute if the declaration or count satisfactorily shows that it was intended to be framed under the statute for insulting words, and not for common-law defamation. Payne v. Tancil, 98 Va. 262, 35 S. E. Rep. 725; Chaffin v. Lynch, 83 Va. 106, 1 S. E. Rep. 803. See *infra* this note, title, "Pleading and Practice."

Common Law Not Abrogated by Statute.—But the legislature did not intend, by passing the statute of insulting words, to interfere with the common-law actions for defamation, and a party aggrieved may still proceed at common law, as if the statute had never been passed. Hogan v. Wilmoth, 16 Gratt. 80; Moseley v. Moss, 6 Gratt. 534; Brooks v. Calloway, 12 Leigh 466. See also, 18 Am. & Eng. Enc. Law 908.

Publication under the Statute.—All the publication that is necessary under the statute of insulting words is, the writing and sending of such words to the person libelled. Rolland v. Batchelder, 84 Va. 664, 5 S. E. Rep. 695.

Province of Court.—It is the duty of the court to determine, whether a publication is capable of the meaning ascribed to it by the innuendo. Johnson v. Brown, 13 W. Va. 71, 107.

Province of Jury—Insulting Quality of Words.—The insulting quality of words depends so largely upon the manner and circumstances in which they are uttered, that they defy all rules of technical import and precision, and hence must be submitted to the experience, observation, and common sense of the jury. Brooks v. Calloway, 12 Leigh 466; Moseley v. Moss, 6 Gratt. 534; Bourland v. Eldson, 8 Gratt. 27; Corr v. Lewis, 94 Va. 24, 26 S. E. Rep. 385; Amos v. Stockert (W. Va.), 34 S. E. Rep. 827. See also, Sweeney v. Baker, 13 W. Va. 158.

Moreover, in actions founded upon the Virginia and West Virginia statute, making insulting words actionable, the jury is, by express provision contained in those statutes, made the sole judge of the insulting quality of these words. Va. Code 1887, sec. 2897; W. Va. Code, ch. 103, sec. 2.

d. WORDS EXPOSING ANOTHER TO RIDICULE, CONTEMPT, ETC.—It is well settled that any writing is libelous, which tends to injure the reputation of the party, or to render him odious, contemptible, or

ridiculous, or reflect shame and disgrace upon him, without any proof of special damage, although the writing does not impute a crime that may be indicted or punished. *Adams v. Lawson*, 17 Gratt. 250; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. Rep. 808; *Moseley v. Moss*, 6 Gratt. 534; *Sweeney v. Baker*, 13 W. Va. 158.

Charge of Hypocrisy.—A false publication in a newspaper, charging that a candidate for popular suffrage acts the part of a hypocrite, is actionable. *Sweeney v. Baker*, 13 W. Va. 158.

Rowdiness.—Falsely charging another with rowdiness is actionable. *Sweeney v. Baker*, 13 W. Va. 158.

Prize Fighter.—To write of another that he is a representative from the prize ring, is actionable *per se*. *Sweeney v. Baker*, 13 W. Va. 158.

Candidates for Office—"Social Leper."—It is not libelous *per se* to charge a candidate for popular suffrage with being a "social leper" who should be "deodorized," unless it affects his moral character, for his talents mentally and physically for the office he asks, may be freely commented upon, though such comments be harsh and unjust. *Sweeney v. Baker*, 13 W. Va. 158.

Lazy—Idle—Ignorant.—Nor is a charge against a candidate, that he is lazy, idle, uneducated and ignorant, libelous *per se*. *Sweeney v. Baker*, 13 W. Va. 158.

Gambler, Bully, Thief.—A false charge, however, that a candidate for office is a professional gambler, bully and thief ought to be severely punished. The fact that the party is a candidate for an office to be bestowed by the votes of the people, so far from being a justification for such falsehood, makes the outrage all the greater. If published against a private person not seeking office, it is admittedly a great outrage, for which the law affords redress not only by civil action but by indictment. The moral traits of the character of a candidate for office can no more be attacked than those of other persons. *Sweeney v. Baker*, 13 W. Va. 158.

Vituperative Language—Ill Breeding.—Words spoken that are merely vituperative, or insulting, or imputing only disorderly or immoral conduct, or ignoble habits, propensities or inclinations, or the want of delicacy, refinement or good breeding, are not regarded by the common law as sufficiently substantial to be treated as injuries calling for redress in damages. *Moseley v. Moss*, 6 Gratt. 534.

e. WRITTEN WORDS IMPUTING DISHONEST, IMMORAL, AND DISHONORABLE ACTS.—As we have seen already written charges that the plaintiff has been guilty of dishonest acts such as the embezzlement of money, or that he is immoral, such as being a whoremaster, or that he has been guilty of lying and instituting vexatious litigation, are actionable *per se*, when the same words, if spoken, would not be, unless special damage were alleged. *Johnson v. Brown*, 13 W. Va. 71; *Sweeney v. Baker*, 13 W. Va. 158; *Adams v. Lawson*, 17 Gratt. 250; *Moseley v. Moss*, 6 Gratt. 534.

Groundless Litigation.—To write to a plaintiff, charging that all his object in appearing before a grand jury was to run him (defendant) to costs is libelous, because it amounts to a charge that the plaintiff is instituting vexatious and groundless litigation, which act involves moral turpitude. *Adams v. Lawson*, 17 Gratt. 250.

Written and Oral Words Imputing Lack of Veracity.—A written accusation against another that he has been making false representations, would be actionable, as charging a want of veracity, but oral words

charging a want of veracity are not unless it appears that reference is had to a judicial forswearing. *Argabright v. Jones*, 46 W. Va. 144, 33 S. E. Rep. 995; *Moseley v. Moss*, 6 Gratt. 534. In *Argabright v. Jones*, however, it did not sufficiently appear that the words were written concerning the plaintiff, and hence the action was dismissed.

Charge That Another Is a Liar—"Quit Lying."—A written charge advising another to "quit lying," is actionable *per se*, because it imports that he has been lying, and such language tends to injure the reputation of the party, to throw contumely, or to reflect shame and disgrace upon, or hold him up as an object of contempt. *Adams v. Lawson*, 17 Gratt. 250.

Dishonesty.—A written charge that the plaintiff in the slander suit is conspiring to defraud the corporation and its stockholders, and divert the money, means, and credit of the company to his own use, is libelous without an innuendo to explain its meaning. *Johnson v. Brown*, 13 W. Va. 71.

"Never Did an Honest Day's Work."—Written charges against a candidate for popular suffrage, that "he never did an honest day's work," or "never earned an honest penny" are privileged, because they merely amount to a charge that he is idle and lazy, and unfit to represent the people, for his talents *mentally* and *physically* for the office he asks may be freely, and even harshly, commented upon. Such charges against a private person, would be actionable, however. *Sweeney v. Baker*, 13 W. Va. 158.

Imputation of Fraud.—If it sufficiently appears that the words were written of the plaintiff by the defendant, a charge that the plaintiff has raised money by fraud is actionable *per se*. *Argabright v. Jones*, 46 W. Va. 144, 33 S. E. Rep. 995; *Johnson v. Brown*, 13 W. Va. 71. In the latter case, however, a written charge that the plaintiff was defrauding a certain corporation, was held to be absolutely privileged because it was contained in a bill in chancery. See *post* this note, "Privileged Communications."

Cheat.—A written charge that another is cheating a corporation is not actionable when contained in a bill filed in chancery, but would be without the existence of such privilege, because it imputes to the plaintiff a crime. *Johnson v. Brown*, 13 W. Va. 71.

Cheat, Villian, Rascal, Coward, Ruffian.—Oral words charging another with being a cheat, villian, rascal, coward, ruffian are not actionable, without allegation and proof of special damage, or without a colloquium to show that they were spoken under such circumstances as to impute the commission of a crime to the plaintiff. *Harman v. Cundiff*, 83 Va. 300; *Moseley v. Moss*, 6 Gratt. 534.

Imputing Want of Mental Capacity.

"Confessed Ignoramus."—To charge a candidate for popular suffrage with being a "confessed ignoramus" is not libelous, because his mental capacity and fitness for the office he seeks, may be freely and even harshly commented upon. *Sweeney v. Baker*, 13 W. Va. 158.

5. WORDS IMPUTING UNCHASTITY.

Written Words—"Pimp, Whoremaster."—To write of anybody, even a candidate for popular suffrage, that he is a "pimp or whoremaster," is actionable *per se* because it holds the person up as an object of contempt, and tends to injure his reputation. *Sweeney v. Baker*, 13 W. Va. 158.

Oral Words Imputing Want of Chastity to Men or Women.—Oral words charging a man with having been guilty of adultery, seduction or debauchery; or a woman with vulgarity, obscenity or incontinence; where such defamation bears only on the feelings or general standing or reputation of the party implicated, and the misconduct imputed has not been made punishable by statute, is not actionable *per se*. *Moseley v. Moss*, 6 Gratt. 534.

Statutory Provision—Fornication, Adultery, Crimes.—But as both adultery and fornication are crimes in Virginia, a charge that involves the commission of either offence, is actionable *per se*. Va. Code 1887, § 3736; *Payne v. Tancil*, 98 Va. 262, 35 S. E. Rep. 725.

Oral Charge of Having a Bastard.—An oral charge that a young girl of hitherto unblemished fame, had been delivered of a bastard child, is actionable. *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. Rep. 791. See also, *Cave v. Shelor*, 3 Munf. 193. In the latter case, however, it did not appear clearly that the language was spoken of and concerning the plaintiff.

"Keeping a Woman."—See *post* this note, "Construction of Words."

How Actionable Charge Made.—It would seem that it is not necessary to impute unchastity in express terms, but if they are naturally and presumably understood by the hearers as imputing criminal intercourse it is sufficient. *Payne v. Tancil*, 98 Va. 262, 35 S. E. Rep. 725.

6. WORDS TOUCHING ANOTHER IN HIS TRADE, OFFICE OR EMPLOYMENT.

Oral or Written Words.—It is a perfectly well-settled rule of the common law that words which tend to injure another in his trade, office or employment, are libelous or slanderous, as the case may be, without any allegation or proof of special damage. *Moore v. Rolin*, 89 Va. 107, 15 S. E. Rep. 520; *Womack v. Circle*, 29 Gratt. 192; *Moseley v. Moss*, 6 Gratt. 534; *Hoyle v. Young*, 1 Wash. 150; *Harman v. Cundiff*, 82 Va. 239.

Imputations upon Candidates for Office.—Upon this subject, see *infra*, this note, VII. "Criticism and Comment."

Oral Imputations upon Merchants.—False and malicious charges against a merchant, that tend to injure his reputation as a merchant, are actionable *per se* at common law. *Hoyle v. Young*, 1 Wash. 150; *Harman v. Cundiff*, 82 Va. 239.

Charge of Dishonesty against a Merchant.—A false and malicious charge by one partner against the other, that the latter has failed to account for goods he has received, is actionable because it imputes dishonesty to the plaintiff and would naturally injure him in his business. *Hoyle v. Young*, 1 Wash. 150.

7. CONSTRUCTION OF WORDS.

Defamation Need Not Be in Express Terms.—It seems that although the words do not import actionable defamation in express terms, or do so by insinuations, still it may be actionable; if, with reference to pre-existing or extrinsic facts, as shown by the conversation or discourse at the time the words were spoken, they do impute defamation, and provided the meaning is clear. *Hansbrough v. Stinnett*, 25 Gratt. 495; *Adams v. Lawson*, 17 Gratt. 250. See also, *Harman v. Cundiff*, 82 Va. 239.

Words Defamatory Though in Form of a Question.—The following defamatory language was held to be actionable, notwithstanding the fact that it was put in the form of a question. "Would you select a man to make laws, whom you would kick out of your

house, and whom you wouldn't trust in your hen-coop?" *Sweeney v. Baker*, 13 W. Va. 158.

Surrounding Facts and Circumstances.—In order to determine what is an insult the surrounding facts and circumstances must be taken into consideration, and the whole case must be looked at in the light of its own peculiar facts. For some words, when spoken contemptuously, or from ill-will, would be universally construed as insulting and tending to violence and a breach of the peace, while the same words spoken under other circumstances, would be considered harmless and unoffensive. Words of praise, spoken ironically, may be intended and accepted as insults, while, many words usually considered insulting, may, when spoken in jest, or by friends, be unexceptionable. *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. Rep. 808; *Corr v. Lewis*, 94 Va. 24, 26 S. E. Rep. 335; *Brooks v. Callo-way*, 12 Leigh 466; *Moseley v. Moss*, 6 Gratt. 534, 540; *Hansbrough v. Stinnett*, 25 Gratt. 495, 499; *Bourland v. Eldson*, 8 Gratt. 27, 37.

Plain and Popular Sense.—Words must be construed in the plain and popular sense in which the rest of the world would naturally understand them. It is not necessary that they should make the charge in express terms, it is sufficient if they consist of a statement of matters which would naturally and presumably be understood by those who heard them, as charging a crime. *Payne v. Tancil*, 98 Va. 262, 35 S. E. Rep. 725; *State v. Aler*, 39 W. Va. 549, 20 S. E. Rep. 588.

It is a well-settled and familiar principle that in arriving at the meaning of the words, the court will understand the words of the writing as the rest of mankind would understand them: that is, according to their plain and ordinary import. *Adams v. Lawson*, 17 Gratt. 250; *Womack v. Circle*, 29 Gratt. 192.

Ancient Rule of In Mitiori Sensu.—In ancient times, the judges to discourage actions of slander, were very rigid in their decisions, from which arose the doctrine (long since exploded) that words should be taken in *mitiori sensu*. But it was found that this had the tendency to encourage actions, and a more rational and just principle was adopted: "That words should be understood in the sense they were understood by the bystanders." *Hoyle v. Young*, 1 Wash. 150, 1 Am. Dec. 446; *Cave v. Shelor*, 2 Munf. 194; *Harman v. Cundiff*, 82 Va. 249. See also, 4 Min. Inst. (4th Ed.) 463.

Illustration.—For example, when it is said in reference to a woman that a man is "keeping her," or of a man that he is "keeping a woman," the ordinary and popular construction of such language is that the relation between the parties is one which involves criminal intercourse, and is actionable *per se*. *Payne v. Tancil*, 98 Va. 262, 35 S. E. Rep. 725.

a. DISTINCTION BETWEEN WORDS WHICH ARE AND ARE NOT ACTIONABLE EX VI TERMINI.

Words Actionable Ex Vi Terminis.—Some words are actionable *ex vi terminis*, without any explanation whatever, because they convey the charge in such clear and unambiguous language, that no other possible construction can be put upon them; thus, when an indictable offence is charged, *i. e.*, by saying that one is a thief, or words that convey the charge of perjury, or a criminal offence involving moral turpitude. *Harman v. Cundiff*, 82 Va. 239; *Johnson v. Brown*, 13 W. Va. 71; *Bourland v. Eldson*, 8 Gratt. 27; *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. Rep. 415; *Payne v. Tancil*, 98 Va. 262, 35 S. E. Rep. 725.

Words Not Actionable Ex Vi Terminis.—Some words,

however, are not actionable *ex vi termini*, but extraneous facts and circumstances, and the manner in which they were spoken may give to them an actionable quality, which they would not bear otherwise. Thus, to charge another man with killing your beef, or with swearing to a lie, is not *ex vi termini* actionable, but depends on other facts and circumstances to make it so. *Hansbrough v. Stinnett*, 25 Gratt. 495; *Harman v. Cundiff*, 82 Va. 239; *Hogan v. Wilmoth*, 16 Gratt. 80; *Moseley v. Moss*, 6 Gratt. 534; *Johnson v. Brown*, 13 W. Va. 71.

b. OFFICE OF INDUCEMENT, COLLOQUIUM AND INNUNDO.

In General.—Where words do not *ex vi termini* convey an actionable imputation it is permissible and necessary to show that they were used in an actionable sense, by taking into consideration the facts and circumstances, and the intention of the person who published the defamatory language, and this is done by means of the inducement, colloquium, and innuendo. *Hansbrough v. Stinnett*, 25 Gratt. 497; *Moseley v. Moss*, 6 Gratt. 534.

Office of Inducement.—It is the office of the inducement, or averment as it is frequently termed, to show that words, which bear upon their face a doubtful meaning, if taken in connection with the discourse that lead up to them, and the extrinsic facts and circumstances, impute a criminal offence or dishonesty in one's calling or profession. *Moseley v. Moss*, 6 Gratt. 534; *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757; *Hansbrough v. Stinnett*, 25 Gratt. 497. See also, *Johnson v. Brown*, 13 W. Va. 71.

Office of Colloquium.—It is the office of the colloquium to show that words, not on their face actionable, when taken with reference to pre-existing or extrinsic facts, spoken with reference to them, are actionable. The conversation or discourse of the defendant, at the time the words were spoken, may have an important bearing on their meaning. Thus, in an action at common law for a charge of false swearing, it is the office of the colloquium to show the judicial proceeding in which the evidence was given, and that the charge had reference to the evidence given in that proceeding. The essentials of explanation are the averments of pre-existing facts and the colloquium concerning them. 4 Min. Inst. (4th Ed.) 462; *Hogan v. Wilmoth*, 16 Gratt. 80; *Hansbrough v. Stinnett*, 25 Gratt. 495; *Moseley v. Moss*, 6 Gratt. 534, 550; *Shroyer v. Miller*, 3 W. Va. 160; *Payne v. Tancil*, 98 Va. 262, 35 S. E. Rep. 725.

Averment and Colloquium Cannot Be Helped by the Innuendo.—If the accusation is not made by the words spoken, taken in connection with the colloquium and averment, it cannot be supplied by the innuendo. It is a clear rule of law, that the innuendo cannot introduce a broader meaning than that which the words, taken in connection with the averment and the colloquium, would naturally bear. *Hansbrough v. Stinnett*, 25 Gratt. 502; *Harman v. Cundiff*, 82 Va. 239, 244; *Johnson v. Brown*, 13 W. Va. 108; *Moseley v. Moss*, 6 Gratt. 534, 550.

Words Not Actionable Per Se Helped by Colloquium.—Though words are not actionable in themselves at common law, yet it may be shown by the averment of extrinsic facts and by the colloquium in the introductory part referring to them, that they have that meaning. 4 Min. Inst. (4th Ed.) 379; *Hansbrough v. Stinnett*, 25 Gratt. 498; *Harman v. Cundiff*, 82 Va. 244 (rascal, cheat, villain, not actionable without colloquium); *Cave v. Shelor*, 2 Munf. 194 (colloquium not averred).

Colloquium—How Actionable Charge Made.—Either

the words themselves must be such as can only be understood in a criminal sense, or it must be shown by a colloquium in the introductory part that they have that meaning, otherwise they are not actionable, and the precise words spoken must be set out, and it is not sufficient merely to set them out in substance. *Hansbrough v. Stinnett*, 25 Gratt. 495.

Must Be Understood by the Hearers.—An accusation of crime must be in precise terms, or have such a plain allusion to some prior transaction that the hearers of the words must necessarily have understood that the slanderer meant to impute to the plaintiff the guilt of some punishable offence. *Harman v. Cundiff*, 82 Va. 239.

Office of Innuendo.—The office of the innuendo is to designate, not enlarge, the meaning of words: but where the words are unambiguous and actionable in themselves, the innuendo is unnecessary and may be rejected as surplusage. *Moseley v. Moss*, 6 Gratt. 549; *Payne v. Tancil*, 98 Va. 262, 35 S. E. Rep. 725; *Hansbrough v. Stinnett*, 25 Gratt. 499; *Johnson v. Brown*, 13 W. Va. 109; *State v. Aler*, 39 W. Va. 549, 20 S. E. Rep. 588; *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. Rep. 995.

Under Enlargement of Meaning.—Moreover an innuendo cannot introduce new matter, nor enlarge, change, or extend the natural sense or meaning of the alleged defamatory words, and if the words charged do not amount to slander, they cannot be helped by the innuendo. 13 Eng. Pl. & Prac. 51; *Moseley v. Moss*, 6 Gratt. 534; *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. Rep. 995; *Harman v. Cundiff*, 82 Va. 244; *Hansbrough v. Stinnett*, 25 Gratt. 498; *Johnson v. Brown*, 13 W. Va. 107; *Hogan v. Wilmoth*, 16 Gratt. 80.

Not Capable of Proof.—As an innuendo is merely explanatory of that which is already expressed, it is not capable of proof. 13 Enc. Pl. & Prac. 54; *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. Rep. 995; *Hogan v. Wilmoth*, 16 Gratt. 80.

Explanation.—An innuendo may serve for an explanation to point out a meaning, where there is precedent matter expressed, and necessarily understood or known, but never to establish a new charge. *State v. Aler*, 39 W. Va. 549, 20 S. E. Rep. 588; *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. Rep. 995, 997. See *Moseley v. Moss*, 6 Gratt. 550.

Undue Enlargement Not Ground for a Demurrer.—Still if words spoken are *per se* actionable, the fact that the innuendo enlarges their meaning, and attributes to them a signification they do not bear, does not render them demurrable, because the words themselves being actionable, the innuendo is a surplusage and may be rejected, without vitiating the count or declaration. If the words in the declaration or count are sufficient in themselves, the innuendo, as we have seen, is useless: but if they are not sufficient in themselves, they cannot be aided by the innuendo. *Payne v. Tancil*, 98 Va. 262, 35 S. E. Rep. 725. See also, *Johnson v. Brown*, 13 W. Va. 107, 108.

Innuendo Insures Certainty.—It is an elementary rule of pleading that whatever is alleged, must be alleged with certainty, and one of the means of insuring certainty in a complaint or indictment for slander or libel is an innuendo. *Townshend on Slander and Libel*, sec. 835; *State v. Aler*, 39 W. Va. 549, 20 S. E. Rep. 588.

But an innuendo cannot give a meaning to words which they do not necessarily import, either of themselves independently of any other circumstances, or with necessary reference to some other

circumstances occurring at the time of the accusation; an innuendo being explanatory of subject-matter sufficiently expressed before, and that only. *Hansbrough v. Stinnett*, 25 Gratt. 499; *Johnson v. Brown*, 13 W. Va. 108; *Moseley v. Moss*, 6 Gratt. 550.

Words Unambiguous — Innuendo Unnecessary.—When the writing on its face, in an action of libel, relates to the plaintiff and the words are libelous in themselves, the innuendo is unnecessary, and may be rejected as surplusage. *Adams v. Lawson*, 17 Gratt. 250. See also, *Payne v. Tancil*, 98 Va. 262, 35 S. E. Rep. 725.

Particulars of Offences Need Not Be Set Out with Strictness Required in Indictment.—It is not indispensable in an action for slander at common law, upon a charge of perjury to set out and charge all the facts constituting the offence with the same technical strictness required in an indictment for the same offence. *Shroyer v. Miller*, 3 W. Va. 158.

The Crime Must Be Clearly Set Forth.—When the ground of defamation is, that the words or writing impute to the plaintiff a criminal offence, it must be made to appear so, clearly and unequivocally, either by the words themselves, or if they do not necessarily express that meaning, any doubt that exists must be removed by proper averments in regard to the subject-matter of the discourse. *Moseley v. Moss*, 6 Gratt. 534; *Hansbrough v. Stinnett*, 25 Gratt. 495; *Johnson v. Brown*, 13 W. Va. 71.

III. DEFAMATION MUST APPLY TO THE PLAINTIFF.

In order that an action for libel or slander may be maintained, it must be averred and shown that defamatory or slanderous words were spoken of and concerning the plaintiff, or that they were spoken in a conversation or colloquium concerning the plaintiff, and the words charged must clearly import that they related to him. In other words the defamation must refer to some ascertained or ascertainable person, *i. e.*, the plaintiff, and if no person appears to be slandered in particular, the averment or innuendo cannot make them defamatory. *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. Rep. 995; *Cave v. Shelor*, 2 Munf. 193.

In an action of libel where the writing on its face relates to the plaintiff and the words are libelous in themselves, the innuendo is unnecessary and may be rejected as surplusage. *Adams v. Lawson*, 17 Gratt. 250; *Moseley v. Moss*, 6 Gratt. 534; *Payne v. Tancil*, 98 Va. 262, 35 S. E. Rep. 725.

Defamatory Words Must Clearly Refer to the Plaintiff.—The law is thus stated in 13 Am. & Eng. Enc. Law. p. 301: "Defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory. An innuendo cannot make the person certain, which was uncertain before." See *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. Rep. 995, which case approves and adopts this language.

Direct Charge Necessary.—A declaration, in slander, containing a mere recital of slanderous words, and no direct charge that those words were spoken of the plaintiff by the defendant, is insufficient to maintain an action of this kind, and judgment will be arrested after the verdict is rendered. It is a well-settled rule of pleading that the pleader must guard against statements made under the *quodcum*. *Donaghe v. Rankin*, 4 Munf. 261; *Hord v. Dishman*, 2 H. & M. 595; *Moore v. Dawney*, 3 H. & M. 127, 271;

Syme v. Griffin, 4 H. & M. 277. See also, 4 Min. Inst. (4th Ed.) 690.

IV. MALICE.

1. GIST OF THE ACTION.—It is a well-settled rule of law, that in every instance of slander, verbal or written, whether for insults under the statute, or common-law actions for defamation, malice is an essential ingredient, and forms the gist of the action, and it must be expressly or substantially alleged, but it is not always necessary to prove malice expressly. The law infers malice from the unauthorized publication of matter which is insulting or defamatory. The plaintiff makes out a *prima facie* case by proving the words, written or spoken, as laid in the declaration. The one exception to the rule that malice is presumed, is in the case of privileged communications, and the legal effect of the exception is to change the burden of proving malice to the plaintiff. *Chaffin v. Lynch*, 83 Va. 116, 1 S. E. Rep. 813; *Dillard v. Collins*, 25 Gratt. 351; *Moseley v. Moss*, 6 Gratt. 534; *Johnson v. Brown*, 13 W. Va. 71, 122.

Absolute Privilege, Qualified Privilege.—The judge must decide whether the occasion is or is not privileged, and also whether the privilege is absolute or qualified. If he decides that the occasion was one of absolute privilege, judgment should be for the defendant, however maliciously and treacherously he may have acted. If, however, the privilege was only qualified, the *onus* lies on the plaintiff of proving actual malice. 18 Am. & Eng. Enc. Law 429; *Ward v. Ward* (W. Va.), 35 S. E. Rep. 875.

2. INFERENCE OF MALICE—LENIENCY.—Although strong or violent language, disproportioned to the occasion, may raise up an inference of malice, and thus take away the privilege that otherwise would attach to it, still when the occasion is privileged, the tendency of the courts is not to submit the words to too strict a scrutiny, but rather to view them in the light of the facts as they appeared to the defendant; for the question is, not whether the imputations are true, but whether the words are such as the defendant might have honestly employed under the circumstances. *Strode v. Clement*, 90 Va. 553, 19 S. E. Rep. 177.

3. PRESUMPTION OF MALICE—BURDEN OF PROOF.—Upon the trial of an issue as to whether certain libelous matters are pertinent, etc., if it appear, that the libelous allegations were published in the due course of a legal procedure, though it be proved that the court had no jurisdiction, or that the allegations were not pertinent to the legal procedure, still the law does not presume malice on the part of the defendant; but the plaintiff must prove express malice, to entitle him to recover. When it appears that the libelous matters were published in the due course of legal procedure, though the court had no jurisdiction, or the libelous matters were impertinent, the *prima facie* presumption of malice is rebutted, and throws the burden of proving express malice on the plaintiff, the case being one of conditionally privileged publication. *Johnson v. Brown*, 13 W. Va. 71, 148; *Strode v. Clement*, 90 Va. 553, 19 S. E. Rep. 177, 178.

Presumption from Publication of Insults.—Malice may be presumed from the unauthorized publication of insults, and the plaintiff makes out a *prima facie* case by proving the words as laid in the declaration; but the rule is not inflexible, and circumstances may rebut the presumption of malice. *Chaffin v. Lynch*, 83 Va. 117, 1 S. E. Rep. 803.

however, are not actionable *ex vi termini*, but extraneous facts and circumstances, and the manner in which they were spoken may give to them an actionable quality, which they would not bear otherwise. Thus, to charge another man with killing your beef, or with swearing to a lie, is not *ex vi termini* actionable, but depends on other facts and circumstances to make it so. *Hansbrough v. Stinnett*, 25 Gratt. 495; *Harman v. Cundiff*, 82 Va. 239; *Hogan v. Wilmoth*, 16 Gratt. 80; *Moseley v. Moss*, 6 Gratt. 534; *Johnson v. Brown*, 13 W. Va. 71.

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Office of Colloquium.—It is the office of the colloquium to show that words, not on their face actionable, when taken with reference to pre-existing or extrinsic facts, spoken with reference to them, are actionable. The conversation or discourse of the defendant, at the time the words were spoken, may have an important bearing on their meaning. Thus, in an action at common law for a charge of false swearing, it is the office of the colloquium to show the judicial proceeding in which the evidence was given, and that the charge had reference to the evidence given in that proceeding. The essentials of explanation are the averments of pre-existing facts and the colloquium concerning them. 4 Min. Inst. (4th Ed.) 462; *Hogan v. Wilmoth*, 16 Gratt. 80; *Hansbrough v. Stinnett*, 25 Gratt. 495; *Moseley v. Moss*, 6 Gratt. 534, 550; *Shroyer v. Miller*, 3 W. Va. 160; *Payne v. Tancil*, 98 Va. 262, 35 S. E. Rep. 725.

Averment and Colloquium Cannot Be Helped by the Innunendo.—If the accusation is not made by the words spoken, taken in connection with the colloquium and averment, it cannot be supplied by the innuendo. It is a clear rule of law, that the innuendo cannot introduce a broader meaning than that which the words, taken in connection with the averment and the colloquium, would naturally bear. *Hansbrough v. Stinnett*, 25 Gratt. 502; *Harman v. Cundiff*, 82 Va. 239, 244; *Johnson v. Brown*, 13 W. Va. 108; *Moseley v. Moss*, 6 Gratt. 534, 550.

Words Not Actionable Per Se Helped by Colloquium.—Though words are not actionable in themselves at common law, yet it may be shown by the averment of extrinsic facts and by the colloquium in the introductory part referring to them, that they have that meaning. 4 Min. Inst. (4th Ed.) 379; *Hansbrough v. Stinnett*, 25 Gratt. 498; *Harman v. Cundiff*, 82 Va. 244 (rascal, cheat, villain, not actionable without colloquium); *Cave v. Shelor*, 2 Munf. 194 (colloquium not averred).

Colloquium—How Actionable Charge Made.—Either

the words themselves must be such as can only be understood in a criminal sense, or it must be shown by a colloquium in the introductory part that they have that meaning, otherwise they are not actionable, and the precise words spoken must be set out, and it is not sufficient merely to set them out in substance. *Hansbrough v. Stinnett*, 25 Gratt. 495.

Must Be Understood by the Hearers.—An accusation of crime must be in precise terms, or have such a plain allusion to some prior transaction that the hearers of the words must necessarily have understood that the slanderer meant to impute to the plaintiff the guilt of some punishable offence. *Harman v. Cundiff*, 82 Va. 239.

Office of Innunendo.—The office of the innuendo is to designate, not enlarge, the meaning of words; but where the words are unambiguous and actionable in themselves, the innuendo is unnecessary and may be rejected as surplusage. *Moseley v. Moss*, 6 Gratt. 549; *Payne v. Tancil*, 98 Va. 262, 35 S. E. Rep. 725; *Hansbrough v. Stinnett*, 25 Gratt. 499; *Johnson v. Brown*, 13 W. Va. 109; *State v. Aler*, 39 W. Va. 549, 20 S. E. Rep. 588; *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. Rep. 995.

Under Enlargement of Meaning.—Moreover an innuendo cannot introduce new matter, nor enlarge, change, or extend the natural sense or meaning of the alleged defamatory words, and if the words charged do not amount to slander, they cannot be helped by the innuendo. 13 Eng. Pl. & Prac. 51; *Moseley v. Moss*, 6 Gratt. 534; *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. Rep. 995; *Harman v. Cundiff*, 82 Va. 244; *Hansbrough v. Stinnett*, 25 Gratt. 498; *Johnson v. Brown*, 13 W. Va. 107; *Hogan v. Wilmoth*, 16 Gratt. 80.

Not Capable of Proof.—As an innuendo is merely explanatory of that which is already expressed, it is not capable of proof. 13 Eng. Pl. & Prac. 54; *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. Rep. 995; *Hogan v. Wilmoth*, 16 Gratt. 80.

Explanation.—An innuendo may serve for an explanation to point out a meaning, where there is precedent matter expressed, and necessarily understood or known, but never to establish a new charge. *State v. Aler*, 39 W. Va. 549, 20 S. E. Rep. 585; *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. Rep. 995, 997. See *Moseley v. Moss*, 6 Gratt. 550.

Undue Enlargement Not Ground for a Demurrer.—Still if words spoken are *per se* actionable, the fact that the innuendo enlarges their meaning, and attributes to them a signification they do not bear, does not render them demurrable, because the words themselves being actionable, the innuendo is a surplusage and may be rejected, without vitiating the count or declaration. If the words in the declaration or count are sufficient in themselves, the innuendo, as we have seen, is useless; but if they are not sufficient in themselves, they cannot be aided by the innuendo. *Payne v. Tancil*, 98 Va. 262, 35 S. E. Rep. 725. See also, *Johnson v. Brown*, 13 W. Va. 107, 108.

Innuendo Insures Certainty.—It is an elementary rule of pleading that whatever is alleged, must be alleged with certainty, and one of the means of insuring certainty in a complaint or indictment for slander or libel is an innuendo. *Townshend on Slander and Libel*, sec. 335; *State v. Aler*, 39 W. Va. 549, 20 S. E. Rep. 588.

But an innuendo cannot give a meaning to words which they do not necessarily import, either of themselves independently of any other circumstances, or with necessary reference to some other

circumstances occurring at the time of the accusation; an innuendo being explanatory of subject-matter sufficiently expressed before, and that only. *Hansbrough v. Stinnett*, 25 Gratt. 499; *Johnson v. Brown*, 13 W. Va. 108; *Moseley v. Moss*, 6 Gratt. 550.

Words Unambiguous — Innuendo Unnecessary.—When the writing on its face, in an action of libel, relates to the plaintiff and the words are libelous in themselves, the innuendo is unnecessary, and may be rejected as surplusage. *Adams v. Lawson*, 17 Gratt. 250. See also, *Payne v. Tancil*, 98 Va. 202, 35 S. E. Rep. 725.

Particulars of Offences Need Not Be Set Out with Strictness Required in Indictment.—It is not indispensable in an action for slander at common law, upon a charge of perjury to set out and charge all the facts constituting the offence with the same technical strictness required in an indictment for the same offence. *Shroyer v. Miller*, 8 W. Va. 158.

The Crime Must Be Clearly Set Forth.—When the ground of defamation is, that the words or writing impute to the plaintiff a criminal offence, it must be made to appear so, clearly and unequivocally, either by the words themselves, or if they do not necessarily express that meaning, any doubt that exists must be removed by proper averments in regard to the subject-matter of the discourse. *Moseley v. Moss*, 6 Gratt. 534; *Hansbrough v. Stinnett*, 25 Gratt. 495; *Johnson v. Brown*, 13 W. Va. 71.

III. DEFAMATION MUST APPLY TO THE PLAINTIFF.

In order that an action for libel or slander may be maintained, it must be averred and shown that defamatory or slanderous words were spoken of and concerning the plaintiff, or that they were spoken in a conversation or colloquium concerning the plaintiff, and the words charged must clearly import that they related to him. In other words the defamation must refer to some ascertained or ascertainable person, *i. e.*, the plaintiff, and if no person appears to be slandered in particular, the averment or innuendo cannot make them defamatory. *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. Rep. 995; *Cave v. Shelor*, 2 Munf. 193.

In an action of libel where the writing on its face relates to the plaintiff and the words are libelous in themselves, the innuendo is unnecessary and may be rejected as surplusage. *Adams v. Lawson*, 17 Gratt. 250; *Moseley v. Moss*, 6 Gratt. 534; *Payne v. Tancil*, 98 Va. 202, 35 S. E. Rep. 725.

Defamatory Words Must Clearly Refer to the Plaintiff.—The law is thus stated in 18 Am. & Eng. Enc. Law, p. 891: "Defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory. An innuendo cannot make the person certain, which was uncertain before." See *Argabright v. Jones*, 46 W. Va. 144, 32 S. E. Rep. 995, which case approves and adopts this language.

Direct Charge Necessary.—A declaration, in slander, containing a mere recital of slanderous words, and no direct charge that those words were spoken of the plaintiff by the defendant, is insufficient to maintain an action of this kind, and judgment will be arrested after the verdict is rendered. It is a well-settled rule of pleading that the pleader must guard against statements made under the *quodcum*. *Donaghe v. Rankin*, 4 Munf. 261; *Hord v. Dishman*, 2 H. & M. 505; *Moore v. Dawney*, 3 H. & M. 127, 271;

Syme v. Griffin, 4 H. & M. 277. See also, 4 Min. Inst. (4th Ed.) 690.

IV. MALICE.

1. GIST OF THE ACTION.—It is a well-settled rule of law, that in every instance of slander, verbal or written, whether for insults under the statute, or common-law actions for defamation, malice is an essential ingredient, and forms the gist of the action, and it must be expressly or substantially alleged, but it is not always necessary to prove malice expressly. The law infers malice from the unauthorized publication of matter which is insulting or defamatory. The plaintiff makes out a *prima facie* case by proving the words, written or spoken, as laid in the declaration. The one exception to the rule that malice is presumed, is in the case of privileged communications, and the legal effect of the exception is to change the burden of proving malice to the plaintiff. *Chaffin v. Lynch*, 83 Va. 116, 1 S. E. Rep. 843; *Dillard v. Collins*, 25 Gratt. 351; *Moseley v. Moss*, 6 Gratt. 534; *Johnson v. Brown*, 13 W. Va. 71, 122.

Absolute Privilege, Qualified Privilege.—The judge must decide whether the occasion is or is not privileged, and also whether the privilege is absolute or qualified. If he decides that the occasion was one of absolute privilege, judgment should be for the defendant, however maliciously and treacherously he may have acted. If, however, the privilege was only qualified, the *onus* lies on the plaintiff of proving actual malice. 18 Am. & Eng. Enc. Law 429; *Ward v. Ward* (W. Va.), 35 S. E. Rep. 875.

2. INFERENCE OF MALICE—LENIENCY.—Although strong or violent language, disproportioned to the occasion, may raise up an inference of malice, and thus take away the privilege that otherwise would attach to it, still when the occasion is privileged, the tendency of the courts is not to submit the words to too strict a scrutiny, but rather to view them in the light of the facts as they appeared to the defendant; for the question is, not whether the imputations are true, but whether the words are such as the defendant might have honestly employed under the circumstances. *Strode v. Clement*, 90 Va. 553, 19 S. E. Rep. 177.

3. PRESUMPTION OF MALICE—BURDEN OF PROOF.—Upon the trial of an issue as to whether certain libelous matters are pertinent, etc., if it appear, that the libelous allegations were published in the due course of a legal procedure, though it be proved that the court had no jurisdiction, or that the allegations were not pertinent to the legal procedure, still the law does not presume malice on the part of the defendant; but the plaintiff must prove express malice, to entitle him to recover. When it appears that the libelous matters were published in the due course of legal procedure, though the court had no jurisdiction, or the libelous matters were impertinent, the *prima facie* presumption of malice is rebutted, and throws the burden of proving express malice on the plaintiff, the case being one of conditionally privileged publication. *Johnson v. Brown*, 13 W. Va. 71, 148; *Strode v. Clement*, 90 Va. 553, 19 S. E. Rep. 177, 178.

Presumption from Publication of Insults.—Malice may be presumed from the unauthorized publication of insults, and the plaintiff makes out a *prima facie* case by proving the words as laid in the declaration; but the rule is not inflexible, and circumstances may rebut the presumption of malice. *Chaffin v. Lynch*, 83 Va. 117, 1 S. E. Rep. 803.

Effect of Privilege upon Presumption of Malice.—When a communication is shown to be confidential, and in the exercise of a duty, the ordinary rule with respect to libelous and slanderous words is so far changed as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or in the situation of the parties, adequate to authorize the conclusion. *Dillard v. Collins*, 25 Gratt. 848.

Supplied by Implication.—Though malice is essential to all defamation, still it is an implication of law that all unauthorized defamation is malicious, except in cases of conditionally privileged communications, and then express proof of malice is necessary to render the communication defamatory. *Hansbrough v. Stinnett*, 25 Gratt. 506.

Slanderous Words Formerly Spoken.—For the purpose of proving malice, it is proper to admit evidence of slanderous words of the same and like character, spoken by the defendant of the plaintiff before the institution of the suit, though the action on them is barred by the statute of limitations. *Lincoln v. Chrisman*, 10 Leigh 388.

Feelings and Motives of Defendant.—But it is inadmissible to ask a defendant his feelings and motives in making a slanderous charge, and whether it was made with ill will against the plaintiff, or only for the protection of his own rights and interests, as his feelings and motives are immaterial after the slanderous words are proven to have been spoken, and the law will not allow him to say that no malice was intended, or that he did not mean to make the charge that the words, according to the common understanding of men, convey. *Dillard v. Collins*, 25 Gratt. 856; *McAlexander v. Harris*, 6 Munf. 465.

Rebuttal of Malice.—Although evidence tending to prove the truth of the words is inadmissible under the plea of not guilty, yet facts, which induced the mistaken belief in the mind of the defendant, that the charge was well grounded, are admissible to rebut malice. *Ward v. Ward* (W. Va.), 35 S. E. Rep. 875.

An Honest Belief.—In an action for defamation, the occasion being privileged, the question for the jury is, not whether the language used was true, or whether the defendant had reasonable ground to believe it true, but whether in point of fact he honestly believed it to be true, and published it without malice, in fair self-defence, or in the reasonable protection of his own interests. And if the plaintiff fails to show actual malice, then the communication is protected, and the defendant is entitled to the verdict, no matter whether the imputations contained in the publication were true or false, unless the plaintiff has availed himself of the occasion for some malicious purposes. A man is morally bound to defend his character against false aspersion, and his communication, if within the limits of the occasion, is protected, because made in the performance of a moral duty. *Cham v. Lynch*, 84 Va. 884, 6 S. E. Rep. 474; *Johnson v. Brown*, 18 W. Va. 126.

V. PUBLICATION—CRIMINAL AND CIVIL ACTIONS.

In order that a civil action for libel may be maintained, it must appear to have been communicated to one or more strangers; but the public offence is consummated by sending the libel to the party him-

self, although no one else shall see it. 4 Min. Inst. (4th Ed.) 471. See *Rolland v. Batchelder*, 84 Va. 672, 5 S. E. Rep. 695.

Publication under Statute of Insulting Words.—Under the statute of insulting words, no publication is necessary. That the words, according to their usual construction and common acceptation, are construed as insults, and tend to violence, and breach of the peace, is sufficient to render them actionable, and that is all the statute requires, for insults tend to violence and a breach of the peace, whether exhibited to a third person or not, even when spoken to another out of the presence of a third person. Va. Code 1887, sec. 2897; Code of W. Va., ch. 103, sec. 2, p. 774; *Rolland v. Batchelder*, 84 Va. 673, 5 S. E. Rep. 695.

1. GENERAL CIRCULATION NOT NECESSARY.—It is not necessary that the contents of a writing should be made known to the public generally, to constitute a publication. It suffices if it is made known to a single person. *Adams v. Lawson*, 17 Gratt. 250, 94 Am. Dec. 455; *Granger v. Com.*, 78 Va. 214. See also, *Rolland v. Batchelder*, 84 Va. 673, 5 S. E. Rep. 695.

2. COMMUNICATIONS TO OTHERS.—A certain letter containing the libel is sent sealed, but the writer afterwards states in the presence of several persons that he had gotten another person to write the letter for him, and he had signed his own name to it, and kept a copy; and states the contents of the letter; but without producing it or a copy of it. *Held*, this was a publication of the libel. *Adams v. Lawson*, 17 Gratt. 250.

Private Letter.—The writing of a letter by the defendant, and its dispatch to the person libelled by a servant, is a sufficient publication of it. *Rolland v. Batchelder*, 84 Va. 664, 5 S. E. Rep. 695.

Criminal Prosecution.—In a criminal prosecution for libel, it does not show a purpose on the part of the prisoner to suppress the libel after its publication, because he refuses to give a handbill containing the libel, to a third person, and is not evidence in mitigation of punishment, especially when he adds after his refusal to give a copy away, "that he wished to consult his brother *before circulating it*," and still more when he said to the third party that "he would read it to him if he stepped into a saloon near by," for this latter offer would clearly have been a publication of it. *Granger v. Com.*, 78 Va. 212, 214.

3. PROOF OF CIRCULATION.—A letter stating that the writer had heard of a slanderous report, is admissible in evidence, to prove the circulation of the report, as this has important bearing on the question whether the plaintiff has been injured, and what is the extent of that injury; the handwriting of the person who wrote it being proved, it is complete evidence of the fact that the report had been heard by the writer. But the letter is not competent evidence to establish the fact that the defendant propagated the report. *Schwartz v. Thomas*, 2 Wash. 167, 1 Am. Dec. 479.

VI. PRIVILEGED COMMUNICATIONS.

1. CLASSES OF PRIVILEGED COMMUNICATIONS.—According to the authorities the following are the classes of privileged communications or publications: 1. Whenever the author or publisher of the alleged slander acts in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests, for example a friendly caution, or a confidential letter concerning a solicitor conveying charges injurious to

his professional character in managing certain concerns in which the writer was interested, and when the person the letter is written to has employed the solicitor. 2. Anything said or written by a master in giving the character of a servant who has been in his employment. 3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party concerning whom they are used. 4. Publications duly made in the ordinary mode of parliamentary proceeding. In the above cases, of course, the burden of proving malice is shifted to the plaintiff, and he can no longer rely on the presumption of law in his favor, for this is all "privileged communication" means. This privilege may be shown under the general issue. *Dillard v. Collins*, 25 Gratt. 352; *Ward v. Ward* (W. Va.), 35 S. E. Rep. 875; *Johnson v. Brown*, 13 W. Va. 71, 120, 121, 122; *Strode v. Clement*, 90 Va. 553, 19 S. E. Rep. 177. See 4 Min. Inst. (4th Ed.) 472 *et seq.*

2. ABSOLUTE PRIVILEGE.

a. JUDICIAL PROCEEDINGS.—The authorities, both American and English, fully establish the position, that there is a class of *absolutely privileged communications*, for which actions of slander and libel will not lie, though the defendants be ever so guilty of express malice, and that there should be such a class is absolutely essential to the untrammelled administration of justice, and is sustained by the soundest reasoning. It is absolutely essential to the ends of justice, that everybody should have a right to bring an action for any complaint; and that he should make his allegations with impunity; and the defendant should have a like immunity in any civil action. This is necessary to a thorough investigation of the truth. If the parties are to be placed in fear of suits for libel or slander for reflections cast upon the parties or others, or if their defence must depend upon the truth of what was said, or their ability to satisfy the jury of the absence of malice, then the trial of civil suits would be far less likely to lead to correct results, than where this embarrassment is not felt. Perfect freedom to say in these pleadings, whatever the parties choose to bring to the consideration of the court or jury, tends obviously to promote the intelligent administration of justice. This perfect freedom is more important to secure than it is to prevent these unfounded reflections on character, and moreover, if they are unfounded, they will not generally cause any lasting injury, as their injustice will appear at the trial. Then the judge, too, will prevent an abuse of this privilege. *Johnson v. Brown*, 13 W. Va. 129, 130, 5 Va. Law Reg. 10.

Broad Statement.—But a number of authorities lay down the proposition broadly, that no action of libel can be maintained for any defamatory matter, contained in a pleading in a court having civil jurisdiction. This view, with some qualifications, was reached by the English courts, and the qualification was that the pleading must be filed in a court having jurisdiction of the subject. *Johnson v. Brown*, 13 W. Va. 71, 112.

Bill in Chancery—Handbills.—There is obviously a great difference between holding allegations in a bill in chancery of a libelous character not actionable, and holding that the publication of such a bill in handbills and circulation thereof is not actionable, and hence the controversy in England as to whether a true report, as to what passed in a court of justice, was or was not absolutely privileged, throws no light on the question whether the *proceedings themselves* in a court of justice are not thus absolutely privileged. Though public policy

might require very rightly, that a plaintiff in asserting his rights before a court, should be allowed to insert in his bill libelous matter, as otherwise he might fear to allege what was necessary to attain justice, still such public policy may not permit the publication in such handbills of a bill in chancery, and the circulation thereof, as this could not help the plaintiff to assert his rights, and no reasons of public policy or justice seem to require such a circulation. *Johnson v. Brown*, 13 W. Va. 125.

b. STATEMENT OF RULE.—Libelous matters published only in the due course of legal procedures, cannot be the basis of a libel suit, provided the court, in which they were published, had jurisdiction of the cause, and they were pertinent to the suit, even if they be libelous reflections on the character of persons, not parties to the suit, if the suit was not resorted to merely for the purpose of conveying the scandal, and as a cover for the malice of the party, and not in good faith for the assertion of a right, or redress of a wrong. *Johnson v. Brown*, 13 W. Va. 71.

General American Rule—Exception to Rule.—"The general American rule is that statements made in a judicial proceeding by witness, counsel or party, concerning one *not a party* to such proceedings, and not before court either as a party or witness, are not privileged, unless pertinent and relevant to the issue. *Johnson v. Brown*, 13 W. Va. 123 *et seq.*, is the only American authority to the contrary—a decision of much ability covering the entire field of privileged communications in judicial proceedings." 5 Va. Law Reg. 1-13.

Statements of Judges, Parties, Counsel, Witnesses—Persons Not before the Court.—The whole subject of communications in judicial proceedings that are privileged, is very ably and exhaustively set forth by Mr. E. C. Pyle in an article in 5 Va. Law Reg. 1-13, in which he reviews the American and English authorities on the subject with reference to *Judges, Parties, Counsel, and Witnesses*, the statements concerning *Persons Not before the Court*.

c. PROVINCE OF COURT—OF JURY.—Whether libelous matters, if they are contained in the pleadings in a cause, are, or are not, pertinent to the cause, is a question of law, which ought to be decided by the court, and not a question of fact to be submitted to the jury. But the question whether the defendants had reasonable cause for believing, and did actually believe, the alleged libelous matters to be pertinent in the chancery cause, is a question of fact to be decided by the jury. *Johnson v. Brown*, 13 W. Va. 71.

d. PRESUMPTION OF MALICE.—The defences that libelous matter contained in pleadings was pertinent to the cause, that the court had jurisdiction, or that the defendants had reasonable cause for believing and did actually believe it to be pertinent to the cause may be shown under the general issue. And upon the trial of such an issue if it appear, that the libelous allegations were published in the due course of legal procedure, though it be proved, that the court had no jurisdiction, or that the allegations were not pertinent to the legal procedure, still the law does not presume malice on the part of the defendant, but the plaintiff must prove express malice, to entitle him to recover. The simple fact, that the libelous matters were published in the due course of legal procedure, though the court had no jurisdiction, or the libelous matters were impertinent, rebuts the *prima facie* presumption of malice, and makes it incumbent on the plaintiff to prove express malice, the case being what is called a

conditionally privileged communication. *Johnson v. Brown*, 18 W. Va. 71. See *post* this note, title, "Pleading and Practice."

3. QUALIFIED PRIVILEGE.

a. **DEFINITION.**—"The proper meaning of a qualified privilege is only this: That the occasion, on which a communication is made, refutes the inference *prima facie*, arising from a statement prejudicial to the character of the plaintiff, and puts the *onus* upon the plaintiff to prove actual malice or malice in fact." *Johnson v. Brown*, 18 W. Va. 126.

Instances.—Newell, in his work on Slander (p. 389), in speaking of qualified privilege, says: "It extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character or imperfect obligation." See *Ward v. Ward* (W. Va.), 35 S. E. Rep. 875. In the latter case the above language was approved and adopted.

b. **SAME AT COMMON LAW AND UNDER THE STATUTE.**—A communication which would be privileged at common law, is, if made under similar circumstances, privileged in an action for insults under the statute. Va. Code 1873, ch. 145, § 2; Va. Code 1887, § 2897; W. Va. Code ch. 103, § 2; *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. Rep. 474.

Right to Communicate Slander.—It is now a settled principle of law that a communication honestly made in the performance of a social duty, is no less privileged than one made in self-defence, or in the protection of one's interest. And a communication, made under such circumstances, and without malice, is protected, notwithstanding its imputations be false, or founded upon the most erroneous information. The rule has been extended in the interests of society, in order that a person's standing in the business and social world may be correctly known. *Chaffin v. Lynch*, 83 Va. 118, 1 S. E. Rep. 803; *Dillard v. Collins*, 25 Gratt. 343; *Johnson v. Brown*, 18 W. Va. 93; *Ward v. Ward* (W. Va.) 35 S. E. Rep. 875.

c. **RIGHT TO REPLY TO AN ATTACK.**—Although it is true that one insult cannot be set off against another, yet if a man is attacked in a newspaper, he may reply; and if his reply is not unnecessarily defamatory of his assailant, and is honestly made in self-defence, it will be privileged. *Chaffin v. Lynch*, 83 Va. 118, 1 S. E. Rep. 803; *Bourland v. Eldson*, 8 Gratt. 40; *McAlexander v. Harris*, 6 Munf. 465.

Abuse of Privilege.—Although a communication is made *bona fide*, still it is not privileged, and will not be protected, if it goes beyond the occasion or exigency, and is unnecessarily defamatory of the plaintiff, or is more extensively published than the circumstances of the case require, though the plaintiff may have honestly believed that in all he did he was discharging a duty, for a man in defending himself must not overstep the line of legitimate defence, and unnecessarily become an aggressor. Whether the occasion imposes a duty upon the defendant, is to be determined by the circumstances. *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. Rep. 474.

d. **INSTANCES OF PRIVILEGED COMMUNICATIONS.**—When a man writes to another, informing him that his servant is dishonest and untrustworthy; or writes to a woman informing her that the man she proposes to marry is unworthy of her hand; or where words are spoken of a tradesman to the effect that he will soon become a bankrupt, are all instances of privileged communications, and will be

protected, when made, in confidence and friendship as a caution, *bona fide* and without malice, because they are made in the performance of a moral duty. A communication made in self-defence, is protected upon the same ground. *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. Rep. 474; *Dillard v. Collins*, 25 Gratt. 343.

"He Is All Broke Up."—To say to a creditor of a plaintiff that "he is all broke up," and similar expressions, is a privileged communication, as the pecuniary condition of a debtor is a matter about which a creditor is interested, and about which he is entitled to know. *Ward v. Ward* (W. Va.), 35 S. E. Rep. 873; *Strode v. Clement*, 90 Va. 553, 19 S. E. Rep. 177; *Reusch v. Roanoke Cold Storage Co.*, 91 Va. 534, 23 S. E. Rep. 858.

Honest Communication.—"If a person having information materially affecting the interest of another, honestly communicates it privately to such other party, in the full and reasonably grounded belief that it is true, he is justified in so publishing it, though he has no personal interest in the matter, and though no inquiry has been made of him, and though the danger to the other party is not imminent." 3 Greenl. on Evidence, § 421; *Ward v. Ward* (W. Va.), 35 S. E. Rep. 876.

Right to Defend Character.—The defendant published a statement in a newspaper that the plaintiff had attempted to decoy away his customers, and clients. The plaintiff denied the charge in the same newspaper, and in his denial he styled the defendant's statement as "a contemptible, cowardly, and malicious lie." The defendant replied by publishing a card in which he referred to the plaintiff's "known character as a liar," and that any person who was "scoundrel enough" to have acted as the plaintiff had "would be unprincipled enough to deny it when charged with it." The court held that the occasion of the defendant's reply was privileged, because "every man has a right to defend his character against false aspersion, and, indeed, it is a duty which he owes to his family. If I am attacked in a newspaper, I may write to that newspaper to rebut the charges, and may at the same time retort upon my assailant, when such retort is a necessary part of my defence, and fairly arises out of the charges he has made against me." And it ought to have been left to the jury to say whether he abused his privilege, and had acted with malice, or honestly, and in the protection of his own interest. *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. Rep. 803.

Interest in the Subject-Matter.—In one case the plaintiff and defendant, having become involved in a dispute over the ownership of certain notes, the defendant wrote to the plaintiff, asking whether he could go through life with a breach of trust taint on his character, and stating that his account books would blast him for life, as they swarmed with false entries that he would not correct, and that his conduct would end in the total ruin of his character and threatening a publication of the facts in a newspaper. It appeared that the defendant did own some of the notes in dispute, and there was no proof of malice intended by the letter; that the defendant honestly believed some of the entries in the books were false, and was partially sustained by the facts, though the plaintiff explained how such entries were made. The court held that the communication was on a privileged occasion, since it was a matter in which the plaintiff was interested, and, that the presumption that the defendant acted without malice was not rebutted by the language of the letter. *Strode v. Clement*, 90 Va. 553, 19 S. E. Rep. 177.

Landlord and Tenant.—There is nothing in the relation of landlord and tenant that will bring disclosures by the former to the latter within the class of privileged communications, and rebut the presumption of malice, especially when the tenants own their property and the landlord continues to warn them against the plaintiffs on the ground that they are thieves. In such a case he is not acting in the protection of his own rights and interests, and there is no public or private, legal or moral duty resting upon him to continue to warn these and other people. *Dillard v. Collins*, 25 Gratt. 355. See also, *Johnson v. Brown*, 13 W. Va. 123.

e. HOW PRIVILEGE ASCERTAINED.—In an action for insults, the question whether a letter is a privileged communication depends, (1) upon whether it was written on a privileged occasion; and if so, then (2) upon whether the occasion was used *bona fide*, and without malice. *Strode v. Clement*, 90 Va. 553, 19 S. E. Rep. 177; *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. Rep. 474.

Existence of Privilege, Question of Law.—It seems to be well settled that the question whether an occasion was privileged, and also whether the privilege was qualified or absolute, is one of law for the court to decide. *Ward v. Ward* (W. Va.), 35 S. E. Rep. 873; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. Rep. 803; *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. Rep. 474; *Strode v. Clement*, 90 Va. 553, 19 S. E. Rep. 177.

f. PROVINCE OF COURT—PROVINCE OF JURY.—It is settled law that a communication made by a person, in the conduct of his own affairs, where his interest is concerned, is privileged, if without malice, and whether or not such an interest exists as to make the occasion privileged is a question for the court; and, if the occasion be held privileged, then it is for the jury to say whether it was used *bona fide* and without malice. *Strode v. Clement*, 90 Va. 553, 19 S. E. Rep. 178; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. Rep. 803; *Rensch v. Roanoke Coal Storage Co.*, 91 Va. 534, 22 S. E. Rep. 358; *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. Rep. 474.

Province of Jury—Malice.—Where the supposed libel is the publication of a privileged communication, the question of malice should be submitted to the jury. *Rensch v. Roanoke Cold Storage Co.*, 91 Va. 534, 22 S. E. Rep. 358.

VII. CRITICISM AND COMMENT.

1. CANDIDATES FOR OFFICE.—When one becomes a candidate for office to be elected by the people more freedom is allowed to criticism than in the case of other persons. Any one may comment freely upon his conduct and actions, and they may be canvassed and boldly censured even though the criticism be unjust, of which the party himself is the sole judge, provided always that the criticism be *bona fide* and without malice, and the acts or conduct commented on are, in fact, what they are represented to be. And besides the above-mentioned privileges, his talents and qualifications, mentally and physically for the office, which he asks from the people, may be freely commented on in the newspapers, though such comments be harsh and unjust or false and no malice will be implied. It must be observed, on the other hand, that no one has a right, by a publication, to falsely impute crimes to a candidate, or publish allegations affecting his moral character generally, nor to publish defamatory language, affecting his moral character, even though it is published as a criticism. If one accuse another of crime, it is presumptively false, and malice is inferred therefrom, and that the plaintiff is

a candidate for office is no excuse. *Sweeney v. Baker*, 13 W. Va. 158; *Com. v. Morris*, 1 Va. Cas. 175, 5 Am. Dec. 515.

What Candidates.—Many remarks, however, are admissible against a candidate for an office to which he is elected by the people, that are not allowable against a candidate for office, the appointment to which is made by a board of limited numbers like a city council; in case of the latter officers, the freedom of speech is much more limited. *Sweeney v. Baker*, 13 W. Va. 195.

2. NEWSPAPER PROPRIETORS—"FREEDOM OF PRESS."—A newspaper proprietor is just as liable as any other person for what he publishes in his newspaper, and is liable in the same manner and to the same extent. What a newspaper proprietor can publish, any other private citizen may publish, as the newspaper has no special privilege in the eyes of the law, and a misapprehension has, to a great extent, grown out of the meaning of the terms "freedom of press" and "liberty of the press," some persons supposing that this gave newspaper proprietors a privilege to publish with impunity what others would be responsible for, but its proper meaning is that newspaper proprietors may publish, without license previously obtained, whatever they choose, but are to be responsible exactly as any one else would be for the publication. *Sweeney v. Baker*, 13 W. Va. 158.

3. TRUTH A JUSTIFICATION—INDICTMENTS.—Upon an indictment or information for libel against public officers, or candidates for public office, truth is a justification, and may be given in evidence. *Com. v. Morris*, 1 Va. Cas. 175.

VIII. WHO ARE LIABLE FOR SLANDER OR LIBEL.

1. INSANE PERSONS.—It seems that insane persons are not liable for slander. *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. Rep. 316; *Horner v. Marshall*, 5 Munf. 466.

2. HUSBAND LIABLE FOR SLANDER AND LIBEL OF WIFE.—Though the common-law rule, making the husband liable for the slanders and other torts of his wife still prevails, yet it is a rule that has lost the reason for which it was originally laid down, since the married woman's acts have preserved to the wife such estate, and her earnings, as the wife's separate estate, free from the husband's control, enjoyment, or liabilities. The continuance of the rule is wholly out of joint with the times and the spirit of the age, and is an inequity and injustice calling loudly for legislative relief. It seems strange, unreasonable, and monstrous that the rule has stood so long. Opinion of BRANNON, J., in *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. Rep. 317.

IX. DEFENCES.

1. TRUTH OR JUSTIFICATION.

a. CIVIL ACTIONS.—The rule at common law and under the statutes and constitutions of Virginia and West Virginia, is that the truth is a complete defence to a civil action for libel or slander. Va. Code 1887, sec. 3375; Constitution of W. Va. art. 3, sec. 8, W. Va. Code, ch. 130, sec. 47, p. 625; *Moseley v. Moss*, 6 Gratt. 534; *Sweeney v. Baker*, 13 W. Va. 158.

No Justification under the Statute Formerly.—But as the statute formerly stood it was held that to an action for insulting words under that statute, no plea of justification could be received. *Brooks v. Calloway*, 12 Leigh 466; *Moseley v. Moss*, 6 Gratt. 534. See *Hogan v. Wilmoth*, 16 Gratt. 80, which comments upon the two cases cited above.

Good Motives and for Justifiable Ends.—Article 8, § 8 of the Constitution of W. Va. provides: "In prosecutions and civil suits for libel the truth may be given in evidence; and if it should appear to the jury that, the matter, charged as libelous, is true, and was published with *good motives* and *justifiable ends*, the verdict shall be for the defendant."

The purpose of this was to settle the bitter controversy, as to whether in a criminal prosecution for libel the truth shall be a bar to the proceedings, and, as will be seen, it determines that it shall be a bar only when published with *good motives* and *justifiable ends*, and it further puts upon exactly the same footing, common-law statutory suits for libel; the truth being a bar when made with *good motives* and *justifiable ends*, and not otherwise. *Sweeney v. Baker*, 18 W. Va. 205.

Rule in Action for Slander—Good Motives.—But it is not necessary for a plea, in an action for *verbal slander* to show that the charges were made "with good motives and justifiable ends," as this requirement, contained in art. 8, § 8, of the W. Va. Constitution, applies strictly to actions for libel, and does not include actions for defamation or verbal slander. § 47, ch. 130 of the Code of W. Va. applies to actions for defamation, and only requires allegations and proof that the words written or spoken are true. *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. Rep. 415.

b. **INDICTMENTS FOR LIBEL.**—Upon an indictment or information for libel, it is in no case necessary or proper for the defendant to plead the truth of the libel. *Com. v. Morris*, 1 Va. Cas. 175.

Indictment—Truth in Mitigation.—But upon an indictment or information for libel of individuals, not public officers, or candidates for public office, truth, though no justification, may be given in evidence in mitigation of a fine. *Com. v. Morris*, 1 Va. Cas. 175.

c. **JUSTIFICATION OF A CHARGE OF PERJURY.**—It seems well settled that when the defendant justifies to the charge of perjury, he must prove all the particulars which constitute the crime of perjury; that is, the deliberate deposition, the lawfully administered oath, the judicial proceedings, the absoluteness of the matter testified to, its materiality direct or collateral to the point in question and its falsity, and the falsity of the words must be proved by two witnesses or by one witness and strong corroborating circumstances, and the oath of the accused, who is presumed innocent until proved guilty, stands as the oath of a disinterested witness. *Hogan v. Wilmoth*, 16 Gratt. 80; *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. Rep. 415; *Kirtley v. Deck*, 3 H. & M. 388.

Sufficiency of Other Defences.—In an action of slander, for saying of the plaintiff, 1st, "G. Hancock (plaintiff) has *stolen* my slave;" 2d, "G. Hancock (plaintiff) has *taken* my slave, and I will have him sent to the penitentiary for it;" 3d, "G. Hancock," etc. Defendant, after pleading "not guilty" to the whole declaration plead justification to the 2d count *i. e.* because, etc., he did take a slave named Nan, the property of the defendant, out of his possession, in such manner and with such intention, as would subject him to the punishment mentioned by the defendant." *Held*, to support the plea of justification to the second count in this declaration, it was sufficient for the defendant to show that the slave Nan had been a long time in his possession as a slave, and was purchased by him as such, notwithstanding the pendency of a suit at that time by

Nan for her freedom. *Hook v. Hancock*, 5 Munf. 549.

Insanity a Defence to Slander.—It is a sufficient ground of equity for a perpetual injunction to a judgment in slander, that at the time of speaking the defamatory words, and when the judgment was obtained, the complainant in the bill (who was defendant at law) was insane, or in a state of partial mental derangement on the subject to which those words related. *Horner v. Marshall*, 5 Munf. 466. See also, *Withrow v. Smithson*, 37 W. Va. 737, 17 S. E. Rep. 316.

Repetition No Defence.—A defendant who has circulated a slander about a young girl, cannot offer evidence to prove that others had heard the same slander. It is no excuse for him that others had heard the same slander after he himself had set it going. *Blackwell v. Landreth*, 90 Va. 743, 19 S. E. Rep. 791; *Cheatwood v. Mayo*, 5 Munf. 16; *Dillard v. Collins*, 25 Gratt. 343.

Words Spoken in the Heat of Passion.—It is no defence or justification for the defendant that he used the words charged, in the heat of passion, provoked by the plaintiff's quarrelsome and insulting words. *McAlexander v. Harris*, 6 Munf. 465; *Dillard v. Collins*, 25 Gratt. 343.

d. **APOLOGY IN MITIGATION.**—In any action for defamation the defendant may give the truth in evidence as a justification for the slanderous words, or an apology in mitigation of damages. Va. Code 1887, § 3355; Code of West Virginia, ch. 130, § 47.

e. **ONE SLANDER CANNOT BE SET OFF AGAINST ANOTHER.**—It is no defence in an action of slander, even in mitigation of damages, that previous to the speaking of the slanderous words laid in the declaration, the plaintiff had used equally offensive and insulting words towards the defendant. *Bourland v. Eldson*, 8 Gratt. 27; *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. Rep. 803.

Specification of Facts as Justification.—When a defamatory charge is made in general terms, it can only be justified by specification of the facts which are relied on to establish its truth. *Amos v. Stockert* (W. Va.), 34 S. E. Rep. 331.

X. EVIDENCE.

1. **SCOPE OF THIS SECTION.**—Under the head of evidence only such matters will be discussed, as do not fall under the other heads in this note. So, for further authority, reference is made to sections on Publication, Malice, and Damages.

Admissions—Res Gestæ.—In an action for libel, a witness cannot testify to a conversation he has had with the general manager of the defendant company several weeks after the writing of the defamatory letter, as it is hearsay. And the alleged admissions that the general manager made in the above-mentioned conversation, cannot be considered in evidence against the defendant company, because they were made several weeks after the letter complained of was written, and hence do not form a part of the *res gestæ*. *Reusch v. Roanoke Cold Storage Co.*, 91 Va. 534, 22 S. E. Rep. 358.

Proof of Negative.—H. swore in an affidavit that L. had engaged to pay certain taxes, L. said that the statement was false, that it was all a lie and that he would have H. indicted for perjury. H. brought an action for slander against L. and he pleaded a justification, and the court held that the *onus probandi* was on the defendant to prove that the plaintiff's affidavit was false, even though it required the difficult task of proving a negative, contrary to the

general rule that he who holds the affirmative of the issue must prove it. *Hinchman v. Lawson*, 5 Leigh 695.

2. EVIDENCE IN SUPPORT OF CHARACTER.—Even before the defendant has introduced any evidence, in an action for libel, the plaintiff may introduce evidence to prove that prior to the publication of the libel, his general character for truth and honesty had been good, and the plaintiff is not precluded by the presumption that the law indulges in his favor, that his character is good, until the contrary appears. *Adams v. Lawson*, 17 Gratt. 250, 260; *Shroyer v. Miller*, 3 W. Va. 158, 161.

General Character of the Plaintiff.—It is inadmissible to allow proof of the general character of the plaintiff, as an insulting, provoking and quarrelsome man, and, that *before* the speaking of the words imputed to the defendant, the plaintiff was in the habit of vilifying, provoking and insulting the defendant and his family. Everything that happened at the time is admissible, as a part of the *res gestæ*, and nothing else. *McAlexander v. Harris*, 6 Munf. 465.

General Bad Character of Plaintiff for Veracity.—In an action for slander for falsely accusing the plaintiff of perjury, it is well settled that the defendant may offer proof of the general bad character of the plaintiff for veracity although it be not in issue, for the general character of the plaintiff is in issue in every declaration in slander, and moreover it is always to be considered by the jury in mitigation of damages, for "certainly one of disparaged fame, is not entitled to the same measure of damages, with one whose character is unblemished." This is true for actions under the statute as well as at common law. *McNutt v. Young*, 8 Leigh 542; *Moseley v. Moss*, 6 Gratt. 534.

Evidence Must Be Relevant.—In an action for slander it is inadmissible to ask a witness what the habits of the neighbors were with reference to social intercourse with the plaintiff, and upon a charge of horse stealing, it is inadmissible to ask a witness as to rumors in the neighborhood that the plaintiff had stolen a hog, the rule being that though the general bad character of the plaintiff is admissible in evidence, under the pleas of not guilty and justification, yet the enquiry must be limited to that specific matter with which he is charged. *Dillard v. Collins*, 25 Gratt. 359.

A defendant cannot introduce evidence of a fight had between the plaintiff and defendant, prior to the uttering of the slanderous words, on the ground that the plaintiff's counsel had referred to this fight in his opening statement to the jury, for it has no connection with the utterance of the slanderous words. *Harman v. Cundiff*, 83 Va. 239, 246.

Impeachment of Witnesses.—In an action for slander, the defendant may introduce evidence to prove particular facts, showing that the plaintiff's witnesses had feelings of ill-will towards him, for although particular facts of hostility cannot be proved to impeach the credit of witnesses, when supported by general reputation; still hostility towards one of the parties is not, in its nature, a matter of general reputation, and if proved at all, must be proved by particular facts and circumstances. *Rixey v. Bayse*, 4 Leigh 330.

Impeachment of Character for Veracity.—A witness cannot testify to particular facts, in order to discredit a witness, to whose general character for veracity he had before borne testimony, for the credit of a witness can be impeached by general

evidence only, and not by evidence of particular facts of falsehood. *Rixey v. Bayse*, 4 Leigh 330.

Perjury—Proof—Record.—In an action for slander, upon a charge by the defendant that the plaintiff, as a witness before a court of record, was guilty of perjury, the record must first be produced to show that the evidence was material, the record being the best evidence of that fact, and until this is done a witness will not be allowed to testify to what was sworn upon the trial in question. *Kirtley v. Deck*, 8 H. & M. 388.

XI. DAMAGES.

1. SPECIAL DAMAGE.—Where words are not actionable *per se*, because they do not impute a crime to the plaintiff, or the having of a contagious disease, or do not affect him in his trade, profession or calling, etc., then there must be an averment and proof of special damage, and the present character of the special damage suffered must be specifically alleged in the declaration, such as the loss of customers, etc. 4 Min. Inst. (4th Ed.) 465; *Hansbrough v. Stinnett*, 25 Gratt. 498; *Harman v. Cundiff*, 82 Va. 239, 244; *Hoyle v. Young*, 1 Wash. 150; *Moore v. Rolin*, 89 Va. 107, 111, 15 S. E. Rep. 520; *Reusch v. Roanoke Cold Storage Co.*, 91 Va. 534, 22 S. E. Rep. 358. See also, *Moseley v. Moss*, 6 Gratt. 538; *Payne v. Tancil*, 98 Va. 262, 35 S. E. Rep. 725.

Filing a Mechanic's Lien.—The filing of a mechanic's lien by a subcontractor, prematurely, and without authority of law, is actionable *per quod*. Va. Code, § 2476; *Moore v. Rolin*, 89 Va. 110, 15 S. E. Rep. 520.

Loss of Customers as Special Damage.—In an action for libel under section 2897 of the Va. Code, where no special damage is claimed except from loss of customers, no proof can be received of the loss of any customers except those mentioned in the declaration. *Reusch v. Roanoke Cold Storage Co.*, 91 Va. 534, 22 S. E. Rep. 358.

Names Need Not Be Alleged.—In an action for libel for prematurely filing a mechanic's lien, the declaration should allege some special damage to the plaintiff, where the language of the lien does not necessarily import injurious defamation, but it is not necessary to give the name of any one whose custom has been lost to the plaintiff. *Moore v. Rolin*, 89 Va. 107, 15 S. E. Rep. 520.

2. ELEMENTS OF DAMAGES IN GENERAL.

Exemplary Damages—Wealth of Defendant.—It is proper to instruct the jury that, if they believe from the evidence that the defendant spoke the defamatory words, and was actuated by actual malice towards the plaintiff, they may give exemplary damages, that the defendant's wealth is to be considered, only so far as it tends to show his rank and influence in society, but not to show his ability to pay. *Harman v. Cundiff*, 82 Va. 246; *Womack v. Circle*, 29 Gratt. 192, 201. See also, 4 Min. Inst. (4th Ed.) 464.

Particular Bad Traits.—Particular bad traits of the plaintiff, in no way connected with the defamatory charge, cannot be shown in mitigation of damages. *McAlexander v. Harris*, 6 Munf. 465. See also, *Cheatwood v. Mayo*, 5 Munf. 16.

Apology.—Under the statutes, the defendant may show in mitigation of damages that before the commencement of the action, or as soon thereafter as possible, he offered an apology to the plaintiff for his defamatory words. Va. Code 1887, § 3375; Code of W. Va., ch. 130, § 47.

Truth in Mitigation of Damages.—Under the statute of insulting words, it is admissible to give in evidence under the general issue, the truth of the

slanderous words, not as a bar to the action, but in mitigation of damages, because, under the statute, the truth could not be pleaded in bar, and it was proper, that it should, in some manner, be brought before the jury. *Moseley v. Moss*, 6 Gratt. 534; *Brooks v. Calloway*, 12 Leigh 409. But see *Sweeney v. Baker*, 13 W. Va. 158, 204; *Amos v. Stockert* (W. Va.), 34 S. E. Rep. 825. But see Va. Code 1887, § 3375; Code of W. Va. ch. 130, § 47.

In an action for slander at common law, evidence is not admissible under the general issue in mitigation of damages, which proves or tends to prove in any form or shape, the truth of the words. But, on the other hand, where defamatory words point to a specified act of the plaintiff, and the evidence offered in mitigation of damages neither proves nor tends to prove, or upon the whole negatives the truth of the words, it is admissible, where it shows the improper conduct of the plaintiff in relation to the transaction in question. *Bourland v. Eldson*, 8 Gratt. 27; *Cheatwood v. Mayo*, 5 Munf. 16; *McAlexander v. Harris*, 6 Munf. 465; *Moseley v. Moss*, 6 Gratt. 534.

Perjury.—In an action for slander for charging the plaintiff with perjury in a judicial proceeding, though it is improper to permit the defendant to prove the *falsity of the plaintiff's words*, and thus fix upon him the charge of perjury indirectly, yet he may prove *what those words were*, in mitigation of damages. *Grant v. Hover*, 6 Munf. 13.

General Bad Character of Plaintiff.—Under plea of "not guilty" the defendant may show, in mitigation of damages, the general bad character of the plaintiff for honesty. *Dillard v. Collins*, 25 Gratt. 355; *McNutt v. Young*, 8 Leigh 542.

Circumstances of Suspicion.—In order to justify a slanderous charge, proof of circumstances of suspicion, not amounting to full justification, are not admissible, under the general issue, in mitigation of damages. Such a proceeding is altogether inadmissible, being not only contrary to justice and policy, but also injurious to the plaintiff, as tending to entrap and surprise him at the trial. *McAlexander v. Harris*, 6 Munf. 465; *Cheatwood v. Mayo*, 5 Munf. 16; *Sweeney v. Baker*, 13 W. Va. 205. But see Va. Code, ch. 176, § 44 (also in force in W. Va.), for the change it wrought in the above rule.

Retraction.—Repetition of the slander, proving the defendant's ill-will towards the plaintiff, may be given in evidence by way of aggravation. *Ex consequenti*, therefore, the defendant may give retraction in evidence, by way of mitigation of damages. *McAlexander v. Harris*, 6 Munf. 465.

Standing of the Parties.—In ascertaining the measure of damages, it is proper for the jury to consider the plaintiff's standing and that of the defendant. *Harman v. Cundiff*, 82 Va. 239.

Character of Plaintiff.—As it is admissible for a plaintiff to introduce a witness to testify to his general character, when speaking on oath and when not on oath, as a man of truth, *a fortiori* is it admissible for the defendant to cross-examine the witness as to the plaintiff's general moral character, as the character of the prosecutor is of some importance in estimating the *quantum* of damages, and it is no hardship in holding that a plaintiff suing for his character must come prepared to defend it from general attacks. *Lincoln v. Chrisman*, 10 Leigh 338; *McNutt v. Young*, 8 Leigh 542; 4 Min. Inst. (4th Ed.) 469.

Antecedent and Subsequent Slanders.—When the words laid in the declaration have been proved,

then evidence of the speaking of like words, antecedent and subsequent to the words laid, is admissible. As the words are admitted only to effect the measure of damages, it would be contrary to both reason and authority to admit such evidence before proof of the words laid. *Hansbrough v. Stinnett*, 25 Gratt. 506; *Harman v. Cundiff*, 82 Va. 245.

Damages Excessive.—In an action for libel, the court will not grant a new trial on the ground that the damages are excessive, unless they are so enormous as to furnish evidence of prejudice, partiality, passion or corruption on the part of the jury. \$8,000 was not considered excessive in the case cited below. *Sweeney v. Baker*, 13 W. Va. 158, 81 Am. Rep. 757.

Inadequate Damages.—It is rare that the court will disturb a verdict on the ground that the damages are too small. *Ward v. White*, 86 Va. 217, 9 S. E. Rep. 1021. But where a candidate for office circulates a false and slanderous report about a young girl living in the family of his opponent, and of hitherto unblemished name and fame, stating that she had been delivered of a bastard child, and that he believed it was his opponent's, a verdict, upon such a charge, for five dollars will be set aside as being so palpably and grossly inadequate as to shock the moral sense of every just man. *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. Rep. 791.

The act of the Assembly (1 Rev. Code 510, § 96), authorizes the granting of a new trial, in an action for slander, when the damages found by the jury are manifestly too small. *Rixey v. Ward*, 3 Rand. 52, 55.

XII. PLEADING AND PRACTICE.

Declaration under the Statute.—In an action of slander, if the plaintiff proceeds under the statute, he must, in his declaration, aver that the words from their usual construction and common acceptance are construed as insults, and tend to violence and breach of the peace, or else employ some other or equivalent averments to denote that the words are actionable under the statute. *Hogan v. Wilmoth*, 16 Gratt. 80; *Moseley v. Moss*, 6 Gratt. 534; *Payne v. Tancil*, 98 Va. 262, 35 S. E. Rep. 725.

Declaration for Common-Law Defamation.—And where the declaration does not show by proper averments, that the action is under the statute, it may be demurred to as defective, unless it sets out properly, and in substantial compliance with the rules of pleading, such a charge as constitutes defamation at common law, and if the words charged do not amount to slander they cannot be helped by the innuendo. *Hogan v. Wilmoth*, 16 Gratt. 80; *Moseley v. Moss*, 6 Gratt. 534; *Sweeney v. Baker*, 13 W. Va. 210; *Shroyer v. Miller*, 3 W. Va. 158; *Argabright v. Jones*, 46 W. Va. 144, 22 S. E. Rep. 995.

Judicial Proceedings—Necessary Allegations.—If a declaration on its face shows, that the libelous matters complained of were published in the due course of legal procedure, it will be held fatally defective on general demurrer, unless it further shows, that the libelous matters complained of are not absolutely privileged publications under the general rule, that all such publications are so privileged, by alleging facts that bring it within some exceptions to this general rule, such as, that the court had no jurisdiction, or that the libelous matters alleged were not pertinent to such judicial procedure. *Johnson v. Brown*, 18 W. Va. 71.

Alternative Allegations.—A declaration in slander

laying both counts in the alternative, that is to say, that the defendant spoke certain words, or words of the same import, is good after verdict. *Bell v. Bugg*, 4 Munf. 260.

Variance Immaterial—Amendment.—Where a declaration charges that the slanderous words were uttered in the presence of three named persons, and proof is that one of the three was not present, the declaration may be amended at the trial as the variance is immaterial. *Harman v. Cundiff*, 82 Va. 239; *Hansbrough v. Stinnett*, 25 Gratt. 495, distinguished in above case.

Essentials of Good Count at Common Law.—To constitute a good count for slander at common law upon a charge of having committed an offence, it is held that the charge of the defendant, if true, must amount to such an offence or crime as would subject the plaintiff to the punishment annexed to it. *Shroyer v. Miller*, 3 W. Va. 158.

When Distinct Libels May Be Charged in Same Count.—If a declaration in a libel suit sets forth, in what is drawn in the form of one count, that the defendant on a given day published a libel against the plaintiff, containing in one part certain specified libelous allegations, and also containing in another part certain other specified libelous allegations of an entirely different character, this is nevertheless but one count, it being entirely formal, by the rules of common law, to set forth in this manner all the libelous allegations published at one time. *Sweeney v. Baker*, 13 W. Va. 158.

Blending of Common Law and Statutory Slander in Same Count.—It is a well-settled principle of law, that common-law and statutory causes of action for slander cannot be blended in the same count. *Chaffin v. Lynch*, 83 Va. 115, 1 S. E. Rep. 803; *Payne v. Tancil*, 98 Va. 266, 85 S. E. Rep. 726; *Moseley v. Moss*, 6 Gratt. 547; *Bourland v. Eldson*, 8 Gratt. 39; *Sweeney v. Baker*, 13 W. Va. 158.

General Plea of Justification—Repleader.—In case for slander, if the defendant pleads the word "justification" only and the plaintiff replies generally, a verdict for the defendant should be set aside and a repleader awarded; but a verdict for the plaintiff ought not to be set aside, it being a rule, that a repleader is not grantable in favor of the person who made the first fault in pleading. *Kirtley v. Deck*, 3 H. & M. 388.

Plea—Surplusage—Statutory and Common-Law Libel.—A plea ought to be rejected, which is an allegation of the truth of a distinct portion of the libelous charges, contained in a count for a common-law libel, and that it was published with good motives and justifiable ends, when the portion of this charge was not at common-law libelous, as such a portion of a charge inserted in the declaration must be regarded as a surplusage. But such plea ought to be received, if pleaded to such a portion of the charges in a count in a suit brought under the statute for insulting words, as no distinct portion of such charges can be treated by the court as surplusage. *Sweeney v. Baker*, 13 W. Va. 158.

Pleas Must Not Be General—Common Law and Statute.—A general plea, that the libelous matter charged is true and was published with good motives and for justifiable ends, is not a good plea, where the libelous matter is a general charge. In such case the plea to be good, must specify the particular facts which show the general charge to be true, and must, unless the declaration shows it on its face, further allege the particular facts which show, that the end, for which the publication was made, was

justifiable, and it would be insufficient, without so doing, to allege generally, that the motives were good and the ends justifiable. This applies equally to suits for common-law defamation, to libels, and to statutory suits for the publication of insulting words. *Sweeney v. Baker*, 13 W. Va. 158.

Plea Need Not Deny Express Malice.—If the declaration alleges facts showing, that the libelous allegations come within some exception to the general rule, a plea denying that they come within such exception, named in the declaration, by alleging that the court had jurisdiction, or that the libelous allegations were pertinent to the cause, as the case may be, is a good plea in bar, though it does not deny express malice. *Johnson v. Brown*, 13 W. Va. 71.

Judicial Proceedings—Pertinent—Honest Belief.—Moreover, a plea, that the libelous matters complained of were only published in the pleadings in a cause, instituted according to the regular course of judicial procedure, and that the defendant had reasonable cause to believe and did actually believe, that they were pertinent to the cause, is a good plea in bar; and such a plea need not deny express malice. *Johnson v. Brown*, 13 W. Va. 71.

When Plea Must Deny Malice.—But if there is no allegation in the plea, that the libelous allegations were pertinent, or that the defendants had reasonable cause for believing, and did actually believe them to be pertinent to the cause, it must then deny malice in the publication, or the plea will not be a good plea in bar. *Johnson v. Brown*, 13 W. Va. 71.

Plea of Bankruptcy.—In an action for slander, a plea alleging that since the action was brought the plaintiff had been adjudged a bankrupt, should be rejected. *Dillard v. Collins*, 25 Gratt. 343.

Special Pleas of Justification.—In an action for defamation, where a special plea of justification is permitted to be filed, which undertakes to justify all the charges in the declaration, but is insufficient in its specifications as to any one of them, and other special pleas are filed, justifying, by proper specifications, certain of the charges, and on the trial it appeared that the defendant offered no evidence to the jury to prove the truth of any of the charges not specifically justified in such other pleas, the appellate court will regard the filing of this insufficient plea, a harmless error. *Amos v. Stockert* (W. Va.), 34 S. E. Rep. 821.

Truth Must Be Specially Pleaded.—In an action for defamation, if the defendant would rely on the truth of the matter declared on, he must plead it specially, or he cannot give it in evidence at the trial. *Amos v. Stockert* (W. Va.), 34 S. E. Rep. 821.

When an Aggravation When a Mitigation of Damages.—If a plea of justification is filed, and is entirely or very slightly sustained by the evidence, the filing of such a plea is an aggravation of the damages, the jury should find under the plea of not guilty; but if the evidence is strong to sustain the plea of justification, though it fails to establish fully this defence, yet it would tend to show a less degree of malice on the part of the plaintiff in uttering the words of publishing the libel, and should therefore be regarded as a mitigation of damages. The above rule is sustained by the weight of authority. *Sweeney v. Baker*, 13 W. Va. 206.

Charge of Perjury—Justification—Plea.—To sustain a plea justifying a charge of perjury, the defendant must prove: (1) that the evidence was false; (2) that it was about a matter or thing material to the investigation; (3) that it was wilful, or corruptly, knowingly, and intentionally given contrary to the

truth. *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. Rep. 415.

Perjury—Plea Must Allege Materiality.—A plea justifying a charge of perjury must allege that the matter or thing about which the false words were spoken was material to the issue; otherwise it is bad. *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. Rep. 415.

Statute of Insulting Words—Joinder in Demurrer.—As the statute of insulting words says that no demurrer shall preclude a jury from passing upon words that are insulting, it is improper to compel the plaintiff, in an action under this statute, to join in the defendant's demurrer to evidence. *Rolland v. Batchelder*, 84 Va. 664, 5 S. E. Rep. 695.

Duplicity.—When it is objected that distinct libelous allegations are contained in one count, the defendant may plead separately to either or both parts of the count, but the objection cannot be taken by demurrer now, as duplicity is an error of form only and can only be reached by special demurrers, which have been abolished. Code of W. Va., ch. 126, § 29; Va. Code, ch. 15, § 3272. *Sweeney v. Baker*, 13 W. Va. 158.

Plea Must Conclude with a Verification—A plea in bar, that the libelous matter was published only in a pleading in the regular course of judicial procedure, and was pertinent thereto, should conclude with a verification by the record, as it proposes for decision a question of law, and not one of fact. *Johnson v. Brown*, 13 W. Va. 71.

General Issue—Perjury.—In an action of slander for charging the plaintiff with perjury in a judicial proceeding, the defendant on the plea of not guilty (though not permitted to show the falsity of the words sworn to by the plaintiff) may prove what those words were, in mitigation of damages. *Grant v. Hover*, 6 Munf. 13. See also, *McClagherty v. Cooper*, 39 W. Va. 313, 19 S. E. Rep. 415; *Brooks v. Calloway*, 12 Leigh 466.

Truth, Good Motives—General Issue.—The truth, and that the publication was made with good motives and for justifiable ends cannot be given in evidence under the general issue. *Sweeney v. Baker*, 13 W. Va. 158; *Amos v. Stockert* (W. Va.), 34 S. E. Rep. 831.

Matters of Excuse Shown under Plea of Not Guilty.—In an action for slander under the plea of not guilty, the defendant may in mitigation of damages prove any facts as to the conduct of the plaintiff in relation to the transaction which was the occasion of the slanderous words complained of, which tend to excuse him for uttering the words, provided the facts do not prove or tend to prove the truth of the charge complained of, but in fact relieve the plaintiff from the imputation involved in it. *Bourland v. Eldson*, 8 Gratt. 27.

General Issue—General Bad Character for Veracity.—Under the plea of not guilty, the defendant may show, in mitigation of damages, the general bad character of the plaintiff for veracity when on oath. *McNutt v. Young*, 8 Leigh 542. See also, *Dillard v. Collins*, 25 Gratt. 343.

Mays v. Swope.

July Term, 1851, Lewisburg.

(Absent CABELL, P.)

Equity Practice—Sales of Land—Defect in Title.*—

Though the vendee of land has abandoned posses-

***Sales of Land—When Ability to Convey Title Must Exist.**—On this subject, see *foot-note* to *Goddin v.*

sion for a technical defect of title, yet upon a bill to enjoin the collection of the purchase money, if the vendor can make a good title at the time of the decree, the vendee is bound to take it.

This was a bill filed by Edwin May in the Circuit court of Greenbrier county, against Jonathan Swope, to enjoin a judgment for 300 dollars, with interest and costs, recovered by Swope against Mays in that Court. The bill charged that this judgment was for part of the purchase money of a tract of land in the county of Monroe: That the complainant had discovered since the purchase of the land that Swope had no title to it, and complainant had therefore left the land of which he had taken possession under the contract. The injunction was granted.

Swope answered, insisting he had a good title; but if it was defective he could
47 and would at any time, if *the complainant had suggested the defect, have had it supplied.

There seemed to be no doubt that the land had belonged to Adam Swope, of Pennsylvania. That he by his will, which was duly admitted to probat in that State, had authorized his executors to sell the land; and that the executors had, by deed bearing date the 5th of December 1825, conveyed it to Jonathan Swope, who had been in undisputed possession of the land until he sold it to B. Perkins in 1840; which contract was rescinded, and he then remained in undisturbed possession until he sold to the complainant in September 1847. The ground of objection seems to have been that the will had not been admitted to probat in this State; and the executors had not qualified as such here.

Whilst the cause was pending, the will was admitted to probat in the County court of Monroe, and Samuel A. Swope qualified as administrator with the will annexed; and he then on the 17th of December 1849, conveyed the land to Jonathan Swope; and he and his wife, in April 1850, executed a deed by which they conveyed it to Mays; and the same was acknowledged before two justices of the peace so as to be ready for admission to record.

The cause came on to be heard in May 1850, when the Court held, that as the defendant had since the filing of the bill procured a conveyance of the legal title to the land sold to the plaintiff, and had executed to him a deed therefor, the injunction should be dissolved, but without damages, and with costs to the plaintiff.

Vaughn, 14 Gratt. 102. As authority for the proposition laid down in this *foot-note*, the principal case was cited in *Rader v. Neal*, 13 W. Va. 388; *Dodson v. Hays*, 20 W. Va. 250, 2 S. E. Rep. 425. See also, *foot-note* to *Peers v. Barnett*, 12 Gratt. 410.

In *Hurst v. Miller*, 96 Va. 41, 27 S. E. Rep. 831, the principal case, *Young v. McClung*, 9 Gratt. 336, *Peers v. Barnett*, 12 Gratt. 410, and *Daniel v. Leitch*, 13 Gratt. 195, were cited as cases in which time was allowed the vendor to perfect his title. See also, cases collected in *foot-note* to *Daniel v. Leitch*, 13 Gratt. 195.

From this decree Mays applied to this Court for an appeal, which was allowed.

Price, for the appellant, insisted, that Swope had no title to the land when he sold, and until the purchase was abandoned by Mays, and therefore it was not a
48 *case in which he would be allowed time to perfect his title. He referred to Garnett v. Macon, 6 Call 308; 2 Story's Equ. Jur., § 776, note 1.

Caperton, for the appellee, insisted, that a Court of equity will enforce the contract of purchase if the vendor can make a title at the decree. He referred to Hepburn v. Dunlop, 1 Wheat. R. 179; Hepburn v. Auld, 5 Cranch's R. 262; Taylor v. Longworth, 14 Peters 172; Sugd. on Vend., p. 430, 431.

By the Court. The decree is affirmed.

Beery v. Homan's Committee.

July Term, 1851, Lewisburg.

(Absent CABELL, P.)

1. Committee of Lunatic—Bond for Counter Security by Order of Court—Case at Bar.—R the committee of a lunatic was summoned to give counter security, as appeared by the order of the County court. The order then proceeds, "Whereupon the said R appeared in Court and acknowledged notice of the motion, and with K and B gave the security as required by the above order, condition as the law directs, which bond was duly acknowledged by the parties thereto, and ordered to be certified." In fact the bond produced was not a bond for counter security, but was a new bond, and though B signed it, his name does not appear in either the penal part or the condition, but there is a blank in the penal part after the name of K. HELD:

1st. Same—Same—Record—Case at Bar.—That the bond acknowledged and certified as this was, became a part of the record, and is to be taken and construed with the order, as shewing what was required by the Court, and therefore it must be taken that the Court required the committee to execute a new bond.

2d. Bonds—Signing—Effect.*—That it is the bond of B though his name is not in either the penal part or the condition.

49 *3. Chancery Practice—Irregular Proceedings—Correct Results—Effect†—Case at Bar.—In a

*Bonds—Recitals—Effect.—In Cox v. Thomas, 9 Gratt. 319, it is said: "Though some of the persons named in the penalty did not sign it, the parties who did sign it are to be considered as the obligors who are bound, and are recited to have been admitted as deputies; and if any have signed who are not named in the penalty, that circumstance does not vitiate the bond or discharge them from its obligation. Luster v. Middlecoff, 8 Gratt. 54; Berry v. Homan's Committee, 8 Gratt. 48." See monographic note on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

†Chancery Practice—Irregular Proceedings—Correct Results—Effect.—For the proposition that, where a decree is right upon its merits, the court will not reverse it on the ground that the proceedings were irregular, the principal case is cited and followed in Max Meadows Land, etc., Co. v. McGavock, 98 Va. 416, 36 S. E. Rep. 490.

suit against several the bill is dismissed as to one; but before the case is decided as to the others, the plaintiff files a bill to review the decree, and the defendant answers. The case on the bill of review is not set for hearing, nor is the decree sought to be reviewed set aside, but the original cause is brought on to be heard without noticing the other case at all, and the Court decrees against the defendant as to whom the bill had been dismissed. HELD: This is no cause for reversing a decree right upon the merits.

In May 1828, John Rader was appointed by the County court of Rockingham, the committee of David Homan, a lunatic, and executed a bond with Richard Pickering and David Bowman as his sureties. At the June term of the County court in 1836, on the motion of David Bowman an order was made that John Rader be summoned to appear at the next court to give said Bowman counter security. The entry of the order then proceeds, "whereupon the said John Rader appeared in Court, and acknowledged notice of the motion; and with Joseph Kratzer and Abraham Beery, gave the security as required by the above order, condition as the law directs; which bond was duly acknowledged by the parties thereto, and ordered to be certified."

The bond executed by these parties, though it was signed and sealed by Beery, does not contain his name in either the penalty or condition; but there is a blank after the name of Kratzer, in the penalty. Moreover it is not a bond for counter security, but is in the form of a new bond of a committee.

Sometime subsequent to 1836, probably in 1843, though the record does not state the time, Rader was removed from the office of committee of David Homan, and Abraham Lincoln was appointed in his place. And in 1844 Lincoln instituted a suit in the Circuit Court of Rockingham county, against Rader, Kratzer and Beery, for the purpose of recovering the lunatic's estate which went into the hands of Rader.

50 *At the May term 1844, Beery appeared and demurred to the complainant's bill; and assigned for causes of demurrer,

1st. That the bond executed in 1836 was executed without the authority of the Court to which it is made payable, and against the order of the Court: it purporting to be a new bond, and not a bond of indemnity to David Bowman, which the Court had ordered to be given.

2d. That the names of John Rader and Joseph Kratzer, two of the obligors in the bond, being inserted in the body of the bond, and the name of the defendant being nowhere inserted therein, it is not binding on him.

The Court sustained the demurrer, and dismissed the bill as to the defendant Beery. And at the October term of the Court Kratzer appeared and likewise demurred to the bill, assigning as ground of demurrer the first cause stated by Beery. This demurrer was overruled in May 1845; and the plain-

tiff was allowed to amend his bill and make Pickering and Bowman, the sureties to the first bond, parties defendants.

In May 1846 the plaintiff filed a bill of review to the decree of May 1844, dismissing the bill as to Beery; and in October 1847 Beery filed his answer relying upon the same grounds of defence upon which he rested his demurrer.

In May 1848 the Court directed a commissioner to state the accounts of the defendant Rader as committee of the lunatic. And these being returned, shewing the amount due from Rader to be 527 dollars 70 cents, with interest on 233 dollars 71 cents, a part thereof, from the 1st of July 1844 until paid, the cause was finally heard in May 1850, though the bill of review was not set for hearing, and there is no other indication that the case was heard on the bill of review, except that the cause was heard as

51 to Beery who was a defendant *only in that case, along with the defendants in the original suit. Upon the hearing the Court held that the bond executed in 1836 by Rader, Kratzer and Beery was a valid bond as to all of them, and that the execution of it released and discharged the securities in the first bond. And it was therefore decreed that the plaintiff recover against these parties, the sum of 527 dollars 70 cents, with interest according to the commissioner's report; and the bill was dismissed as to the defendants Pickering and Bowman's executor. From this decree Beery applied to this Court for an appeal, which was allowed.

Grattan, for the appellants.

Price, for the appellee.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that to constitute a valid bond of the party, the intention to bind himself must appear on the face of the instrument; that the signature and seal form a part thereof; and furnish prima facie evidence that the person so signing and sealing the bond intended to make himself a party thereto, and to be bound by the stipulations thereof; although the name of the party so signing, sealing and delivering the bond, may not be inserted in the penalty or recited in the condition. The case of Bell v. Allen's adm'r, 3 Munf. 118, does not actually decide that the bond there offered in evidence, was not the bond of the security because his name did not appear in the body of the instrument, but it was rejected when offered in evidence, on the ground of an alleged variance between it and the bond described in the declaration. If, however, it is to be inferred that the case was decided upon the ground that the bond was invalid as to the surety for the cause aforesaid, the authority of the case is impaired by the decisions of this Court

52 in the cases of Bartley v. Yates, 2 Hen. & *Munf. 398; Beale v. Wilson, 4 Munf. 380; Raynolds v. Gore, 4 Leigh 276; and was in effect overruled in Crawford v. Jarrett, 2 Leigh 630. In that

case the name of one of the sureties, Shrewsberry, did not appear in the body of the writing; and there was no blank left for the insertion of other names; which has sometimes been supposed to shew an intention not to exclude other parties who have signed the instrument. Yet the said security was held bound upon proof that he executed the instrument with the intention of becoming a party thereto. In the case of a sealed instrument declared upon, proof of the execution thereof becomes necessary by the plea of non est factum at law (or the answer in chancery, if a case in equity), putting that fact in issue. The circumstance that the writing declared on in Crawford v. Jarrett was not under seal, does not affect the principle involved in this question. The intention to become a party to, and be bound by the instrument, is the fact to be determined in either case. In this case the execution of the bond by the surety Abraham Beery was not denied by the answer, and therefore in the opinion of the Court, no further proof of its execution was necessary. The fact of execution however is conclusively established by the order of the County court, from which it appears that the principal John Rader appeared in Court, and with Joseph Kratzer and Abraham Beery, gave the security required, which bond was duly acknowledged by the parties thereto and ordered to be certified.

The Court is further of opinion, that as the order of the County court sets forth that the said John Rader appeared in Court, and with the said Kratzer and Beery gave the security as required by the above order, and acknowledged a bond which was ordered to be certified, the bond so acknowledged and certified constitutes a part of the record, and must be taken and construed with the

53 order as shewing what was required by the *Court. By the condition of the bond it appears that the said Rader was required to execute a new bond, and in pursuance thereof executed the bond in the bill and proceedings mentioned, and this distinguishes the present from the case of the Greenesville Justices v. Williamson, 12 Leigh 93. In that case the bond not being mentioned in the minute of the Court to have been required, executed or accepted, could not be regarded as part of the record; and so the order itself was the true and only record; and the new bond found in the office could not be looked to or considered for the purpose of ascertaining what was done by the Court. The principal in this case was summoned to appear at the next succeeding Court to give counter security; whereupon he appeared forthwith, and as the condition of the bond shews, being required to execute a new bond, thereupon executed the bond in question, which was received, acknowledged in Court and ordered to be certified. Whatever mode of relief the party may apply for, it is within the discretion of the Court, under the act 1 Rev. Code, chap. 104, § 38, to require counter security or a new bond: and upon the execution of the

new bond the securities to the former bond are discharged.

The Court is further of opinion, that although it was irregular to proceed in the original cause until by a decree on the bill of review, the decree sustaining the appellant's demurrer had been reversed and annulled, yet the irregularity is one more of form than substance. The answer of the appellant applied as well to the bill of review as to the original and amended bills, the cause was heard thereon, and the question of law presented by the bill of review was in effect adjudged by the final decree. The effect upon the rights of the parties is the same as if there had been first a formal

order and decree on the bill of review reversing and annulling the *former decree, and then a decree giving relief on the original and supplemental bills.

The Court is therefore of opinion, that there is no error in the decree, and it is adjudged and ordered that the same be affirmed with damages and costs to the appellee.

Luster v. Middlecoff & als.

July Term, 1851, Lewisburg.

[56 Am. Dec. 120.]

(Absent CABELL, P., and MONCURE, J.*)

1. **Executors—Bond—Liability of Parties.**†—The official bond of an executor contains in the penal part the names of the executor and several sureties, and there is no blank for the name of another: but it is signed and sealed by all those whose names are in the penal part, and also by another person. **HELD:** It is the bond of the person who executed it, though his name is not in the penal part.

2. **Legatee—Death of—Distribution of Estate.**—A legatee being dead, a decree for the distribution of the estate should be in favour of his personal representative, and not of his distributee.

This was a bill filed in the Circuit court of Botetourt county by the legatees of John Middlecoff against Jacob Carper, the executor, and John Luster, Absalom C. Dempsey, and others, as his sureties, for the purpose of obtaining a settlement of the executorial account and a distribution of the estate. They charged that the executor was hopelessly insolvent; and they filed as exhibits with their bill certified copies of their testator's bill and the executorial bond.

55 The bond reads, **"Know all men by these presents, that we, Jacob Carper, Joseph K. Pitzer, John Luster and Matthew S. Robinson, are held and firmly bound,"* &c. This bond was executed by the parties before named, and also by Absalom C. Dempsey.

*The cause had been argued before his appointment.

†The principal case cited and followed in *Cox v. Thomas*, 9 Gratt. 319. See *foot-note* to *Berry v. Holman*, 8 Gratt. 48; monographic *note* on "Official Bonds" appended to *Sangster v. Com.*, 17 Gratt. 124; monographic *note* on "Executors and Administrators."

Dempsey appeared and demurred to the bill; and although no special cause of demurrer was stated, the attempt was to sustain it on the ground that Dempsey's name not having been inserted in the penal part of the bond or the condition it was not his bond. The Circuit court sustained the demurrer and dismissed the bill as to Dempsey.

The cause proceeded as to the other parties, and accounts were taken which shewed a considerable balance in the hands of the executor, which was apportioned among the legatees according to their interests; and there was a decree against the sureties in favour of the legatees for the sums ascertained to be due to them respectively. And thereupon Luster applied to this Court for an appeal.

There were other questions in the cause which it is unnecessary to state.

Lackland and Cooke, for the appellant, insisted, that the bond was the bond of Dempsey; and therefore that the demurrer was improperly sustained. They referred to *Bac. Abr.* title *Obligation*, letter C; 2 *Lomax Dig.* 113; *Bartley v. Yates*, 2 *Hen. & Munf.* 398; *Beale v. Wilson*, 4 *Munf.* 380; *Crawford v. Jarrett*, 2 *Leigh* 630; *Holman v. Gilliam*, 6 *Rand.* 39; *Clark v. Blackstock*, 3 *Eng. C. L. R.* 159; *Bailey on Bills* 44; 1 *Story's Equ. Jur.* § 155, 162, 166, 168; *Fonb. Equ. Book* 1, ch. 1, § 7; 1 *Madd. Ch.* 49, 50; *Wiser v. Blackly*, 1 *John. Ch. R.* 607.

56 F. T. Anderson, for Dempsey, insisted, there was no evidence that he intended to bind himself; and *that the intention was necessary to bind him, and should appear on the face of the bond. *Catlin v. Ware*, 9 *Mass. R.* 218; 2 *Lomax Dig.* 206; *Black. Com. Book* 2, p. 298; 1 *Tuck. Com.* 234, 275; *Bell v. Allen's adm'r*, 3 *Munf.* 118. And he insisted that if Dempsey was not bound at law he was bound in equity. *King v. Baldwin*, 2 *John. Ch. R.* 554; *Buller, J.*, in *Straton v. Rastall*, 2 *T. R.* 367; *People v. Spraker*, 18 *John. R.* 390; *Moses v. Libingarth*, 2 *Rawle's R.* 428; 2 *Rob. Pr.* 37; *Commonwealth v. Jackson's ex'or*, 1 *Leigh* 485; *Graves v. McNeil*, 1 *Call* 488; *Ward v. Webber*, 1 *Wash.* 279; *People v. Jansen*, 7 *John. R.* 331.

J. T. Anderson, argued the case for Middlecoff's legatees, but they were not particularly interested in this question.

BALDWIN, J., delivered the opinion of the Court.

The Court is of opinion, that upon the face of the bill of the plaintiffs, and of the official bond of Jacob Carper, executor of John Middlecoff the elder, therewith exhibited, the defendant Dempsey must be regarded as one of the sureties in the said bond, he appearing to have executed the same, although his name is not therein mentioned as one of the obligors; and therefore that the Circuit court erred in sustaining the said Dempsey's demurrer and dismissing the bill as to him, instead of overruling said demurrer, and requiring

him to answer the bill, which error is to the prejudice of the appellant and of the appellees Pitzer and Robinson. And the Court is further of opinion that there is no other error in the decree of the Circuit court, unless it be in decreeing in favour of the children and heirs of John Middlecoff the younger and the children and heirs of George Middlecoff, instead of their personal representatives; it being uncertain from the record whether the *said

57 John Middlecoff the younger and George Middlecoff, sons and legatees of the said John Middlecoff the elder, died before or after the death of their father; and unless it be in the omission of the decree to state that the recovery in favour of Thomas J. and Harriet Middlecoff, infant children and heirs of the said John Middlecoff the younger, is by their guardian and next friend: in regard to which alleged errors no action of this Court need be had, inasmuch as for the error above declared in sustaining the demurrer of said Dempsey, the decree must be reversed and the cause remanded to the Circuit court for further proceedings to be there had, and any such irregularities may be there corrected, after enquiry into the facts bearing thereupon. It is therefore adjudged, ordered and decreed, that so much of the said decree as sustains the demurrer of the said Dempsey and dismisses the bill of the plaintiffs as to him, be reversed and annulled, with costs to the appellant against the appellees who were plaintiffs, and said Dempsey. And it is further adjudged, ordered and decreed, that the said demurrer be overruled, and that the said Dempsey do answer the bill of the plaintiffs; and that the reports of the commissioner in regard to the matters of account be recommitted in order that the same may be reformed, in respect to any responsibility which may appear on the part of the said Dempsey or to any errors therein which may be shewn by him. And the cause is remanded to the Circuit court to be proceeded in as above indicated.

58 *Mann v. Gwinn & als.

July Term, 1851, Lewisburg.

(Absent CABELL, P.)

Adjournment of Court to Day Certain—Failure to Meet on That Day—Effect on Pending Cases.—In a proceeding of forcible entry and detainer, the Court is constituted and then adjourns to a day certain. The Court failing to meet on the day to which it is adjourned, the cause is not discontinued, but stands adjourned by operation of law, to the next term of the County court.

This was a case of forcible entry and detainer in the County court of Fayette, by William T. Mann against Lockridge Gwinn and others. The warrant of the justice directed the justices and the jury to be summoned to meet on the 14th of November 1849. Accordingly the justices met and constituted the Court on that day, and then on the motion of the defendants, the cause

was continued until the 29th of March 1850, to which day the Court was adjourned.

The Court did not meet on the 29th of March; but at the regular term of the County court in June the cause was tried, and there was a verdict and judgment in favour of the plaintiff. The defendant then applied to the Circuit court of Fayette county for a supersedeas to the judgment, which was granted; and on the hearing of the cause in that Court, the judgment of the County court was reversed on the ground that the failure of the special Court to meet on the 29th of March operated as a discontinuance of the cause; and therefore that the County court had no jurisdiction to try the case at the June term of the Court. Mann then applied to this Court for a supersedeas, which was awarded.

59 *Price and Caperton, for the appellant, and

Reynolds, for the appellees, submitted the case.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that as by the act of 3rd January 1834, p. 76, it is provided that whensoever the justices summoned to form a Court for the trial of any case of forcible entry, shall fail to meet, and no Court be formed on the day appointed, such failure shall not operate a discontinuance of the cause, but the same shall stand continued until the next regular Court of the county or corporation, whether monthly or quarterly; the act by a fair construction, applies as well to a failure of the Court to meet on the day to which it stood adjourned, as to a failure to meet on the day appointed in the warrant; and in either case the cause stands continued to the next County court, and no discontinuance is operated. It therefore seems to the Court here, that the judgment of the Circuit court reversing the judgment of the County court is erroneous; and the same is reversed with costs to the plaintiff in error. And this Court proceeding to render such judgment as the Circuit court should have rendered, it is considered that the judgment of the County court be affirmed, with costs in the Circuit court expended.

60 *Allen and Ervine v. Morgan's Adm'r & als.

July Term, 1851, Lewisburg.

(Absent CABELL, P., and DANIEL, J.)*

Chancery Practice—Decree between Codefendants†—Case at Bar.—In a bill by a creditor against an administrator and his sureties, charging a *devastavit* by the administrator, and the liability of his sureties for it though some of the sureties insist in their answer that under the circumstances one of the sureties is liable to the others, if they are liable to the plaintiff, though there is a decree for

*JUDGE DANIEL had been counsel in other cases out of which this originated.

†Chancery Practice—Decree between Codefendants.—In Whitlock v. Gordon, 1 Va. Dec. 251, it is said:

the plaintiff, and though it appears from the proofs that the *devastavit* was occasioned by a payment of a debt of inferior dignity to the surety sought to be charged, yet it is not a proper case for a decree between the codefendants.

This was a bill filed in the Circuit court of Botetourt county, by William Morgan against William A. Watson, administrator of Robert Tinsley, and his sureties in his official bond, among whom were Bernard Owen and the appellants James S. Allen and Robert Ervine. The bill charged that the complainant had, in 1829, recovered a judgment against Robert Tinsley, in his lifetime, for 1055 dollars 96 cents, with interest from the 28th of January 1823, until paid. That Tinsley died in 1839. That a *scire facias* to revive the judgment against Watson the administrator, was issued in April 1839, and served upon him. That the administrator had been guilty of a *devastavit* in paying away the assets of his intestate's estate. That Tinsley had in his lifetime executed a bond to the firm of Watson & Owens, of which firm the administrator was a partner, for the sum of 4721 dollars 57 cents; and they had,

61 *after Tinsley's death, assigned this bond to Bernard Owen, who brought suit upon it against the administrator; and that he, with the knowledge of the plaintiff's judgment, had confessed a judgment for the amount of the bond, with interest, for the purpose of giving the assignee of Watson & Owens a preference over the other creditors of the estate. That upon this judgment execution was immediately issued,

"In relation to decrees between codefendants. I understand the rule in Virginia to be the same as that laid down by LORDS ELDON and REDFORD in the House of Lords in the case of *Chantry v. Lord Dunsany*, 2 Sch. and Lef. 689, that 'whenever a case is made out between the defendants by evidence arising from the pleadings and proofs between the plaintiff and the defendants, a court of equity is entitled to make a decree between the defendants, and is bound to do so.' *McNiel v. Baird*, 6 Munf. 316; *Allen v. Morgan*, 8 Grattan 60; *Morris v. Terrell*, 2 Rand. 6; *Munday v. Vawter*, 8 Grattan 518; *Templeman v. Fauntleroy*, 3 Rand. 484. There have been various cases decided in our court of appeals rejecting decrees between codefendants (and the case of *Blair v. Thompson*, etc., 11 Grattan 441, cited by the counsel of the appellants, is one of them), because the matter did not arise from the proceedings and proofs between the plaintiff and defendants. But none of them, I think, impugn the rule as above laid down that whenever a case does arise between the defendants upon such proceedings and proofs it is the right and duty of the court to decree between them, and make an end of the controversy, and save the necessity of other suits and further delay and expenses."

As to decrees between codefendants, the principal case was also cited in *Blair v. Thompson*, 11 Gratt. 450; *Watson v. Wigginton*, 28 W. Va. 509. For further information on this subject, see *foot-note* to *Blair v. Thompson*, 11 Gratt. 442; *foot-note* to *Ould v. Myers*, 23 Gratt. 384; *foot-note* to *Glenn v. Clark*, 21 Gratt. 35; monographic note on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

and was levied on the slaves of the intestate in the hands of the administrator, which were sold to the amount of 2378 dollars 37 cents.

Watson answered, calling for proof of the plaintiff's judgment against Tinsley, and denying notice of it. But the *scire facias* to revive the judgment seems to have been served upon him before the confession of judgment to Owen. The defendant also set up other grounds of defence, which it is not necessary to notice.

Bernard Owen also answered, taking the same grounds of defence as Watson. The other sureties, Allen and Ervine, also answered, and insisted, that if the plaintiff's judgment was entitled to priority over that of Owen, so that the application of the assets to the satisfaction of the latter was a *devastavit*, then that Owen should be held responsible personally to the creditors of Tinsley's estate, before resort was had to the other sureties; because said Owen was one of Watson's sureties, as administrator of Tinsley, and had no right to unite with him in the misapplication of the assets of the estate, and thereby to benefit himself by the injury of his co-sureties.

The accounts of the administrator were referred to a commissioner, who, excluding the payment to Owen's debt, reported a balance due to the estate, of 2728 dollars 51 cents, with interest on 2617 dollars 31 cents, a part thereof, from the 31st of December 1840 until paid.

62 *The cause came on to be heard in April 1846, when the Court rendered a decree in favour of the plaintiff against the defendant Watson, and all his sureties. From this decree Allen and Ervine applied to this Court for an appeal, which was allowed.

Michie, for the appellants, and Boyd, for the appellees, submitted the case upon notes. The questions were, 1st. Whether the Court below should have decreed between the co-defendants, without a cross bill. And 2d. Whether under any state of the pleadings, the other sureties of Watson were entitled to a decree over against Bernard Owen.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that the only questions raised by the issue between the complainants and defendants in the Court below, were the *devastavit* charged to have been committed by the administrator of Robert Tinsley, and the joint liability of his sureties in his official bond therefor; and that upon the case, as made out by the pleadings and proofs between the said complainants and defendants, no decree could have been properly rendered as between the co-defendants. The Court therefore, without deciding upon the equities of the co-defendants, as amongst themselves, is of opinion, that as between the complainants and defendants in the Court below, there is no error in the decree. It is therefore adjudged and ordered, that the same be affirmed with costs to the appellees.

63

***Rankin v. Roller & als.**

July Term, 1851, Lewisburg.

(Absent CABELL, P.)

Instruments—Failure of One Party to Affix Seal—Action of Debt against All.*—An instrument binding the parties thereto to pay a sum of money, purports to be under their hand and seals; but it is signed by one of the parties without a seal, and by the other parties with seals, to their names. **Held:** Upon demurrer, that one action of debt may be brought against all the parties.

court of Augusta county, brought upon the following paper:

\$485. One day after date we promise and bind ourselves, our heirs &c. to pay to George Rankin or order the sum of four hundred and eighty-five dollars, for value received. As witness our hands and seals.

Roler & Crawford.

Benjamin Weller, [Seal.]

John W. Roler, [Seal.]

The action was in the name of George Rankin, against all the other parties to the paper; and the declaration complained against Jacob C. Roler and John Crawford, late partners under the firm of Roler & Crawford, Benjamin Weller and John W. Roler, and set out the paper as a promissory note as to Roler & Crawford, and as a writing obligatory as to Weller and John W. Roler; and charged that all the parties had jointly promised and bound themselves to pay &c.

The defendants appeared and pleaded payment; and at another day they demurred to the declaration; the plaintiff joined in the demurrer, and, upon the hearing of the case, the Court rendered a judgment for the defendants, upon the demurrer. Whereupon the plaintiff applied to this Court for a supersedeas, which was awarded.

Fultz, for the appellant, and

Michie, for the appellees, submitted the case.

DANIEL, J. If the plaintiff had in this case declared on the paper, of which profert is made, as the joint bond of Roler, Crawford, Weller and John W. Roler, I am not prepared to say that such a declaration might not have been good: For though there are but two scrolls to the paper, one of which is opposite to the name of Weller and the other opposite to the name of John W. Roler, and though the names of Roler and Crawford are signed as a firm; yet it might be that each of the last named parties signed the paper, and adopted one of the scrolls upon it as his seal; or that one of them executed the paper as the bond of each, being duly authorized by the other so to do. The plaintiff, how-

This was an action of debt in the Circuit ever, does not so treat the transaction, and, most probably, because the facts of the case would not justify him in so treating it. He declares on the paper as the promissory note of Roler & Crawford, and the bond of Weller and John W. Roler; and the simple question presented is whether upon such a paper a joint action of debt against all the parties will lie.

If such an action can be maintained it must be because the undertaking of the parties is either joint and several or merely joint. That it is not a joint and several undertaking, the plaintiff in error concedes in his petition, and such a conclusion necessarily follows from the language of the paper, "We promise" &c. That it is not one joint undertaking is I think equally plain. The paper contains upon its

65 face two instruments, and *its language is to be distributed and applied to each according to their respective characters. Roler & Crawford by their joint promissory note promise to pay the debt; and Weller and John W. Roler, by their joint bond, at the same time promise and bind themselves and their heirs to do the same thing. The undertakings of the two sets of contractors, are as distinct as if they had been evidenced by different papers.

Though the defendants in error have all agreed, at the same time, to pay the money; yet they have thought proper to sever in the use of the instruments selected to evidence that agreement. Two have expressly reserved to themselves the right to enquire into the consideration of the agreement; whilst the other two have estopped themselves from so doing. Roler & Crawford upon the plea of "nil debet," might have shewn that the paper was without consideration; and if so they would have been discharged. Now, one of the most familiar rules governing joint actions is, that the discharge of one of the defendants upon a plea, going to the original merits of the cause of action, operates a discharge of all; and yet Weller and John W. Roler have by their contract estopped themselves from denying that there was a consideration; and have in effect stipulated that, though want of consideration should in any way appear, they would still stand bound. To render judgment in such a supposed state of pleading, in favour of Roler & Crawford and against Weller and John W. Roler would be to violate the rule, in respect to joint actions, just above mentioned; whilst on the other hand, to discharge the two latter, would be to give them the benefit of a defence, which, by giving a bond, they have voluntarily precluded themselves from making. I cannot think that such a conflict between a well settled rule of pleading and an equally well established law of contract, could arise in an action properly brought.

66 *Again, Weller and John W. Roler have expressly covenanted to pay the debt; whilst Roler & Crawford have at the same time assumed to do so. What is there

*The principal case is cited in Keller v. McMuffman, 15 W. Va. 84, 87. See monographic note on "Debt, The Action of" appended to Davis v. Mead, 13 Gratt. 118; monographic note on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

in the nature of the transaction to debar the plaintiff of a right to sue the two former in covenant or the two latter in assumpsit? Such a right seems to me to be necessarily attached to the undertaking and its establishment is wholly inconsistent with the idea of there being but one joint contract, upon which there must be a joint action against all the parties, if against any.

The question here is not one in respect to the joinder of actions, but of parties; not whether an action of debt on a bond and an action of debt on a note may not be joined, but whether two parties who have undertaken to pay a debt, by bond, may be sued as joint contractors with two others who have, at the same time undertaken to pay the same debt, by promissory note; not, whether two distinct causes of action against the same parties may not be blended in one suit, but whether the two sets of parties have not united in a single cause of action. The settlement of the former question does not therefore tend in any degree to aid us in solving the latter.

It seems to me, that whilst the defendants in error have all contracted to pay the same debt, yet that the respective rights and responsibilities of the parties, growing necessarily out of the different instruments by which they have bound themselves, are of such a character that they could not, in case of a controversy, be litigated and adjudged in one action without doing violence to well established rules of pleading; and that the demurrer to the declaration on account of the improper joinder of parties ought to have been, as it was, sustained by the Court. I think therefore, that the judgment ought to be affirmed.

MONCURE, J., delivered the opinion of the Court.

67 The Court is of opinion, that the Circuit court erred *in sustaining the demurrer to the declaration. The contract on which the suit was brought is a joint contract. The defendants contracted together, with the plaintiff, for one and the same act, to wit, the payment of the debt in the declaration mentioned; and it appears on the face of the contract, that they intended to become jointly liable. The fact that there is no seal or scroll annexed to the signature of Roler & Crawford, and that there are scrolls annexed to the signatures of Benjamin Weller and John W. Roler, while it makes the instrument a promissory note as to the former, and a single bill obligatory as to the latter, does not change the joint nature of the contract. Without intending to decide in this case that several actions might not be maintained upon the instrument, regarding it in one action as the simple contract of Roler & Crawford, and in another as the specialty of Benjamin Weller and John W. Roler, the Court is yet of opinion that one action of debt may be maintained upon it against all of the joint contractors; each of whom will in such an action be entitled to make any defence which he might make in a separate action. In this way the intention of the

parties is effectuated, multiplicity of actions is avoided, and no injury or inconvenience is occasioned to any person. Therefore it is considered, that the said judgment be reversed and annulled, and that the plaintiff recover against the defendants his costs by him expended in the prosecution of his writ aforesaid here. And this Court proceeding to give such judgment as the said Circuit court ought to have given, it is further considered, that the demurrer to the declaration be overruled, and that a trial be had of the issue in fact joined upon the plea of payment. And the cause is remanded to the said Circuit court for further proceedings to be had therein.

68

*Duncan v. Helms & Others.

July Term, 1851, Lewisburg.

(Absent CABELL, P.)

Evidence—Record—Effect as to Persons Not Parties to Original Suit.*—A record to which neither the demandants or the tenant was a party, is not even *prima facie* evidence against the tenant that the grantor in the deed to the demandant was heir at law of the grantee in the patent under which the demandant claimed title.

This was a writ of right in the Circuit court of Floyd county, brought by Madison B. Helms and others, who sued for John Belden, against Squire Duncan, to recover a tract of land of eight thousand acres. The tenant appeared and filed a plea, by which he defended his right to ninety acres of the land, and pleaded non-tenure as to the remainder. And the record states that the demandants filed their replication to the plea, and so the mise was joined; but the replication does not appear to have been in writing.

On the trial, the demandants claimed under a patent from the Commonwealth to Austin Nichols; and having introduced in evidence the copy of record in a suit in equity in which John Belden was plaintiff, and Daniel Nichols, alleged in that case to be the only heir at law of Austin Nichols deceased, and others, were defendants, the object of which suit was to obtain the naked legal title to a large tract of land, embracing the land in question, the equitable title having been previously conveyed, and in which there was a decree appointing a commissioner to convey the title to the plaintiff, the demandants moved the Court to 69 instruct the *jury that said record was *prima facie* evidence that the said Daniel Nichols was the heir at law of Austin Nichols, and that the legal title was in him; which instruction the Court gave; and the tenant excepted.

There was a verdict and judgment for the demandants, and the tenant thereupon applied to this Court for a supersedeas, which was allowed.

The Attorney General and Staples, for the appellant.

J. B. J. Logan, for the appellees.

*The principal case is cited in Wilcher v. Robertson, 78 Va. 619.

DANIEL, J., delivered the opinion of the Court.

The Court is of opinion, that it was not competent for the demandants on the trial to rely on the record of the suit in chancery between John Belden and Daniel Nichols and others, for the purpose of shewing that the said Daniel was the heir of Austin Nichols, and that the legal title to the land in controversy was in him; neither the demandants nor the tenant having been parties to said suit: And consequently, that the Judge of the Circuit court erred in giving the instruction as asked for by the demandants, and excepted to by the tenant; and that for this error the judgment of the Circuit court ought to be reversed, the verdict set aside, and the cause remanded. Such being the opinion of the Court, it becomes unnecessary to decide the other question presented in the petition, to wit, whether the issue on the first plea of the tenant was ever properly joined in the cause; and if not, whether the irregularity was cured by the verdict. The cause being demanded for a new trial on account of the erroneous instruction aforesaid, the Judge of the Circuit court can, before such new trial is had, cause the alleged defect in the pleadings to be supplied, by requiring the demandants to file the written replication required by the statute.

Judgment reversed with costs; verdict set aside, and *cause remanded for further pleadings, and a new trial, and with directions to the Judge of the Circuit court not to repeat, on such new trial, the instruction complained of, should it be again asked for by the demandants.

Jennings v. Palmer.

July Term, 1851, Lewisburg.

(Absent CABELL, P., and DANIEL, J.*)

Equity Practice—Principal and Surety—Assignment of Security by Surety†—Case at Bar.—A surety holds a security for the repayment to him of the amount of certain debts he has paid for his principal, and for his indemnity as to another large debt for which he is surety. He makes an arrangement with the creditor whose debt is yet unpaid, by which he pays a part of it, he assigns with recourse to himself, the debts he had paid for his principal; and he also transfers the security held by him, all of which is agreed to be taken in discharge of the debt for which he is bound. It is obvious that at the time of the transfer the surety is ignorant of the amount of the security which he transfers; and when the fund is finally ascertained, it proves to be much more than sufficient to discharge the debts assigned with recourse to the surety, and

*JUDGE DANIEL had been counsel in a cause from which this case originated.

†**Contracts—Mistake of Law—Rescission.**—In *Ferry v. Clarke*, 77 Va. 409, it is said: "A mistake in law, however, where there is neither fraud, concealment, nor mistake in fact, constitutes no ground for rescinding a contract. *Brown v. Armistead*, 6 Rand. 604; 3 Rand. 504; 8 Gratt. 70; 21 Gratt. 318."

also the balance of the debt for which the surety had been bound. **HELD:** That under the circumstances equity will treat the assignment as a security for the benefit of the creditor for the payment of the whole amount due on his debt; but for nothing more.

By deed bearing date the 9th day of July 1838, Thomas A. Fourquorean, an apothecary in the town of Lynchburg, conveyed to David R. Edley his whole *stock of goods and his interest in his mother's estate, for the purpose, as stated in the deed, of indemnifying Chancey Steen as his surety in a bond executed to James A. Meriweather, dated the same day with the deed, for the sum of 1753 dollars 85 cents, and payable six months after date, and as endorser of Fourquorean upon notes discounted at the banks in Lynchburg for 500 dollars more. This deed was duly admitted to record on the 12th of July.

On the day of September 1838, Fourquorean executed another deed to Frederick Isbell, whereby he conveyed the same property in trust to pay, first, certain debts due and notes endorsed by P. & J. W. Dudley; second, a debt due to J. W. Dudley; thirdly, certain notes on which Robert Jennings was endorser, described in the deed as a note for 250 dollars, dated July 12th, 1838, payable sixty days after date, and endorsed by Robert Jennings and Joseph Marsh, another for 150 dollars, dated 5th of July 1838, on which Chancey Steen and Robert Jennings were endorsers, another for 300 dollars dated the 31st of August 1838, endorsed by P. & J. W. Dudley and Robert Jennings, another for 150 dollars dated July 5th, 1838, endorsed by Robert Jennings and Joseph Marsh, a like note for 150 dollars dated 2d August 1838, with the same endorsers, and a note for 100 dollars endorsed by Robert Jennings and held by Michael Hart, and also a bond due Reuben D. Palmer for 1460 dollars, on which Joseph Jennings and Tilden Reed were sureties; and fourth, to pay Marsh a debt due him of 689 dollars 7 cents. This deed was admitted to record on the 3d of September.

The trustee Isbell being about to sell the property conveyed in the deeds, Steen filed his bill in the Circuit court of Lynchburg to enjoin the sale, on the ground of his prior lien under the deed of the 9th of July 1838 to Edley. The injunction was granted, and in the progress of that cause the trust property was sold *and deposited in one of the Savings banks in Lynchburg subject to the order of the Court.

Whilst this suit of Steen's was pending, and previous to January 1844, Jennings had paid off the four notes above mentioned on which he was the first or only endorser; and Palmer had instituted an action against him in the Circuit court of Halifax county upon the bond for 1460 dollars, mentioned in the deed of trust to Isbell, on which Jennings and Reed were the sureties of Fourquorean; and Reed, as well as Fourquorean, was insolvent. On the 25th of Jan-

uary 1844 Palmer and Robert Jennings, the latter acting by his brother William B. Jennings, entered into an agreement in writing whereby Robert Jennings was to execute his bond with William B. Jennings as his surety, for 500 dollars, payable to Palmer on the 25th of January 1846, with interest from the date of the agreement; to assign to Palmer with recourse to Jennings, the four notes of Fourquorean which Jennings had paid, which were then in the hands of his counsel in Lynchburg; and also to assign to Palmer all his other interest in and to all claims secured to him by the deed of trust executed by Fourquorean to Isbell in 1838: And Jennings further bound himself to pay all the costs which had accrued in the suit of Palmer against him upon the said bond, except so much as had arisen from the employment of more than one lawyer.

And in consideration of this arrangement Palmer agreed to stop the suit as soon as the conditions were complied with; and that the arrangement when complied with, should be in full of the bond of Fourquorean on which Jennings and Reed were sureties. From this paper it appears the bond was executed on the 9th of March 1838, and that 60 dollars had been paid upon it.

On the 27th of February 1844, Robert Jennings executed another paper, by which in conformity with the contract of the 25th of January, he assigned to Palmer*the four notes aforesaid with recourse to him, and he also assigned to Palmer all his interest in the deed of trust to Isbell, which interest was first to be applied to the payment of the said four notes, and the residue he assigned without recourse.

The case of Steen v. Fourquorean & others came on to be heard in November 1846, when the Court held that the debt secured by the deed of the 9th day of July 1838 was usurious. A statement of the trust fund under the control of the Court and of the debts secured by the deed to Isbell was then made marked A A, from which it appeared that the fund to be divided among the beneficiaries in that deed amounted on the 12th November to

The debts secured in the first and second class, amounted at the same date, to		\$ 5749 41
The amount of the four notes paid by Jennings,	977 54	
The amount of the bond due to Palmer,	2174 68	
These were in the third class specified in the deed.		
The fourth class consisted of the debt due to Marsh,	1011 91	
And there was in addition the note endorsed by Steen and Jennings, as to the payment of which it was doubtful whether it was by Steen or Jennings,		
	223 66	
		<u>\$5514 94</u>

The Court then made a decree, by which the bond claimed by Steen, and the deed of trust to secure it, were directed to be delivered up to be cancelled; and the trust fund was distributed among the beneficiaries in the deed to Isbell, according to, and to the extent of *their respective interests; the decree being in favour of Palmer, as the assignee of Jennings, for the sum of 977 dollars 54 cents, the amount of the four notes paid by Jennings, and in favour of Jennings for 2174 dollars 68 cents, the amount of the bond of Palmer, and which Jennings had settled with him by the agreement of the 25th of January, and the assignment of the 27th of February 1844.

After the decree had been entered, the counsel for Palmer suggested that under the agreement and assignment aforesaid, Palmer was entitled to the decree for the sum of 2174 dollars 68 cents, and that if there was any doubt of Palmer's right, on the construction of these papers, that Jennings would state that such was the intention of the parties to the agreement; and on his motion the Court suspended the decree in favour of Jennings for thirty days, in order to give Palmer an opportunity to assert his claim, if any he had, in such mode as he might be advised to adopt.

In December 1846, Palmer filed his bill in the Circuit court of Lynchburg, against Jennings and the officer of the Court who had the proceeds of the trust property in his hands, to enjoin the payment by the officer to Jennings, of the sum of 2174 dollars 68 cents, as directed by the decree in the case of Steen v. Fourquorean and als. In his bill he stated the execution of the bond to him by Fourquorean, Reed and Jennings, and that the whole thereof, except 60 dollars, was due in 1843, at which time the first two named were insolvent; his suit against Jennings, and the agreement and assignment of January and February 1844; the deeds of trust to Edley and Isbell, and the proceedings in the case of Steen v. Fourquorean & others; and he charged that by the agreement and assignment he was entitled to the whole of Jennings' interest in the trust deed to Isbell; that such was the intention of the parties to the said agreement and assignment, and in pursuance *of such intention, Jennings on the 25th of November 1846, gave to the plaintiff an order authorizing him to receive the money. But that notwithstanding said compromise and assignment Jennings had given notice to the officer not to pay over the money to the plaintiff, and demanded it for himself. The prayer of the bill was for an injunction, and for general relief. The injunction was granted. The order referred to in the bill and which was exhibited with it, bore date the 25th November 1846, and recited that by the agreement of January 1844 it was Jennings's intention to convey to Reuben D. Palmer all his interest in and to everything coming to him under the deed of trust to Isbell, and then relinquished all

the proceeds of said deed of trust in his favour, to said Palmer, and authorized the payment of the same for the benefit of Palmer.

Jennings in his answer denied that the agreement and assignment aforesaid was intended to transfer to Palmer so much of his interest in the trust fund as he was entitled to for having satisfied the bond to Palmer, and insisted that there was doubt at the time whether the two notes mentioned in the deed to Isbell on which Jennings was endorser, on one of them after the Dudleys, and on the other after Steen, had been paid by him, the payments made by him having been made by his agent and attorney in Lynchburg, who had collected monies due to him in that place; and that it was these debts to which the latter branch of the agreement referred; it being intended to give to Palmer the benefit of the payments if they had been made by Jennings, and only in that event. He went into a minute statement of the circumstances under which the paper dated the 25th of November 1846 and filed with the bill was obtained from him. It is unnecessary for the purposes of this report to state the facts. The Court below was of opinion that it was not obtained under

76 *such circumstances as vitiated it; and this Court thought it was entitled to no weight in deciding upon the rights of the parties.

When the cause came on to be heard, the Court below perpetuated the injunction, and directed the officer in whose hands the trust fund was, to pay to Palmer the sum of 2174 dollars 68 cents, with the accruing interest thereon. From this decree Jennings applied to one of the Judges of this Court for an appeal, which was allowed; and by consent of parties, the case was sent to the Court at Lewisburg.

The case was argued in writing by Bouldin and Cooke, for the appellant, and Garland and Cabell, for the appellee, and turned upon the true construction of the agreement of January, and assignment of February 1844. That question was considered as upon the terms of the writings themselves, and also in connection with the facts appearing in the record.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that by the literal terms of the agreement of the 25th January 1844, as carried into execution by the transfer of the 27th February 1844, it was the intention of the appellant to assign and transfer to the appellee Palmer all his interest secured by the deed of trust in the agreement referred to, embracing the amount paid by the appellant towards the discharge of the bond for which he was the security for the said Fourquorean for 1460 dollars; yet said agreement and transfer were executed under such circumstances as in a Court of equity to require it to be treated as a security for the benefit of the appellee for the payment of the whole

amount due to him on his bond, and nothing more. It appears from the statement A A, referred to and made part of the decree in the case of Steen's administrator against said Fourquorean *and others that the fund collected under said deed of trust and under the control of the receiver, would have been sufficient on the 25th January 1844, the date of the agreement aforesaid, to have discharged all the debts entitled to priority of satisfaction over said bond, and the balance left unpaid of said bond after crediting the same with the amount secured by said agreement, even if the validity of the prior deed of trust had been sustained. Of this fact it does not appear that either party was apprised: It certainly does not appear that the appellant who resided at a distance from the scene of the transactions knew any thing of the state of the fund, when to obtain a discharge he paid a large proportion of the bond, and agreed to transfer his interest in the deed, under which an amount was secured sufficient under any aspect of the controversy, to discharge the balance due to the appellee on the bond, nor is there any proof of knowledge of the true state of the facts on the part of the appellee: If known to him and concealed from the appellant it would have been a fraud; but in the absence of any proof of such knowledge, and from the fact that the appellant was required to transfer the notes or bonds in the agreement set out with recourse, it is the fair presumption that both parties were ignorant of the real state of facts, and the contract was entered into under a mutual mistake; and it would be unjust, oppressive and inequitable to enforce it against the appellant according to the literal terms thereof; and full justice is done to the appellee by holding it as a security for his benefit, for the payment of the whole amount of his demand with interest.

The Court is further of opinion, that the order of the 25th of November 1846 was obtained under circumstances which entitle it to no weight in deciding upon the rights of the parties. The Court is therefore of opinion that the decree of the Circuit court is erroneous, *and it is adjudged, 78 ordered and decreed, that the same be reversed and annulled, and that the appellee pay to the appellant his costs by him expended in the prosecution of his appeal here. And the cause is remanded to the Circuit court with instructions to refer the same to a commissioner to ascertain the balance of principal and interest due to the appellee on the bond for 1460 dollars, after crediting the same with 60 dollars, the credit endorsed thereon, with 500 dollars, the amount of the bond given by the appellant and W. B. Jennings, his security, as of the 25th of January 1844, and with the sum of 977 dollars 54 cents on the 12th of November 1846, the sum decreed to be paid to the appellant for the use of the appellee by the decree of the 20th of November 1846 in the case of Steen's adm'r v. Fourquorean & others; for the balance due upon the bond

after deducting said credits, together with the costs in the Chancery court the appellee will be entitled to satisfaction out of the sum of 2174 dollars 68 cents with the accruing interest thereon, mentioned in the decree appealed from, and the appellant will be entitled to the residue of said last mentioned sum with the accruing interest thereon.

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*Price v. Via's Heirs.

July Term, 1851. Lewisburg.

(Absent CABELL, P.)

1. **Pleading and Practice—Action on Award*—Plea—Case at Bar.**—In an action on an award, if upon the face of the submission, it does not clearly appear that the award does not cover the whole matter submitted, a demurrer to the declaration will not be sustained; but the defendant will be left to his plea of "no award;" to which the plaintiff may reply and shew that the award does cover the whole matter submitted.

2. **Same—Same—Same—Same.**—So if the parties may have waived a decision on one branch of the matters submitted, and requested the arbitrators to decide the other matters, though this is not stated in the declaration, a demurrer will not be sustained; but the plaintiff will be allowed to reply the facts to the plea of "no award."

This was an action of covenant brought by Barnett W. Price against James Via and others in the Circuit court of Patrick county, and removed from thence to the Circuit court of Montgomery. The declaration was upon a covenant by which the parties bound themselves in the penalty of 600 dollars, to submit certain matters in dispute between them to the award of arbitrators, and to abide by their award.

The covenant was entered into in August 1841, and was in substance, that whereas a controversy has arisen between the parties in relation to a certain tract of land claimed by the heirs of William Via deceased, they claiming the land amounting to two hundred and ninety-one acres, under an entry and patent to John Ingram sen'r deceased; and Price claiming under a large survey made by John Ward previous to the one made by Ingram, and the parties being then at law about their respective rights to said land, covenanted with each

80 other *to dismiss the suit and refer the matter to five disinterested men chosen by the parties, viz.: Thomas Penn, &c., &c., and it is agreed that these men so chosen for the purpose shall meet on the land on a day appointed by the parties; and a surveyor shall run the land according to the papers which may be produced by the parties; and after the parties have produced their evidence, and the same has been heard by the arbitrators, they shall decide to whom the land belongs in law and equity; and their judgment shall be final between the parties. And the parties

*See monographic note on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684.

agree that the costs of the suit aforesaid, and of the arbitration, shall be paid by the losing party. And the parties further agree that whereas the patent the heirs of William Via claim under seems defective in respect to the proper courses to cover the two hundred and ninety-one acres claimed in the patent, and the said Price has laid a warrant on that part of the land which the patent seems not to cover, and contends against the said heirs of William Via for the right to said land, the parties jointly agree to leave the same matter to the aforesaid arbitrators to be decided by them, after having the same surveyed and hearing the evidence they may think proper to hear. And the parties bind themselves to abide by the award of the arbitrators, and that the expenses of the survey and the compensation to the arbitrators shall be paid by the losing party, who shall relinquish all right, title and interest in said lands, so far as to comply with the award of said arbitrators.

The arbitrators proceeded to hear the case and made an award, which is as follows, viz.:

We the undersigned arbitrators mutually chosen by Barnett W. Price sen'r on the one part, and the heirs of William Via deceased on the other part, to settle all matters of difference between the parties in a certain writ of right depending in the Circuit court of Patrick county, in which

81 the said Barnett W. Price is demandant *and the said heirs are tenants, have after hearing all the evidence adduced by both parties, agreed unanimously, that the said B. W. Price has more right to recover the land demanded by him than the said heirs have to hold it; and that he therefore recover of them the land demanded by him in his said writ as he demands it, and his costs about his suit by him expended. Given under our hands and seals this the 14th of September 1841: And the award was signed and sealed by the arbitrators.

The declaration set out the submission and award as above given, and laid the breach of the covenant first in the refusal to abide by the award as a final decision of the suit for said land; but that they had always since the rendering the award defended, and continued to defend, the said suit; to settle which the said covenants and award were made; second, in their failure to pay the costs of the suit, survey and award. And third, in their failure to relinquish all right, title and interest in the land aforesaid.

The defendants appeared and craved oyer of the covenant and award, and then demurred to the declaration; and stated as causes of demurrer, that the award set out in the declaration does not correspond to the submission contained in the covenant, but varies therefrom in this, that the said award is parcel only of the things submitted to arbitrament by the covenant aforesaid.

The plaintiff joined in the demurrer; and when the cause came on to be heard the Court

sustained the demurrer and gave a judgment for the defendants. Whereupon Price applied to this Court for a supersedeas, which was awarded.

Eskridge and John T. Anderson, for the appellant, and Staples, for the appellee, submitted the case.

82 *ALLEN, J., delivered the opinion of the Court.

It seems to the Court here, that upon the bond of submission taken by itself and without reference to the record of the suit referred to in the condition, it does not clearly appear that both the subjects referred to the arbitrators were not involved in and embraced by the controversy pending between said parties in Court, and that the plaintiff in error was not asserting in said action a title to the whole of the said tract of land of 291 acres, partly in virtue of the Ward survey, and in part under the warrant referred to. If such were the fact the award covered the whole matter referred to the arbitrators; and whether such was the fact, or if not, and the latter branch of the submission was of an independent controversy not involved in the suit, whether the parties may not have waived a decision thereon, and requested the arbitrators to make their award on the subject in controversy in said suit alone, are matters which can only be shewn by proper pleadings in the cause; and which the plaintiff in error should have an opportunity of shewing by his replication to a plea of no award; and that it was not incumbent to set out such matters in his declaration; the award itself on its face purporting to be of the whole matter submitted. It is therefore considered that the judgment of the Circuit court is erroneous, and the same is reversed with costs. And this Court proceeding, &c., it seems to the Court that the declaration and matters and things therein contained are sufficient for the plaintiff to have judgment. It is therefore considered that the demurrer to the declaration be overruled; and the cause is remanded to said Circuit court, with leave for the defendants to plead, and for further proceedings: Which is ordered to be certified.

DANIEL, J., dissented.

83 *Higginbotham v. Cornwell.

July Term, 1851, Lewisburg.

[56 Am. Dec. 130.]

(Absent CABELL, P.)

1. **Wills—Provision for Wife—Right to Dower in Land Sold during Coverture.**—Husband during the coverture sells and conveys land with general warranty, but his wife does not join in the deed. By his will he gives his whole estate real and personal

***Wills—Provisions for Wife—When Considered in Lieu of Dower.**—For the proposition laid down in the second headnote, see the principal case cited with approval in *Nelson v. Kownslar*, 79 Va. 475, 477;

to his wife for her life, remainder to his children. **HELD:** She is entitled to take under the will, and also to have her dower in the land sold.

2. **Same—Same—When Considered in Lieu of Dower.**—That a provision for a wife in the will of her husband shall be held to be in lieu of her dower, the will must so declare in terms; or the conclusion from the provisions of the will ought to be as clear and satisfactory as if it was expressed.

This was a suit instituted in the Circuit court of Monroe county on the 19th of January 1847, by Jane Higginbotham against

Douglas v. Feay, 1 W. Va. 33; *Shuman v. Shuman*, 9 W. Va. 53; *Cunningham v. Cunningham*, 30 W. Va. 604, 5 S. E. Rep. 142. In *Douglas v. Feay*, 1 W. Va. 34, it is said: "The case of *Craig's Heirs v. Walthall and Wife*, 14 Grattan 578, cited and relied on by the counsel for the appellees, we are not to suppose, was intended to be in conflict with the case of *Higginbotham v. Cornwell*, and the doctrine therein declared, but in the opinion of the court it fell within the rule as settled in the latter case."

In *Dixon v. McCue*, 14 Gratt. 551, DANIEL, J., in delivering the opinion of the court, said: "In saying in the case of *Higginbotham v. Cornwell*, 8 Gratt. 53, that 'the conclusion against the claim of the widow ought to be as satisfactory as if it were expressed,' JUDGE BALDWIN has, as I humbly conceive, stated the doctrine somewhat too strongly. A rule thus rigid, whilst it formed no necessary foundation for the judgment of the court in that case, would, in my opinion, come in conflict with decisions in numerous cases which have been too long and too generally recognized as precedents, to allow of dissent or doubt in respect to their authority now. There are comparatively very few of the reported cases, wherein implications of the testator's intentions have prevailed in putting the widow to her election, in which it would be truly said that the conclusion against the claim of the widow was as satisfactory as if the testator, in the very terms of the devise, had expressed an intention to exclude it. And I think it fairly results from the authorities, that whenever the inference against the widow's right is clear beyond reasonable doubt; whenever the implications against her are so strong, that, to defeat them, resort must be had to a forced, far-fetched or unreasonable construction of the will, a case is made which puts her to her election." See, also, citing the principal case and *Dixon v. McCue*, as to this point, *Gregory v. Gate*, 30 Gratt. 91.

In *Bolling v. Bolling*, 88 Va. 526, 14 S. E. Rep. 67, it is said: "This statute (Code 1860, ch. 110, sec. 4) was construed in *Higginbotham v. Cornwell*, 8 Gratt. 53, where it was held that a provision for the wife, to bar her dower, must not only have been so intended, but that such intent must appear from the conveyance or devise, either by express words or clear and necessary implication. To change this rule of construction the amendatory act of 1866 was passed, which amended the statute by adding thereto these words: 'And every such provision, by deed or will, shall be taken to be in lieu of dower, unless the contrary intention plainly appears in such deed or will, or in some other writing signed by the party making the provision.' Acts 1865-66, p. 166; Code, sec. 2270."

For further information on this subject, see monographic note on "Dower" appended to *Davis v. Davis*, 25 Gratt. 587.

William Cornwell. In her bill she charged that her late husband, Thomas Higginbotham, had, during their marriage, sold and conveyed to Cornwell a tract of land in the county of Monroe. That she had not united in the deed. That Thomas Higginbotham died in 1846; and she was therefore entitled to dower in said land, which she prayed might be assigned to her. With her bill she exhibited the deed to Cornwell which bore date on the 4th of November 1807.

In May 1847 Cornwell answered the bill admitting the sale and conveyance of the land to him; but he alleged that Thomas Higginbotham had left a will, which had been duly admitted to probat, by which he bequeathed his whole estate, real and personal, to the plaintiff for her life, and at her death to his son and two daughters. That the plaintiff had accepted

84 the *provision made for her by the will, as she had failed to renounce that provision within a year from the testator's death: And he insisted that the provision made for her by the will was in lieu of dower. And he exhibited a copy of the will which was presented for probat at the February term of the County court of Monroe. The provision for the plaintiff is as stated in the answer.

The cause came on to be heard in October 1847, when the Court dismissed the bill. Whereupon Mrs. Higginbotham applied to this Court for an appeal, which was allowed.

N. Harrison, for the appellant.

Lackland, for the appellee.

BALDWIN, J., delivered the opinion of the Court.

It appears in this case from the testator's will, that after charging his estate, real and personal, with the payment of his debts, he devised the same to his wife for life, with remainder to his children. Upwards of thirty years before the making of his will, he had sold and conveyed, with general warranty, a tract of land to the appellee, but his wife did not unite in the conveyance. The sale and conveyance to the appellee are in no wise mentioned or alluded to in the will. Shortly after the testator's death, this suit was brought by the appellant to recover her dower in the land so sold and conveyed to the appellee. And the defence made by the answer is, that the widow is barred of the dower claimed by the provision made for her in the will, which was intended by the testator to be in lieu of dower of all the lands which he at any time owned; which provision it is averred she has accepted. The will of the testator and his deed of conveyance to the appellee are the whole evidence in the cause. And the question presented by

85 the record is, whether the widow *is entitled to recover the dower claimed, and also to retain the provision made for her by the will. If she is, then her acceptance or refusal of that provision is a matter wholly immaterial.

The dower provided by law in behalf of a

widow, by which is secured to her one third of all the lands of her husband, of which he was at any time seized during the coverture, is paramount to all conveyances, incumbrances, contracts, debts or liabilities of the husband. But as there is no obligation upon him to make a greater provision for her than that which is conferred by the law, it is competent for him, in the exercise of his testamentary power in her behalf, to couple it with the condition that it shall be a substitute for and stand in lieu of her legal dower in the whole or any part of his estate, and thus propose to become the purchaser of the latter; and then if she accepts the devise, she takes it with the condition thereto attached, or if she rejects the condition, she thereby rejects the devise itself: and so she cannot have both the legal dower and the devise which she accepts as its substitute. And the devise in her favour may thus be made conditional by its express terms or by a clear and necessary implication of the testator's intent to that effect, to be derived from the will. But as the exercise of a testator's testamentary bounty in behalf of his wife, beyond or irrespective of the provision made for her by law, is natural and frequent, it is not allowable to infer an intent on his part to the contrary from other parts of the will, by conjecture or probability: the conclusion ought to be as satisfactory as if it were expressed.

This clear and necessary implication which puts the widow upon her election is to be derived from provisions of the will which would be defeated or disturbed by allowing her to claim in both characters of devisee and dowress: for example, if a testator devises his estate, or a part of it, to his wife and others, to be equally 86 *divided amongst them, the equality required would be defeated if she were permitted to claim one third of the property so devised as her dower, and also a third of the remaining two thirds under the will. But a mere disappointment of the expectations of others under the will does not put the widow to her election: as in the case of a devise by the testator to her of a specific part or portion of a farm, say a moiety, and of the other moiety to his children: in that case the widow may take her moiety under the will and one third of the other moiety under the law, though it may perhaps have been his design that she should have but a moiety of the whole: there being no plain and necessary implication that the children were not to take subject to her right of dower.

In the present case, the purchaser from the testator in his lifetime was in no wise an object of his testamentary care or bounty. There is no devise to him of the property he had purchased, nor any indemnity provided for him by the will against the assertion of the widow's right of dower. That right of dower was not and could not have been even conveyed to him by the husband, and it is only by force of the warranty express or implied of the latter that he could have any claim against his estate

for compensation, in the event of eviction by the paramount claim of the widow. Such a liability of the husband's estate under his contract stands upon the same footing as his debts and contracts generally, and furnishes no implication of an intent on the part of the husband to bar his widow's right of dower, by the provision made for her by his will. A testator is understood to speak of his real property as of the date of his will, and of his personal property as of the time of his death; and how can we know in this case that the testator had in his mind at the date of his will, real property which was no longer his, but had been sold and conveyed

87 by him many years before *to another; or if it was present to his thoughts, that he recollected the failure of his wife to unite in the deed to the purchaser; or if he did, how can we safely infer an intent to deprive her of her lawful right in the subject by a testamentary provision in her favour in regard to his remaining property?

Nor is there any incompatibility of a liability of the husband's estate, by reason of the widow's eviction of the purchaser, with the provisions of the will. The devise to her, it is true, is of all the testator's real and personal estate during her life; which is liable to be diminished by a claim of the purchaser, if he should choose to assert it, upon the covenant of warranty in the deed. But there is no repugnancy in such diminution of the value of her interest in the estate under the will, nor of that of the devisees in remainder, if that were material, with the assertion of her right of dower against the purchaser; and indeed it is entirely compatible as well with the charge upon it in the will in behalf of creditors, as with that which is given them by operation of law.

It cannot be that the claim of a purchaser from the husband in his lifetime, founded merely upon the warranty of the latter, to compensation out of his estate, in case of eviction by the widow, falls within any rule of equity requiring her to elect between her right of dower under the law, and the provision made for her in the testator's will: for in equity the rule of election is also a rule of compensation, and not one of forfeiture. It is applicable only to the case of a beneficiary under the will, the provision in whose favour is defeated by the enforcement of the claim against the will; and then invariably the defeated devisee or legatee receives compensation out of the claim under the will, so far as it may extend, or be requisite, of the claimant who defeats him; and if there be any surplus, the latter is entitled to receive it. Now

88 how can such compensation *be made to a purchaser from the husband in his lifetime? He is not designated in the will as is the case with the defeated devisee or legatee; and can be no more entitled to the compensation than any other purchaser from the husband. Suppose then the fund for compensation be exhausted by the claim of such a purchaser, where is an-

other purchaser of other land from the husband to look for redress, and by what rule can he be relieved, unless it be a rule of forfeiture?

The Court is therefore of opinion, that the decree of the Circuit court is erroneous in dismissing the appellant's bill, instead of sustaining and enforcing her claim of dower, and extending to her such other and consequent relief as it may appear she is entitled to; therefore reversed with costs, bill reinstated, and cause remanded for further proceedings in conformity with the foregoing opinion and decree.

Calhoun v. Palmer.*

July Term, 1851, Lewisburg.

(Absent CABELL, P.)

Milldam—Inquisition by Jury—Unforeseen Damages

—Case at Bar.—A gives and conveys to his son B a lot of land on which is a millseat. B then applies to the County court for leave to build a mill and dam, and when the inquest meets on the land A attends, and when the jury propose to level the stream to ascertain how high B may be permitted to build his dam, A tells them he had leveled it, and that B may be permitted to build a dam twelve feet high without flowing the water back on the land of any person but A. That such a dam will hurt no one but himself, and he does not believe it will hurt himself. The jury act upon his opinions and information, and allow B to 89 build a dam twelve feet high, and *report that it will inflict no damage on any person: and this inquisition is confirmed by the Court and leave is given to build the dam. B builds his dam ten feet high. Afterwards he raises the water about six inches by putting boards on the top of the dam; and of this A complains, and B takes them off; and in the ten years B keeps the mill he does not attempt to raise the dam. A becoming embarrassed B determines to sell the property to relieve him; and A adds twenty acres to that owned by B and they join in the conveyance of the whole to C. After C takes possession of the mill he ascertains that the inquisition authorized the dam to be built twelve feet high, and he elevates it 8 inches, which seriously injures the land of A which lies immediately above on the stream, whereupon A sues B for the damages occasioned by the raising of the dam. HELD:

1st. Same—Same—Same—Same.—That the inquest and judgment of the Court is no bar to an action for damages sustained by A which were not actually foreseen and estimated by the inquest.

2d. Same—Same—Same—Same.—That as C relied on the inquisition and judgment of the Court authorizing the dam, as the ground of his defence, it is not competent for him to deny the ownership of the land by B at the time of said proceedings, or to assert the continued ownership of the land by A.

3d. Same—Same—Same—Same.—That the right of A to recover damages for the injury arising from raising the dam by C, is not defeated by the conduct of A at the time the inquest was taken.

*For monographic note on Mills and Milldams, see end of case.

4th. Same—Same—Same—Same. — That the fact that B did not raise the dam in the first instance to the height authorized by the inquest, did not have the effect of precluding him from raising it to the full height authorized by the inquest, provided by so doing he did not occasion injury to others.

5th. Same—Same—Same—Same. — That A having united in the conveyance to C he cannot recover damages against C for any injury done him by any reflow of the water to the extent the injury existed at the time of said conveyance.

This was an action of trespass on the case, brought by William Calhoun against Philip O. Palmer, in the Circuit court of Augusta county. The injury complained of was that the defendant who owned a mill on the Middle river immediately below the land of the plaintiff, had raised his dam, so that the land of the plaintiff was overflowed, and the health of his family injuriously affected.

90 *On the trial of the case the plaintiff proved that the defendant purchased the mill and milldam mentioned in the declaration, in 1844; at which time the dam did not exceed ten feet in height. That after his purchase he had raised the dam; but that it was not yet more than twelve feet in height. And he proved that his land had been seriously injured by the increased height of the dam. The defendant then offered in evidence a deed by which the plaintiff conveyed the land on which the mill and dam was situate, to his two sons, William B. and James W. Calhoun; and also a deed in which the plaintiff and his said two sons and their wives united to convey to the defendant the land conveyed to the sons, and about twenty acres more adjoining, taken from the land of the plaintiff. And the defendant then offered in evidence the record of the proceedings upon a writ of ad quod damnum in the County court of Augusta, upon the application of William B. and James W. Calhoun, to have permission to erect a dam for a mill, it being the same which was the subject of controversy in this case, by which the jury authorized them to raise the dam twelve feet from the foundation; and found by their inquisition that it would not injure any person: and upon the return thereof the Court had authorized them to build the mill and dam in accordance with the inquest of the jury. To the introduction of this record the plaintiff by his counsel objected, on the ground that as the record shewed that the damages which he had sustained had not been foreseen and estimated by the jury, that proceeding could not be a bar to the plaintiff's action. But the Court overruled the objection, and admitted the evidence, not as constituting of itself a bar to the recovery of damages by the plaintiff, but as a link in the chain of evidence which the defendant's counsel alleged they were prepared to adduce, and by which they expected to establish that the plaintiff was personally present when the inquest

91 was taken, was *fully apprised of said

inquest and order of Court, and acquiesced in and assented to them; and that William B. and James W. Calhoun had proceeded within one year to erect their dam and mill, and had finished it within three years. And that the defendant after he had purchased the property finding that the dam was not twelve feet high, had proceeded to raise it to a height not exceeding twelve feet. To this opinion of the Court admitting the evidence, the plaintiff excepted.

The defendant then offered parol testimony to prove that the plaintiff was present when the inquest was taken, and assented to the action of the jury, and aided them in their examinations; that he suggested twelve feet as the height of the dam, and when they proposed to ascertain by actual levelling, how far the water would be flowed back by the dam, he stated that he had himself leveled it, and that the dam would flow back the water to a particular point, which he shewed to the jury; and he said that it would not back the water on the lands of any one but himself, and that nobody but himself would be injured, and that he was satisfied he would not be injured by it. To the introduction of this evidence the plaintiff objected, but the Court overruled his objection, and he excepted.

After all the evidence had been introduced, the plaintiff moved the Court to instruct the jury as follows, viz:

1st. If the jury shall believe from the evidence in the cause, that the milldam in the declaration mentioned, was established by an order of the County court of Augusta, upon a writ of ad quod damnum, and an inquisition and verdict thereupon, had upon the petition of William B. Calhoun and James W. Calhoun, who were at the time the owners in fee simple of the mill seat; and that the plaintiff William Calhoun was not in any manner interested in the property, and was not a party to the said proceedings, then

92 the said writ, verdict, *and order of Court, cannot operate as a bar to this action, unless the damages now claimed by the plaintiff were actually foreseen and estimated by the jury upon the said inquest. And any acts or declarations of the plaintiff at the time of the inquest, indicating his assent to or approbation of the act of the jury, but constituting no part of the record and proceedings upon the said writ, could not operate as a bar to any subsequent action by him for damages sustained, unless such acts or declarations amounted to a contract with the said William B. and James W. Calhoun, founded upon a consideration, whereby the said plaintiff bound himself not to claim such damages: And in considering such acts and declarations of the plaintiff, the jury must take them all together as fixing the terms, conditions and limitations of such contract.

2d. And if the jury shall believe from the evidence in the cause, that after the said writ, inquisition and order of Court, and

after the supposed contract so made by the acts and declarations of the plaintiff, the said William B. and James W. Calhoun went on to erect the said dam to a height short of the twelve feet allowed by the inquest, viz. to the height of ten feet; and shortly afterwards attempted to raise it still higher; that the plaintiff objected to such increase of elevation on the ground that it would injure him to an extent not foreseen by the jury, or by any of the parties at the time of the inquest; and that the said William B. and James W. Calhoun, in consideration of such injury, agreed with the plaintiff that they would not further increase the elevation of said dam; and that in fact the said William B. and James W. Calhoun did not afterwards, during their ownership of the property, which was about ten years, attempt further to elevate said dam, and that the dam in its then condition was sold and conveyed to the defendant with the mill and its appurtenances, then

the said William B. and James W. Calhoun *had no right at the time of the said sale and conveyance, to increase the height of said dam, so as to damage the lands or other property of the plaintiff, and could not convey such a right to any other person; and no such right could pass by a deed conveying the mill with its appurtenances, nor could the plaintiff by uniting in the deed and warranty, upon such conveyance, grant any such right without express words to that effect.

These instructions the plaintiff by his counsel moved the Court in the first place to give as a whole, and that being refused he offered each of them separately; and the Court having refused to give either, he excepted to both opinions of the Court.

The plaintiff by his counsel then moved the Court to instruct the jury as follows, viz:

1st. If the jury shall believe from the evidence in the cause, that the milldam in the declaration mentioned, was authorized in 1831 by an inquest and order of the County court of Augusta, regularly and legally made, authorizing it to be raised to the height of twelve feet from the foundation, that the parties applying therefor began to build the same within one year, and finished it within three years after such leave of the Court obtained, so that it was in good condition for the public use, but to a height much less than twelve feet, say nine or ten feet; that within a few years after such leave obtained, the said parties applying for leave, undertook to raise the said dam five or six inches over the height to which it was first finished, as aforesaid, but yet under the height of twelve feet; that the plaintiff objected to said last mentioned raising, on the ground that it would injure and damage his lands, and that, thereupon, and in consideration thereof, the said parties being still the owners of said mill and dam, ceased from their undertaking, and never again attempted to raise said dam; that said parties applying for

leave, held *and owned said mill and

dam until the year 1844, when they in conjunction with the plaintiff sold and conveyed and warranted said mill and dam, with other lands, to the defendant, and that the defendant afterwards, viz. some twelve or eighteen months after his said purchase, and before this suit was brought, without any new writ of ad quod damnum, or leave of the Court, proceeded to raise said dam, and did raise it higher, thereby causing damage to the plaintiff, over and above any damage resulting to the plaintiff from the dam as it originally stood, then the jury must find for the plaintiff.

2d. If the jury shall believe from the evidence in the cause, that the plaintiff was present with the jury of inquest, who acted in 1831 and rendered a verdict, authorizing the erection of the dam in the declaration mentioned, which verdict was the foundation of the leave afterwards given by the Court to build the dam; that he aided and directed the jury in their action and examination on that occasion; that he had previously leveled the water above said dam, and told the jury he had done so; and that he dispensed with such examination by them; that he said to the jury that no one could be injured but himself, and that he did not believe he would be injured by raising said dam; that he then and there consented that the jury should fix the height of the dam in their verdict at twelve feet; that after said leave was granted, the parties applying therefor went on to begin, and finished the same within the time allowed by law, to the height of only nine or ten feet; that afterwards they raised the dam some inches higher, being still owners thereof, whereupon the plaintiff remonstrated and forbade them; that they at once yielded, abated the additional height, and continuing owners of said mill property and dam for many years afterwards, viz., until the year 1844, never afterwards attempted to raise the dam higher: That the defendant

95 purchased said mill property and dam in 1844, which, *together with several acres of adjacent land of the plaintiff, was conveyed to the defendant by a joint deed from the parties who had applied for leave to build the dam, and the plaintiff, with general warranty of title; and that the defendant, after the lapse of twelve or eighteen months from the date of his purchase, and before the institution of this suit, raised the said dam to an additional height of five or six inches, without any new leave of Court granted; whereby the plaintiff suffered damage; then from the foregoing state of facts, the jury are well warranted in inferring that any consent if proven to have been given by the plaintiff at the time of the inquest, only extended to the raising of the dam to the height to which it was originally raised as aforesaid; and does not bar his right of action for damages for raising it to an additional height.

But the Court refused to give either of the said instructions, and the plaintiff again excepted.

After the Court had refused to give the instructions set out in the foregoing exceptions, the defendant moved the Court to instruct the jury as follows, viz:

If the jury believe, from the evidence in this cause, that the plaintiff advised and prompted the application by his sons, one (if not both), of whom was an infant at the time of the application for the writ of ad quod damnum, and other proceedings on the petition for the establishment of the mill and dam in the declaration mentioned; and that the plaintiff was present when the jury were acting in regard to the assessment of damages, and aided them, and suggested the height of the dam twelve feet: and when the jury were about to level the water, to see how far it would be dammed back on the land of plaintiff, the plaintiff then said he had himself levelled the water, and ascertained that it would flow it back to a particular point, which he then shewed to the jury, and said that it would not injure any one but him, and that

96 he claimed no damages, and that by reason *thereof the jury found their verdict, awarding him no damages; to which the plaintiff assented; such assent and agreement to said verdict, is sustained by the consideration of benefit to plaintiff's sons, who were the objects of his bounty, and whose interest were intended to be promoted by the establishment of said mill and dam, and will be sufficient to bar the plaintiff from obtaining damages incurred by reason of the erection of said dam; which instruction the Court gave, and the plaintiff excepted.

The plaintiff then moved the Court to give to the jury the following instruction:

The writ of ad quod damnum, verdict, and order of Court, authorizing a milldam to be raised to a certain height, named and designated in the verdict, only confers the right upon the applicant and his assigns, to erect the dam to the height thus designated, subject to the right of adjacent tenants to their action, for all damages occasioned thereon, not actually foreseen and estimated by the jury of inquest; and such right to raise the dam, becomes appurtenant to the land on which leave is given to raise it, subject to the said right of the adjacent tenants.

If, therefore, such land is sold by the party acquiring such right to erect a dam, with general warranty of the title and appurtenances thereto, and the purchaser subsequently elevates the dam to a height within that authorized by the verdict and order of Court giving leave, so that damages not actually foreseen and estimated by the jury of inquest, are suffered by an adjacent tenant, who sues for, and recovers the same, the covenants of such deed are not thereby broken, and no action thereupon accrues to such vendee against such vendor on said covenants. But the Court refused to give the instruction; but instead thereof instructed the jury, that the jury of inquest having estimated and allowed no damages to the plaintiff, upon the writ of ad

97 quod damnum, *their verdict presents no bar to the recovery of damages in this action, unless the plaintiff be precluded from their recovery upon other grounds.

If the jury shall be satisfied from the evidence, that the plaintiff was the real owner of the land, on which leave was asked to erect the mill, and the real applicant for the writ, and that his sons were only nominally the legal owners, and only nominal or ostensible applicants for the writ of ad quod damnum, and that no damages were allowed by the jury of inquest, not only because none were claimed, but because on the contrary, damages were disclaimed or waived, whether by parol, by writing or by deed, and that after the privilege to erect the dam and build the mill was established by the inquest or verdict of the jury and the judgment of the Court thereupon, the plaintiff united in selling, conveying and warranting the premises with its appurtenances to the defendant, received the cash payment of the purchase money, and receipted for it in his own name, and took bonds for the deferred instalments payable to himself; the plaintiff by reason of such ownership, and disclaimer or waiver of damages, and by reason of his sale, and conveyance by deed with warranty to the defendant, is precluded from any recovery against the defendant for any damages resulting to himself from the dam of the height not exceeding twelve feet, that being the height ascertained by the verdict of the jury of inquest; and any private understanding or agreement between the plaintiff and his sons, before their sale to the defendant, limiting or restricting their rights and privileges under the inquisition, of which the defendant had no notice at the time of the purchase, cannot impair or derogate from his right to a dam of the altitude fixed by the jury of inquest, however valid and obligatory such agreement or understanding may have been between the father and the sons before they united in

98 selling and conveying to a purchaser without notice. *To the opinion of the Court refusing the instruction asked, and giving the instruction given, the plaintiff again excepted.

After the Court had refused the instruction asked by the plaintiff, and given its own instruction as mentioned in the last exception, the plaintiff's counsel moved the Court to give the following instructions:

The fact that the plaintiff united in selling and conveying and warranting the mill, the dam and premises in the declaration mentioned with the appurtenances to the defendant, standing by itself will not preclude him from recovering in this action. If the jury believe from the evidence, that the plaintiff was not at the time of the verdict or judgment by the County court, giving leave to erect the dam in the declaration mentioned, the real owner of the land on which said dam was to be erected, but that he had made a bona fide advancement thereof to his sons William B. and James W. Calhoun, and that the plaintiff did not

before the jury disclaim or waive damages, or that if he did he received no consideration therefor; then, though the plaintiff afterwards united with his said sons in a conveyance to the defendant of said lands with general warranty of title and appurtenances, he is not thereby barred of his right to bring this suit. But the Court refused to give the said instructions, and the plaintiff again excepted.

The jury then found a verdict for the defendant, and there was a motion by the plaintiff for a new trial, which the Court overruled, and gave a judgment on the verdict for the defendant; and the plaintiff again excepted, and applied to this Court for a supersedeas, which was allowed.

From the facts stated in the exceptions, it appears that in October 1831, the plaintiff gave and conveyed to his two sons, William B. and James W. Calhoun, twenty acres of land, including the site of the mill

99 and dam which was the subject of the suit. One of *these sons was about eighteen or nineteen years old, and the other a few years older. In November 1831 they applied to the County court of Augusta for leave to build a milldam across the Middle river; and a writ of ad quod damnum was directed. When the jury of inquest met upon the premises, the sons being young, the plaintiff was present and managed the business, shewing the premises and making explanations to the jury; and he suggested twelve feet as the height of the dam. It being proposed by some of the jury that they should level the water, the plaintiff stated that he had levelled it as for a nine foot dam, and that dam would not flow the water back off his own land; and he shewed the jury the point to which he said the water would flow back, which satisfied them. Plaintiff said he thought no one would be injured; that if any one was injured it would be himself, and that he did not believe he would be injured. The jury accordingly returned a verdict that the erection of the dam would injure no one.

Soon after the County court made the order granting leave to erect the dam, William B. and James W. Calhoun went on to build the mill and dam, with means furnished them by their father; the dam being raised about nine or ten feet high.

In the first year of the operation of the mill, which was in 1834 or 1835, the sons desired to raise the dam a little higher, and made the experiment by placing boards on the top of it to the height of five or six inches. This was done without consulting the plaintiff, but he soon discovered it, and complained that he was injured by the raising of the dam, and required them to pull it down; which was accordingly done. And from that time until 1844, when the property was sold to the defendant, these parties made no attempt to raise the dam.

100 *In the year 1844 the plaintiff was seriously embarrassed in his circumstances, and as his embarrassments arose

in a great measure out of his expenditures in fitting up the mill property for his sons, they determined to sell it and apply the proceeds to his relief; and this, though the plaintiff at first refused it, he afterwards consented to accept; and the property with twenty acres of the land of the plaintiff was sold to the defendant, and it was conveyed to him by a deed in which the plaintiff and his sons united, with a general warranty. Some twelve or eighteen months after his purchase the defendant ascertained that the order establishing the mill authorized the erection of the dam to the height of twelve feet; and he thereupon elevated it about eight inches, which occasioned serious damage to the plaintiff's land.

Michie and Baldwin, for the appellant, and

Stuart, for the appellee, submitted the case.

BALDWIN, J., delivered the opinion of the Court.

It seems to the Court that by the express provision of the 9th section of the statute concerning mills, &c., 2 Rev. Code, p. 222, no inquest taken by virtue of that act, and no opinion or judgment of the Court thereupon is a bar to any action which could have been had or maintained if the said act had never been made, other than actions for such injuries as were actually foreseen and estimated upon such inquest: And therefore, and inasmuch as the inquest in the record set forth, finds that no person will be injured by the erection of the dam therein mentioned, that the plaintiff in this action, who was no party to the proceedings in which said inquest was had, is not thereby barred from the recovery of such damages as he may have sustained by the reflow of the water upon his land, occasioned by such dam.

101 *And it further seems to the Court, that inasmuch as the said dam, and the mill to which it pertains, were established upon the application of William B. Calhoun and James W. Calhoun, as the owners of the land upon which the same are situate, and the defendant in this action asserts in his defence the regularity of the proceedings by which said mill and dam were established, and claims the protection thereof under the title derived by him from the said applicants, it is not competent for him to deny the ownership of the said land by the said applicants at the time of said proceedings, or to assert the continued ownership thereof by the plaintiff, from whose conveyance to said applicants they derived their title.

It further seems to the Court, that the record of the proceedings by which said mill and dam were established, cannot be aided or supplied by parole evidence of what passed before the jury at the time of their inquisition, for the purpose of shewing that the plaintiff assented to the establishment of said dam at the height fixed by the jury, and thereby renounced any claim which he might thereafter have for damages unfore-

seen and unestimated by the jury; and that although the plaintiff may have attended the inquisition of the jury, and given them information as to the height to which it would be proper the applicants should have leave to erect their dam, and expressed to them his opinion and belief founded upon observation and actual leveling, that a dam twelve feet high would not back the water upon the lands of any person but himself, and that as to himself he was satisfied that he would not thereby be injured; still that such conduct and declarations of the plaintiff would only serve to shew that any injury thereafter actually occasioned him by said dam was not foreseen and estimated by himself any more than by the said jury; and that such conduct and declarations of the plaintiff

cannot be treated as a contract with
102 *said applicants giving them leave to erect such dam and thereby occasion injury to the plaintiff; for as a contract so far as it allowed them to erect a dam upon their own land, it would be idle and nugatory, and so far as it authorized them to injure the plaintiff by backing the water upon his land, it was voluntary, executory and personal to the said applicants, amounting at most to nothing more than a parol license to them, indeterminate in point of time, and revocable at the pleasure of the plaintiff.

And it further seems to the Court, that if, as the evidence at the trial tended to prove, the said William B. and James W. Calhoun complied with the condition imposed by the statute, requiring such applicants to begin to build their mill and dam within one year, and finish the same within three years after the leave of the Court obtained, so as to be in good condition for the public use, but that the height to which the dam was so finished by them was not greater than about nine or ten feet, yet that their so stopping short of the full height fixed by the inquest aforesaid, did not have the effect of precluding them, or their assignees, from afterwards raising the said dam to the full height of twelve feet allowed by the inquest, provided by so doing they should not occasion injury to others.

And it further seems to the Court, that if, as there was evidence at the trial tending to prove, after the mill was finished and in operation, and when the dam was at the height of about nine or ten feet, the said William B. and James W. Calhoun desired to raise the latter somewhat higher, and did so by placing boards on the top to the height of several inches, which was done without consulting the plaintiff, who however soon discovered it, and complained that he was injured by such elevation, and required them to pull it down, and they being satisfied upon examination that the plaintiff was really thereby injured,

103 consented, and took *off the increased height, then that this was a revocation of any such parol license as above supposed.

And it further seems to the Court, that if, as the evidence at the trial tended to

prove, the said dam was erected and finished by the said William B. and James W. Calhoun as above mentioned only to the height of about nine or ten feet, at which height it was not complained of but acquiesced in by the plaintiff, until their sale and conveyance of the property on which it is situate, to the defendant in the year 1844, and was standing at that height at the time of such sale and conveyance, then that inasmuch as the plaintiff united in said sale and conveyance, the said dam as of that height must be considered as passing to the defendant by the terms and true intent and meaning of the deed of conveyance, and the plaintiff cannot recover damages against the defendant for any injury done him by any reflow of the water to the extent to which it existed at the time of said sale and conveyance; this Court expressing no opinion as to any injury from the reflow of the water, not existing at that time; the declaration only claiming the damages occasioned by the defendant's raising the dam since his purchase.

And it further seems to the Court, that the instructions and opinions of the Circuit court at the trial, so far as the same conflict with the principles above declared, are erroneous. It is therefore considered that the said judgment of the Circuit court be reversed and annulled, and the verdict of the jury set aside with costs to the plaintiff in error; and the cause is remanded to the Circuit court for a new trial of the issue between the parties; which new trial is to be governed; so far as applicable, by the principles above declared.

MILLS AND MILLDAMS.

- I. Jurisdiction.
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Cross References to Monographic Notes.

Constitutional Law.

Eminent Domain.

I. JURISDICTION.

Suit Brought Where Mill is Located.—An act of the assembly authorizing a canal company to sell its property and franchises to a railroad company, and providing that the circuit court of Richmond shall have exclusive jurisdiction over all suits in regard to the contract of sale, does not require that an action by a mill owner against a successor of the latter company, for the diversion of water by a canal, required to be maintained by such act, be brought in the circuit court of Richmond, but it may be properly instituted in the county where the mill is situated. *Ches., etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. Rep. 320.

Of County and Corporation Courts at Quarterly and Monthly Terms.—The county or corporation courts at quarterly terms may in their discretion decide upon controversies concerning mills; but at a monthly session they cannot take jurisdiction of any case expressly and exclusively assigned to the quarterly term. *Wilkinson v. Mayo*, 8 H. & M. 565.

No Power to Condemn Land for Race.—It was held in *Coalter v. Hunter*, 4 Rand. 58, that the law gave the court no power to condemn lands for a tall-race to a mill.

In Equity—To Settle Relative Water Rights.—Where the owners of two mills have the use of the same stream of water, and become involved in a controversy as to their relative rights to the same, the case is one for the equitable jurisdiction of a court, and it should proceed to ascertain, define and settle the rights of the parties to the use of the water power. *Hanna v. Clarke*, 81 Gratt. 36, 1 Va. Dec. 338, Va. Law Jr. 1879, p. 103.

Same—Removal of Dam—Inadequate Damages.—Where a suit is brought against a mill owner to abate his dam as a nuisance, the inadequacy of the damages, which the jury could give a mill owner for the loss and injury sustained by him in the removal of his dam, is a good ground for the interposition of equity. Thus where a milldam is attempted to be abated as a nuisance because it obstructs navigation, and such abatement would produce great loss to the owner of the mill, and great inconvenience to the public, equity has jurisdiction to prevent such abatement, and to preserve to the owner his establishment, until the question of his rights to keep up his dam has been decided. *Crenshaw v. Slate River Co.*, 6 Rand. 245.

Same—To Enjoin Rebuilding of Dam.—A mill and milldam were erected according to the statute concerning mills. The stagnation of water injured the health of the neighborhood, and one of the parties injured brought an action and recovered damages. Subsequently the milldam was washed away. While the mill owners were proceeding to rebuild, proposing certain expedients to prevent a repetition of these injuries, it was proper for a court of equity at the suit of the previous plaintiff at law to enjoin the rebuilding of the dam, unless the expedients proposed appeared effectual, which should have been ascertained by a jury. *Miller v. Trueheart*, 4 Leigh 569.

Same—Same—Necessary Allegations.—Two verdicts were rendered in favor of a party, whose land was overflowed, against the owner of a mill, for keeping

his dam too high. The dam being swept away, an injunction was asked to prevent the owner of the mill from rebuilding, alleging that he had not begun within the prescribed time, and that irreparable mischief would result. It appeared that the mill and dam had existed more than fifty years, but it did not appear that there was ever any order of court granting leave to build. It was held that the verdicts showed that the owner had a prescriptive right to keep the dam to some height, that they did not warrant an injunction, unless it appeared that he was about to build it beyond the authorized height; and that if it was competent for a court of equity to enforce a forfeiture, because of the lapse of the prescribed time in which he might rebuild, it could not be done by way of injunction, in the absence of an allegation of some sufficient and distinct ground of irreparable mischief. *Talley v. Tyree*, 3 Rob. 500.

II. ERECTION OF MILLS.

Strict Compliance with Authority Necessary.—The owner of an island in the Appomattox river obtained leave of court to build a mill on his island, and to condemn an acre of land on the main for an abutment for his dam. He placed the abutment on the condemned land, but did not build his mill on the island, but on the main, lower down, with the consent of the owner. It was held in *Stokes v. Upper Appomattox Co.*, 3 Leigh 818, that the mill was not established according to law, and that the mill owner and those claiming under him had no right to the water power of the stream, as against the public right of navigation, and an incorporated company to improve the navigation.

What Proceeding Proper When Petitioner Owns One Side of Stream.—Where the petitioner for leave to build a mill owns land on only one side of the stream, the proceedings should be under §§ 1, 2, 3 of ch. 235, 2 Rev. Code, and if the petitioner proceeds under § 4, the writ and inquisition should be quashed. *Whitworth v. Puckett*, 3 Gratt. 528.

Mill Rebuilt—Construction of Statute.—A mill which had been built, and had gone down, prior to the statute, 2 Rev. Code ch. 235, § 10, and which was rebuilt after the passage of that statute in 1819, is not a mill "thereafter built," within the meaning of the statute. *Webb v. Com.*, 3 Leigh 731.

Condemnation of Land for Abutment of Dams.—It was held in *Nash v. Upper Appomattox Co.*, 5 Gratt. 332, that the 9th section of the Act of 1834-35, p. 82, which was in regard to the condemnation of land by the defendant company necessary for the abutments of dams, embraced the case of a proprietor, whose land was injured by the erection of a dam across the river, to condemn the abutments of which dam no writ of *ad quod damnum* had been sued out by the defendants, they having agreed with the proprietors of the land owning the abutment.

III. RIGHTS OF MILL OWNER.

1. IN GENERAL.

Not Entitled to Land Overflowed on Payment of Damages.—The applicant for leave to build a mill is not entitled to the ownership of the land overflowed by the erection of a dam, upon paying the damages assessed by the jury. *Whitworth v. Puckett*, 3 Gratt. 528.

Failure to Erect Dam to Authorized Height—No Estoppel in Absence of Injury.—Where an inquest in a mill case authorizes the applicant to build a dam to a certain height, the fact that he did not in the first instance raise it to the authorized height, does not

preclude him from raising it to the full height authorized, provided in doing so he does not injure others. *Calhoun v. Palmer*, 8 Gratt. 88.

Estoppel of Subsequent Purchaser to Deny Title of Grantor.—Where a subsequent purchaser of a mill and dam relies upon the inquest and judgment of the court in authorizing the dam, as a defence to an action for damages caused by increasing the height of the dam, it is not competent for him to deny the ownership of the prior owner at the time of the proceedings, or to assert the continued ownership of the land by the plaintiff. *Calhoun v. Palmer*, 8 Gratt. 88.

2. SOURCE OF AUTHORITY.

a. LEGISLATIVE AND JUDICIAL.

Legislature May Confer Paramount Right on Individuals.—Although the public has a right to the use of streams and rivers for the purposes of navigation, yet the legislature by general law or particular grants may confer upon individuals rights in opposition to this public right. The general law authorizing courts to establish mills has conferred such paramount rights on owners of mills. *Crenshaw v. Slate River Co.*, 6 Rand. 245.

Dam Erected by Authority of Court on Floatable Stream Is No Nuisance.—If a county court gives authority for the erection of a dam on a floatable stream for the purpose of furnishing water power for the operation of a mill for the use of the public, such dam is not a public nuisance, although it is without sluices and flood gates and obstructs navigation. So a railroad company which inflicts injury upon a mill by an unlawful act cannot justify its wrong upon the plea that such dam is a public nuisance. *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. Rep. 521, 45 Am. St. Rep. 894. Compare *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. Rep. 60, 25 Am. St. Rep. 848.

b. PRESCRIPTION.

Public Rights Not Affected.—A riparian proprietor is not given any prescriptive right to maintain his dam across a floatable stream by lapse of time, as against the public, though it might give him the right to maintain such dam as against another riparian owner. *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. Rep. 60, 25 Am. St. Rep. 848.

Twenty Years' Use Not Conclusive—Rebuttal.—The fact that a dam was built in 1824, and that from that time the owner and those claiming under him have claimed and held possession and use thereof, and of the water power afforded thereby, and used in working the mill for which it was built, adversely and uninterruptedly for twenty years, is not conclusive of the right of the defendant to continue said possession and use of said mill and dam; it is only presumptive and may be rebutted by circumstances. *Field v. Brown*, 24 Gratt. 74.

3. IN FLOATABLE STREAMS.

May Build on Own Property without Order of Court.—Although a stream is floatable, a riparian proprietor may erect a mill and dam under his right of dominion over his own property without an order of court. *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. Rep. 521, 45 Am. St. Rep. 894.

Subservient to Public Right to Float Logs, etc.—A riparian proprietor of a floatable stream has the right to maintain and construct a dam, and to use the water for his mill, but in a way consistent with the public right to float logs on it. Thus the maintenance of a dam across a floatable stream, so as to prejudice the right of the public to float logs therein, and without providing suitable sluices to

allow logs to pass around the dam, is a public nuisance. *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. Rep. 60, 25 Am. St. Rep. 848. Compare *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 19 S. E. Rep. 521, 45 Am. St. Rep. 894.

Thus there can be no recovery for the destruction of a dam across a floatable stream by logs placed therein, as the land owner has no right to interfere with the public in the floating of logs and other products down the stream. *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. Rep. 60, 25 Am. St. Rep. 848.

4. TO USE OF WATER.

Rights of Prior Owner.—Where the prior owner of a dam across a stream only backs the water to the extent which is necessary for the operation of his mill, and does not pollute or divert the water, it is an error to perpetually enjoin him at the suit of a lower proprietor of a dam, from entirely cutting off or diminishing the natural flow of the stream, so that the plaintiff shall not at all times have a reasonable supply of water therefrom. *Mumpower v. City of Bristol*, 90 Va. 151, 17 S. E. Rep. 858.

Of Different Owners in Same Water Power—Preference in Use.—For a great many years a gristmill and a sawmill, owned by separate parties, were propelled by water power taken from the same dam. When the water was insufficient to run both, the gristmill had the preference in its use. The gristmill was subsequently sold, with all its privileges, and the owners changed it into a papermill, and changed the character of the wheels, which required that the water should be taken on a higher level. On a bill of injunction filed against the owner of the sawmill, it was held that the relative rights of the proprietors of the two mills, with respect to the water powers, continued the same after the sale of the gristmill as they were before; and that after the sale the owners were entitled to convert it into a papermill, and to the same priority in the use of the water for its operation, to the same extent to which they were previously entitled for the operation of the gristmill, but to no greater extent. *Hanna v. Clarke*, 31 Gratt. 36, 1 Va. Dec. 338, Va. Law Jr. 1879, p. 103.

IV. GRANTS OF PRIVILEGES.

1. CONSTRUCTION.

Below Established Mills.—The grant of water privileges below established mills will be so construed as to preserve the water power of such mills undisturbed, unless a contrary intent plainly appears from a reasonable construction of the instrument conveying the grant. *Miller v. Shenandoah Pulp Co.*, 38 W. Va. 558, 18 S. E. Rep. 740.

So when the privilege of turning the waters of a river down a canal has been given a mill owner, such privilege does not carry with it the right to dam the waters back by head gates or in any other manner, so as to destroy the water power of mills already established. *Miller v. Shen. Pulp Co.*, 38 W. Va. 558, 18 S. E. Rep. 740. See *Humes v. Shugart*, 10 Leigh 332.

2. EFFECT.

Rights Vested in Grantee.—Mills are considered as great public conveniences and benefits, and are regulated by law. They are never established except on inquisition of a jury, which must inquire whether ordinary navigation will be obstructed, and if they report that it will not, then leave is given to erect the mill. Such grant under such proceedings is a perfect one, and vests in the grantee

all the public rights to the stream, or so much thereof as is necessary to the full enjoyment of the mill. *Crenshaw v. Slate River Co.*, 6 Rand. 245.

Of Uniting in Conveyance on Recovery of Damages.—By uniting in the conveyance of mill property, the grantor cannot recover any damages against the grantee for any injury done him by the reflow of water, to the extent that the injury existed at the time of the conveyance. *Calhoun v. Palmer*, 8 Gratt. 88.

A father gave his son a tract of land on which there was a mill seat, and the latter applied to the county court, to build a mill and dam. At the inquisition the father stated that by erecting a dam twelve feet high, no damages would result to any body but himself, and he did not believe that it would injure him. The jury acted upon these representations, and the son was permitted to build a dam of that height, but he only erected it ten feet high. The father and son united in a conveyance of the property to a third party, who as soon as he found out what the inquisition of the jury was, added eight inches to the height of the dam. In a suit by the father to recover damages for the injury resulting from the increase of the height of the dam, it was held that his right to recover was not defeated by his conduct at the inquisition. *Calhoun v. Palmer*, 8 Gratt. 88.

On Conditions—Court May Allow Time for Compliance.—By an act of assembly a county court was empowered to grant permission to an individual to make a dam across a public highway; but the privilege was conditional on his keeping in his dam a lock or slope in repair for the passage of boats and fish. The county court was to be the judge of its sufficiency, and was empowered to abate the dam as a nuisance, if after three months' notice the lock or slope be adjudged insufficient. On motion of two individuals the dam was abated as a nuisance, because raised higher than authorized, and because of no sufficient lock or slope. The court had power to give the proprietor reasonable time to reduce the dam to the proper height, and to construct a sufficient slope or lock. *White v. King*, 5 Leigh 726.

V. PROCEDURE.

1. PROCESS.

Execution by Deputy Sheriff.—The writ of *ad quod damnum*, which issues upon an application to a court for leave to build a mill, may be executed by the deputy sheriff. It may be executed by him in all cases, unless the high sheriff is expressly required to act in person. *Wroe v. Harris*, 2 Wash. 126; *Noel v. Sale*, 1 Call 495.

Amendment before Judgment.—The court ought to permit the sheriff to amend his return upon a writ of *ad quod damnum* at any time before judgment is given upon it. *Dawson v. Moons*, 4 Munf. 535. See *Baird v. Rice*, 1 Call 18; *Bullitt v. Winstons*, 1 Munf. 209.

Should Direct Jury to Ascertain Damages Generally.—It was held in *Nash v. Upper Appomattox Co.*, 5 Gratt. 332, that where there had been no previous writ of *ad quod damnum* sued out by the company, to assess the damages sustained by the proprietor of land injured by the erection of a dam, it was proper that the writ sued out by the proprietor should direct the jury to inquire of, and assess the damages sustained by him generally, and not limit it to damages which had not been foreseen, estimated and satisfied.

Statement of Certain Height Where None in Order.—The mentioning in the writ of *ad quod damnum* of a

certain height for the milldam, is no ground for setting aside the proceedings at the instance of the opposite party; notwithstanding no particular height was specified in the order directing the writ. *Coleman v. Moody*, 4 H. & M. 1.

Defects Waived by Appearance.—An inquisition on a writ of *ad quod damnum* in a mill case, having found that the lands of a deceased person would be overflowed, and a summons having issued to the executor and trustee of the decedent, to show cause why leave should not be given to erect the mill; and the executor having appeared and contested the motion on its merits, he was precluded from afterwards saying that he was not legally summoned as the tenant or proprietor of the land. *Coleman v. Moody*, 4 H. & M. 1.

2. THE APPLICATION.

May Be Made *Ore Tenus*.—A petition for leave to build a mill may be made to the court *ore tenus*. *Mead v. Haynes*, 8 Rand. 88. See *Mairs v. Gallahue*, 9 Gratt. 94.

Must Comply with Statute.—In his application for leave to erect a mill, the petitioner must show that he has proceeded in the mode prescribed by law. *Whitworth v. Puckett*, 3 Gratt. 528.

What Is a Sufficient Compliance.—The petition states that the applicant desired a writ of *ad quod damnum* to issue for the purpose of erecting a water gristmill, etc. This is a sufficient compliance with the statute, which says "when any person desiring to build a water gristmill," etc. The difference is merely verbal and not material, the intention of the parties to build a mill being sufficiently and plainly expressed. *Mairs v. Gallahue*, 9 Gratt. 94. and *foot-note*.

Effect of Allegation That Applicant Owns Both Banks.—In a petition for leave to build a dam, the petition, which was *ore tenus*, stated that the applicant was the owner of the banks on both sides of the stream. This was in effect a statement that he was the owner of the land, especially as it appeared from other parts of the proceedings that he owned the land on both sides of the stream. *Mairs v. Gallahue*, 9 Gratt. 94.

Navigable Streams—Must Allege Bed in Commonwealth.—It is necessary to state in petitions for mills on navigable rivers, that the bed is in the commonwealth. *Martin v. Beverley*, 5 Call 444.

Failure to Allege Bed in Petitioner—Sufficient When Otherwise Shown.—A petition for leave to build a mill, where the bed of the stream belongs in part to the petitioner, will be sufficient upon showing that fact, although the petition itself does not state it, but on the contrary states that the bed of the stream belongs to the commonwealth. *Mead v. Haynes*, 8 Rand. 83.

Petitioner Owning One Side Only—Must Allege Bed in Himself or Commonwealth.—Where the person applying for leave to build a mill has land on one side only of the stream, it should be stated in the petition that the bed of the stream is in himself, or in the commonwealth. But this is not necessary, if he owns the land on both sides of the stream. *Wroe v. Harris*, 2 Wash. 126.

Application Refused When It Would Destroy Mill Already Built.—After a county court has granted leave to one applicant to build a mill, if application be made by another to build a mill lower down the stream, and the first applicant shows that the building of the second dam would destroy the privilege previously granted to him, the court in the exercise

of a sound discretion ought to refuse the second application. *Humes v. Shugart*, 10 Leigh 332.

Although leave be given to build a mill, while a prior application to build lower down the stream is still pending, yet as long as the order is unreversed and not appealed from, and it appears that by granting the prior application the privilege would be destroyed, the prior application should be refused. *Humes v. Shugart*, 10 Leigh 332.

3. ISSUES.

Cannot Try Title to Land.—An applicant for leave to build a mill upon a stream, and a dam across it, owned the lands on both sides of the stream. The inquest found, on *ad quod damnum*, that lands in the possession of another of a certain value, would be overflowed. The court being of opinion that these lands belonged to the applicant, gave him leave to build his dam without paying the assessed damages. This was an error, as the title to the land could not be thus collaterally tried. *Anthony v. Lawhorne*, 1 Leigh 1.

In *Wood v. Boughan*, 1 Call 329, the question was raised whether the court, on a petition for a mill, can try the title of the parties to the lands, without the intervention of a jury. It seemed to the court that the intention of the legislature was not to authorize the court in this summary proceeding to enter into a contest about title. And in this case the directing of the issue in the district court was not considered error, as the case upon the merits was left open for discussion.

Same—Proper Procedure.—The proper procedure in a case where the owner of lands on both sides of a stream petitions for leave to build a mill upon, and a dam across the stream, and the inquest shows that lands, which in the opinion of the court belong to the applicant, in possession of another party will be damaged to a certain amount, is that leave should be given the petitioner to build the mill and dam, only on condition that the applicant pay to the apparent owner the assessed damages. Then the dam might be built, without paying the damages, and the action for them could be defended on the ground that the overflowed land belonged to the owner of the mill, and thus the title would be directly put in issue in a regular way, without any embarrassment. *Anthony v. Lawhorne*, 1 Leigh 1.

Immaterial Issue.—In an action of trespass for destroying a milldam. If the defendants plead that the said dam was unlawfully erected by the plaintiff, in a ford where a public road crossed the stream, whereby the said road and ford were obstructed, to the great damage and nuisance of the citizens of the commonwealth, and that the defendants in order to abate the nuisance peaceably cut down and removed a part of the dam; and the plaintiff replies that by erecting the dam, he did not entirely obstruct the public road and ford, and the citizens of the commonwealth were not altogether prevented from passing the same; whereupon issue be joined, such issue is immaterial, and after a verdict for the plaintiff, should be set aside, and a repleader directed. *Dimmett v. Eskridge*, 6 Munf. 308.

4. INQUISITION.—See subsec. 7, "Verdict," *infra*.

a. IN GENERAL.

Same Questions Arise on Application to Raise Dam as on Application to Construct.—On an application to raise a milldam already erected, it is as necessary that an inquest should be had as to injuring the health of neighbors, obstructing navigation, etc., as on an application to construct a milldam originally. *Kownslar v. Ward*, Gilmer 127.

Proceedings When Improperly Quashed.—If the inquisition in proceedings for leave to build a mill be improperly quashed, the plaintiff should pray a new writ, or except to the opinion of the court. *Noel v. Sale*, 1 Call 495.

b. FINDINGS OF JURY.

Need Not Set Out Land Injured by Metes and Bounds.—It is not necessary in a mill case, either in the writ or inquest, that the land injured should be set out by metes and bounds, and the finding in the inquest that the proprietor's land had been injured by the overflowing of the waters produced by the erection of the dam, and that the damages assessed were on that account, is sufficiently specific. *Nash v. Upper Appomattox Co.*, 5 Gratt. 332.

Not Necessary to Set Out Injury to Land Below Dam.—It is not necessary that the inquisition should set forth the injury, which the land below the dam may sustain. *Wroe v. Harris*, 2 Wash. 126.

Fatal Omissions.—In a proceeding to raise a milldam, the writ required the jury to say what damage would be caused to the neighboring proprietors, as to their mansion houses, offices, curtilages, gardens or orchards; and to inquire into what degree fish of passage and ordinary navigation would be obstructed, and whether the health of the neighborhood would be annoyed by the stagnation of the water. The inquisition of the jury was fatally defective in that it made no particular answer respecting the passage of fish, the obstruction of navigation, and the annoyance of the health of the neighborhood. *Eppes v. Cralle*, 1 Munf. 258.

When Date Immaterial.—A date to the inquisition, upon a writ of *ad quod damnum*, is not essential, if it be stated under the hands and seals of the jurors that "in obedience to the annexed writ, they viewed the lands in question." *Dawson v. Moons*, 4 Munf. 535.

Proper for Jury to Name Height of Dam Where Order Omits It.—Where the petition or the order of the court directing the writ of *ad quod damnum* to issue in a mill case, does not specify the height proposed to be erected, it is proper and correct for the jury to name that height in their inquisition. *Mairs v. Gallahue*, 9 Gratt. 94.

c. SUFFICIENCY.

Substantially Responsive to Statute.—The inquisition in a mill case is sufficient, where upon a fair and reasonable construction, it is substantially responsive to the requirements of the statute. *Mairs v. Gallahue*, 9 Gratt. 94, and *foot-note*.

Implication of Other Damages Renders Inquisition Uncertain.—Where the jury, in a mill case, make return of certain damages, which will be caused by raising the dam, and by the uncertain wording of their inquisition, imply that there may be other damages to the parties than those given, the inquisition is defective for uncertainty, and will be set aside. *Eppes v. Cralle*, 1 Munf. 258.

Finding as to Effect on Health.—In a proceeding before the county court for leave to build a water gristmill and dam, the inquisition found was "that the health of the neighbors would be less or as little annoyed as it was possible it should be by the erection of any dam." On objection that this inquisition was insufficient and defective in regard to the effect upon health, it was held that the inquisition was sufficient. *Smith v. Waddill*, 11 Leigh 582.

d. WHEN SET ASIDE.

False Statements by Applicant.—If the applicant for leave to build a mill states that he is the owner of the land on both sides of the watercourse, when

In fact he is not, the writ of *ad quod damnum* and inquisition taken upon it, ought to be quashed. *Wilkinson v. Mayo*, 3 H. & M. 565.

More Land Damaged Than Is Estimated.—If on the hearing of a mill case, it appears that a greater quantity of land of the adjoining proprietors will be overflowed than is estimated by the jury, the inquisition should be quashed, and a new writ directed. *Whitworth v. Puckett*, 3 Gratt. 528.

Jurors Formerly Served in Same Case.—On a petition for leave to build a mill upon, and place a dam across a watercourse, the writ of *ad quod damnum* was awarded, and the inquisition of the jury was returned. An interested party was made defendant, and attempted to quash the inquisition on the ground that two of the jurors had formerly served in the same case. Though it appeared the points now in controversy could not have been at issue on the first inquest, yet it was held that the inquisition should be quashed for that cause. *Hunter v. Matthews*, 12 Leigh 228.

Variance between Petition and Writ.—The petition in a mill case requested permission to raise the dam "from its present height to fourteen feet and one-half." The court directed inquiry to be made as to what damages would accrue from raising the dam "six inches higher than the present height," without mentioning what the present height was. The writ was erroneous, and the inquisition taken on such writ erroneous. *Eppes v. Cralle*, 1 Munf. 258.

Jury Treated by Applicant—Inquisition Valid.—An inquisition in a mill case, ought not to be set aside on the ground that the jurors, before they were sworn and afterwards, when their verdict had been agreed upon, but before they had signed it, ate and drank moderately at the expense of the applicant, no corruption appearing, and the opposite party having consented. *Coleman v. Moody*, 4 H. & M. 1.

Statements by Applicant to Jury at Inquisition.—The jury impanelled under a writ of *ad quod damnum* awarded on an application for leave to build a mill, were apparently unable to agree upon a verdict, when the applicant announced that he would be willing to pay any damages they thought reasonable. A juror asked the applicant in the presence of the sheriff, the remaining jurors and the persons assembled, if he was willing to pay a certain amount. The applicant replied in the affirmative and the inquisition was completed. Although the owner of the land was not present, this was held not such an interference of the applicant with the jury, as would render it proper to set the inquisition aside. *Hunter v. Matthews*, 1 Rob. 468.

Statement by Sheriff.—On the trial of a writ of *ad quod damnum* to erect a milldam, one of the jurors, who signed the inquisition, gave evidence that the sheriff had declared in the presence of himself and another juror, that the defendant had consented to the erection of the milldam, in consequence of which he had agreed to sign the inquisition, this will not be a sufficient reason for quashing the inquisition. *Harwell v. Bennett*, 1 Rand. 282.

5. EVIDENCE.

a. IN GENERAL.

Question Tried in Lower Court Proved by Record.—Although in controversies concerning mills, the superior court of law, to which an appeal is taken from the county or corporation court, may hear new evidence upon questions submitted to its revision by the record, it ought not to receive any evidence, but that of the record itself, to prove what

questions were in fact tried in the court below. *Bohn v. Sheppard*, 4 Munf. 408.

Instructions.—The plaintiff, in an action on the case for damages caused by the erection of a dam across a stream by a previous owner, asks for instructions based upon the assumption that there can be no legal dam across a watercourse, unless established by legal proceedings under statutory authority, ignoring entirely rights acquired by actual grant, by permission and presumptive rights, derived from long use and enjoyment. Where there is any evidence in respect to such rights, these instructions are properly refused. *Field v. Brown*, 24 Gratt. 74.

b. COMPETENCY.

Who Not Competent as Expert.—A person who all his life has been familiar with the effect of a dam upon the channel of a stream, and who has twice superintended the putting up of the dam, and who was familiar with the effect on the channel when the dam was washed away, but who was not a millwright, or mechanic of any sort, is not competent to give evidence as an expert, as to the effect of a dam upon a stream in another county. *Ellis v. Harris*, 32 Gratt. 684.

When Plaintiff Competent, Defendant Owner Being Dead.—In an action against a mill owner for injury caused by the erection of a dam, where the question is whether the acts of the deceased in building his dam across the stream, injured the land of the plaintiff, the latter is a competent witness to prove the condition of his land, the character of the stream, the effect of the dam on the stream and on adjacent land, and other independent facts, as to which his testimony, if untrue, could be rebutted by others as readily as by the deceased. *Field v. Brown*, 24 Gratt. 74.

Record of Suit Competent to Rebut Adverse Possession.—In order to rebut the evidence of adverse possession introduced by the defendant to an action on the case for injury to land by a dam, the record of a former suit by the plaintiff against the administrator of a former owner of the premises, under whom the defendant claims, brought within twenty years from the date of the raising of the dam, for injury sustained by the same, and in which the plaintiff recovered damages, is competent for the plaintiff. *Field v. Brown*, 24 Gratt. 74.

c. ADMISSIBILITY.

Parol Evidence to Controvert Record.—Parol evidence is inadmissible to show that the legality of the erection of a dam was not in issue in a former case, when the record of that case shows that its legality was in issue. *Ches., etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. Rep. 830.

Evidence of Effect of Dams in One County Inadmissible in Another.—In an action to recover damages for injury to land caused by the overflow of a dam, in the county of Louisa, evidence of the effect of a dam in raising the bottom of a stream, and overflowing lands in the county of Albemarle, is inadmissible. *Ellis v. Harris*, 32 Gratt. 684.

Evidence to Show Defect in Inquisition Should Be Admitted.—The inquisition of the jury in a mill case was that the health of the neighborhood would not be affected, and it was opposed by a defendant on the ground of insufficiency, and that it was defective as to its effect on health, and intimated that if the objection was overruled he would offer testimony on that point. The court overruled the objection and refused to hear the evidence. This was

held on appeal to be error, as the testimony should have been heard. *Smith v. Waddill*, 11 Leigh 532.

Evidence of Title Inadmissible When Applicant in Possession Claiming Title.—The widow being in possession of a mansion house and plantation, as dower had not been assigned to her, notice was given to her by an applicant, desiring to build a dam against her land, that he would apply for a writ of *ad quod damnum*. After the writ was awarded and the inquisition returned, one of the heirs, residing on the place with his mother, was made a defendant and asked the dismissal of the case because no notice was given him as one of the proprietors. This being overruled he offered evidence to show that the applicant was not the owner of the land; but it being proven that the applicant was in possession claiming title, and had built a house thereon, it was no error for the court to refuse to admit this evidence. *Pitzer v. Williams*, 3 Rob. 241.

Facts May Be Proved Prior to Period Stated in Declaration.—In an action of covenant the breach of covenant charged in the declaration was, that during a specified period of time, the defendant deprived plaintiff of the water necessary for his mill, by diverting it therefrom, and suffering it to be diverted by others. The plaintiff is not limited in proving acts committed by the defendant or other persons, to the period stated in the declaration; but he may prove previous acts, in consequence of which the injury was sustained during that time. *Hollingsworth v. Dunbar*, 5 Munf. 199.

Recitals in Declaration—Evidence Admissible.—In 1824, a dam was built across a river, and did the land above the dam no injury. But in 1845, the owner of the land raised the dam, which caused injury to the land. The owner sued the owner of the dam claiming under the prior owner for continuing the dam, to the injury of his land, and in his declaration recited that the dam was erected without authority of law. Under this declaration the plaintiff may prove that the dam was raised in 1845, and the injury to his land was caused by raising it. *Field v. Brown*, 24 Gratt. 74.

Adverse Possession Presumptive Evidence—May Be Rebutted.—In an action on the case by the owner of a mill against the defendant for causing the water in a stream to flow back and obstruct his mill, it appeared that the defendant claimed under a person who had obtained leave to build a dam below, provided he did not dam the water higher than a particular log. The water was dammed higher than the log, and was backed upon the plaintiff. This state of affairs had existed for more than twenty years. It was held that the twenty years' exclusive and adverse user was not conclusive evidence of the defendant's right, but only presumptive, and that evidence showing that this user was not acquiesced in, but contested, was proper evidence to rebut the presumption. *Nichols v. Aylor*, 7 Leigh 546.

So in an action for injury to land by continuing a dam erected across a stream by a previous owner, the defence is adversary possession by the defendant, and those under whom he claims for more than twenty years. This presumption may be rebutted by the plaintiff proving what passed between his agent and a former occupant of the premises, showing that the agent denied the right of the former occupant to raise the dam, and that the latter requested it as a privilege for a short time. *Field v. Brown*, 24 Gratt. 74.

6. PLEA AND REPLICATION.

Dam Adjudged Unlawful in Former Action.—Where an action was brought for damages for failure to maintain a dam for the benefit of the plaintiff's mill, a plea that in a former action by the grantors of the plaintiff against the defendant the dam was adjudged unlawful, states a good defence, since the right of the plaintiff cannot be maintained, as the dam is unlawful. *Ches., etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. Rep. 320.

Compliance with Statutory Authority.—In an action brought by a mill owner for damages for the diversion of water from his mill, a plea that the defendant, by statutory authority was empowered to construct a dam and operate a canal, and was required to keep the canal supplied with water for the purpose of navigation, and that it was necessary to withdraw water from the river at the mill, and that no more was used than was necessary, states a sufficient defence. *Ches., etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. Rep. 320.

Contention Not Considered Unless Pleaded—Where in an action against a mill owner, the damage resulting from a dam, lawfully constructed, is in issue, the contention that certain rights of the plaintiff were not condemned, and could not be condemned, will not be considered, when such rights are not pleaded. *Ches., etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. Rep. 320.

Insufficient Replication.—To an action for damages for the diversion of water from a mill, it was pleaded that the defendant was required by statute to supply water from its dam for the navigation of a canal, causing the diversion complained of, and the replication stated that the act authorizing the dam had only provided that compensation be made for foreseen damages, and that the damages to the plaintiff could not be foreseen. This was insufficient, as the effect of the diversion of water from the dam could have been seen at the time of the inquest. *Ches., etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. Rep. 320.

7. VERDICT.—See subsec. 4, "Inquisition," *supra*.

Omissions Render Imperfect—Inquest Quashed.—On an application to raise a milldam already erected, the verdict only responds to the damage done a contiguous owner, by flooding his land, and not to the health of the neighborhood. This verdict is imperfect and the inquest will be quashed. *Kownslar v. Ward*, Gilmer 127.

Unnecessary Inquiries Regarded as Surplusage.—In a proceeding to obtain leave to add to the height of a milldam, if the jury is directed to ascertain damages accruing from the dam already erected, the error should be regarded as surplusage (the petition for the writ having only prayed for such inquiry as the law authorizes) if the jury assessed such erroneous damages separately, and the court did not direct the same to be paid, but only the damages properly assessed. *Eppes v. Cralle*, 1 Munf. 258.

Effect on Petitioner—Finding as to Health.—A finding of a jury in a mill case, that "probably the health of certain families who live near the pond will be annoyed by the stagnation of the water," is conclusive against the petitioner. *Mayo v. Turner*, 1 Munf. 405.

Lack of Particularity in Indictment Cured by Verdict.—An indictment for a nuisance caused by a certain mill and milldam, the property of the defendant situated near a common highway, without particular specification or description of the mill, and without expressly alleging that it is in the county

wherein the indictment is found, is good and sufficient after verdict. *Stephen v. Com.*, 2 Leigh 759.

What Verdicts Sufficiently Special.—If the verdict of a jury in a mill case finds that a certain number of acres of land will be overflowed, estimated at a certain price, and that all other damages which the owner will sustain for probable injury to other lands and inconveniences, are estimated by them at a further sum expressed in their inquest, the verdict is special enough. *Dawson v. Moons*, 4 Munf. 535. See *Coleman v. Moody*, 4 H. & M. 1.

Likewise in a proceeding for the erection of a mill if the jury find that a certain number of acres of land will be overflowed, "together with all other damages to the value of a certain sum," the verdict is special enough, and will not be a bar to an action for any damages not foreseen and estimated by them. *Coleman v. Moody*, 4 H. & M. 1; *Dawson v. Moons*, 4 Munf. 535.

8. JUDGMENT.

Effect on Issues Raised.—A judgment which determines the legality of a dam, when such issue has been raised by the pleadings, is conclusive between the parties or their privies in a subsequent action, as they are estopped from denying such fact. *Ches., etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. Rep. 320.

Has No Effect on Issues Not Decided.—It cannot be contended that a judgment which only authorized the construction of a dam, and did not find that the dam actually constructed was lawful, will defeat an estoppel arising from a subsequent judgment finding the dam to be illegal. *Ches., etc., R. Co. v. Rison*, 99 Va. 18, 37 S. E. Rep. 320.

Granting Application on Condition—Incident to Grant.—Where the judgment of the court, granting leave to erect a dam, provides that the applicant shall keep a ferry boat at the crossing of a public road over the stream, the duty of keeping up the boat is not merely personal to the grantee of the privilege of erecting the dam, but it is a condition and incident to the grant, and attaches to it into whosoever hands it may pass. *Mairs v. Gallahue*, 9 Gratt. 94.

Reversed for Uncertainty.—When the jury, on an application proceeding for leave to build a mill, suggested three plans, in each of which the damages were different, and in one of which the health of the neighborhood would be injured, and the court established the mill generally, without confining the applicant to either plan, the order will be reversed for uncertainty. *Coalter v. Hunter*, 4 Rand. 58.

Where Applicant Owns Both Sides of Stream.—A judgment, which gives leave to the proprietor of the land on both sides of a stream to erect a mill and dam thereon, is valid and sufficient, though the record does not show to whom the bed of the stream belongs, and though the owner of land which the inquisition finds will be overflowed, had no notice of the time of making the application for the writ of *ad quod damnum*, or of the time of executing the same. *Hunter v. Matthews*, 1 Rob. 468.

Erroneous Giving of Land Injured to Applicant on Payment of Damages.—Where, upon an application to the county court for leave to erect a mill and dam, the inquisition finds that a certain quantity of land not belonging to the applicant will be overflowed, and assessed damages to the proprietor, it is erroneous for the judgment, granting leave to erect the mill and dam, to provide that upon payment of the assessed damages, the land overflowed shall become vested in the applicant in fee simple. Upon appeal by the proprietor to the circuit court,

it must reverse the judgment with costs, though the appellee himself suggest the error and move that it be corrected. *Hunter v. Matthews*, 1 Rob. 468.

9. APPEALS.

Jurisdictional Amount.—In an action on the case for consequential damages, occasioned by the erection of a mill, if the damages recovered be less than \$100, the defendant cannot appeal to the court of appeals, notwithstanding it appears from the record that the right to erect the mill was drawn in question. *Skipwith v. Young*, 5 Munf. 276.

Writ of Error from General Court.—A motion to abate a dam as a nuisance, as provided in the act of assembly authorizing its construction, is a criminal prosecution, and a writ of error lies from the general court to the order of the circuit superior court, affirming an order of the county court. *White v. King*, 5 Leigh 726.

When Witnesses Divided Judgment of Lower Courts Affirmed.—When, on a petition for a mill, the witnesses are divided whether it will be injurious or not, and the county court and district court both decide that it will not be injurious, the court of appeals will affirm the judgment. *Home v. Richards*, 2 Call 507.

Party Prevailing Entitled to Costs.—On an appeal in a mill case, the party prevailing ought to be allowed in the bill of costs, the mileage and attendance of his witnesses, summoned to the court of error, though the court determined on viewing the record, and therefore did not examine the witnesses. *Eppes v. Cralle*, 1 Munf. 258.

In Absence of Contrary Evidence Actions of Lower Court Presumed Correct.—The judgment of the court giving permission to erect a dam provides that the applicant shall keep a ferry boat at the crossing over the stream across which the dam is to be erected. This was authorized by 2 Rev. Code, ch. 237, § 5; and as the county and circuit courts held that this would remedy any impediment to the crossing of the stream, the court of appeals will presume that they acted rightly, nothing being shown to the contrary. *Mairs v. Gallahue*, 9 Gratt. 94.

Evidence in Lower Court Presumed Sufficient When No Exception.—The judgment of the county court authorizing the erection of a dam was excepted to on the ground that the health of the neighborhood would be injured; and the evidence was embodied in the exception. With all the evidence before it the circuit court passed upon the question, and no exception was taken to its opinion. As both county and circuit court were satisfied upon the question, the court of appeals will presume that the evidence was sufficient to show that the health of the neighborhood would not be affected by the dam. *Mairs v. Gallahue*, 9 Gratt. 94.

Supersedeas—Lies Only for Interested Party.—A *supersedeas* to a judgment of a county court, granting leave to erect a mill, will not lie on behalf of a person who may be interested, but whose name does not appear in the record of the county court as a party. Such person should make himself a party to the contest before the final decision in the county court, and then it is competent for him to carry the case to a superior tribunal. *Wingfield v. Crenshaw*, 3 H. & M. 245.

Same—Appellate Court Not Confined to Errors Apparent in Record.—If a *supersedeas* be granted to an order of an inferior court, giving leave to build a mill, the superior court is not confined to errors apparent

on the face of the record. *Lee v. Turberville*, 2 Wash. 102.

Remand of Cause—Inquisition Erroneously Quashed and Relevant Testimony Excluded.—When the order of the circuit superior court in a mill case was erroneous in quashing the inquisition found in the county court, and it also erred in refusing to admit certain testimony as to it, the court of appeals should reverse the order with costs, and the cause should be remanded to that court, to be there heard upon the evidence and the merits. *Smith v. Waddill*, 11 Leigh 532.

Same—Judgment against Plaintiff without Prejudice to Future Application.—On an appeal to the circuit superior court, from the county court giving the plaintiff leave to build a mill and dam in a mill case, the judgment was reversed, inquisition quashed, and judgment was given for the defendant without prejudice to a future application. The appellate court should have remanded the cause to the county court for further proceedings to be there had. *Hunter v. Matthews*, 12 Leigh 238.

10. REVIVAL AND REMOVAL.

Prior to Code of 1849 Revival against Heirs of Defendant.—If prior to the Code of 1849, any party resisting an application for permission to build a mill had died, the proceeding might have been revived against his heirs, not by virtue of any statute, but from the very nature of the statutory proceedings by the writ of *ad quod damnum*. See, as to revivals, Code of 1849, ch. 178, p. 656; *Hale v. Burwell*, 2 P. & H. 608.

Removal to Circuit Court under Code 1849.—An application for permission to build a mill is a civil action, which under the 4th section of the Act of March 14, 1843, amended and re-enacted in the Code of 1849, p. 657, §§ 1 and 2, may be removed from the county to the circuit court, after it has been pending in the former court for twelve months. *Hale v. Burwell*, 2 P. & H. 608.

11. RECORD.

Should Show Notice or Waiver.—Upon an application for leave to build a mill, it should appear to the appellate court by the record, that the party whose property is sought to be condemned, had ten days' previous notice of the motion for a writ of *ad quod damnum*. This might be dispensed with, if the record shows that the proprietor appeared and contested the application upon the merits. A general appearance will not be sufficient. *Bernard v. Brewer*, 2 Wash. 76.

Should State Bed of Stream in Applicant or Commonwealth.—Upon an appeal from an order giving leave to build a mill, the record should state that it appeared to the court granting the order, that the bed of the watercourse was in the applicant, or in the commonwealth. *Richards v. Hoome*, 2 Wash. 36.

What Statements by Clerk Sufficient.—It is sufficient for the clerk to state in the record of a mill case, that the writ of *ad quod damnum* with the inquisition annexed, was returned by the sheriff, without inserting a copy of the signature of the sheriff or his deputy to the return; a copy of the inquisition itself with the signatures of the jurors being inserted in the record. *Coleman v. Moody*, 4 H. & M. 1.

VI. DAMAGES.

Measure of for Injury to Real Property.—In an action to recover for injuries to real property resulting from the construction and maintenance of a dam backing water thereon, the measure of damages is

the difference between the value of the property at the time the damages were inflicted and its value before such was done. *Rowe v. Shenandoah Pulp Company*, 42 W. Va. 551, 26 S. E. Rep. 820, 57 Am. St. Rep. 870.

Court Cannot Increase Damages Assessed by Jury.—It is not within the power of the court in a mill case to increase or diminish the damages, which have been assessed by the jury, as resulting to the adjoining proprietors. *Whitworth v. Puckett*, 2 Gratt. 528.

When Payment of Damages Presumed.—Under some circumstances payment of the damages assessed in a mill case, ought to be presumed, as where a great length of time has elapsed, during which the owner of the land, to whom such damages were assessed, acquiesced in the building of the mill, without claim or objection on his part. *Young v. Price*, 2 Munf. 534.

Injury at Time of Erection of Dam—Subsequent Injuries—Presumption.—Where the erection of a dam results in injury to land by overflows, the owner may recover full damages for all the land owned by him at the time of the erection of the dam. But for injuries for land since acquired by him he can only recover such damage as was not actually foreseen and estimated by the jury when the dam was built. The jury must presume that the jury of the inquest did foresee and estimate all damages which were then practicable to foresee and estimate for. *Ellis v. Harris*, 32 Gratt. 684.

Injuries for Negligence in Keeping Guard Bank in Repair.—In an action for injury to land from negligence in not keeping a guard bank to a dam in proper repair, only the injuries suffered after the plaintiff's purchase can be considered. *Ches., etc., R. Co. v. Chambers*, 95 Va. 508, 28 S. E. Rep. 872.

Though one condemn land for dam, abutment, and guard bank and pay damages assessed therefor, damages can afterwards be had for injury to the part of the tract not condemned, resulting from negligence in not keeping the guard bank in proper repair. *Ches., etc., R. Co. v. Chambers*, 95 Va. 508, 28 S. E. Rep. 872.

Petition to Increase Height of Dam—Proper Inquiry of Damages.—On a petition for leave to add to the height of a dam, the only proper subject of inquiry is what damages will be occasioned by the proposed addition. It is error therefore to direct a jury to assess such other damages, accruing from the dam already erected as were not contemplated by the original jury. *Eppes v. Cralle*, 1 Munf. 258.

Order Granting Mill Valid without Direction to Pay Damages.—An order of court granting leave to erect a mill is valid, though no order be made directing payment of the damages found by the inquisition. *Coleman v. Moody*, 4 H. & M. 1.

VII. CRIMINAL PROSECUTIONS.

Obstruction of Navigation or Passage of Fish.—A boom company may be proceeded against by indictment for erecting and maintaining a dam or other things, in any watercourse which is a public highway, which dam obstructs the navigation or the passage of fish, under sec. 24, ch. 44, W. Va. Code 1891. *State v. Elk, etc., Co.*, 41 W. Va. 706, 24 S. E. Rep. 590.

Leave of Court to Build No Bar to Prosecution.—Although leave has been given by the county court to erect a mill according to the provisions of the statute, yet that is no bar to a public prosecution or private action for injuries, other than those actually

foreseen, and estimated by the inquest. *Com. v. Faris*, 5 Rand. 691.

Throwing Sawdust in Water No Offence.—Casting sawdust into a brook from the operation of a saw-mill does not constitute an offence under W. Va. Code 1891, ch. 150, sec. 20b. *State v. Mitchell* (W. Va.), 35 S. E. Rep. 845.

104 ***Kelly v. Linkenhoger.**

July Term, 1851, Lewisburg.

(Absent CABELL, P.)

1. **Foreign Attachment—Land of Absent Debtor Purchased by Home Defendant—Liability for Debt.***—In a proceeding by foreign attachment, the home defendant denies that he has any effects of the absent debtor in his hands. He says that a tract of land which had belonged to the absent debtor, had been purchased by himself and paid for: And he in fact held the receipt of the absent debtor for the amount of the purchase money. As however he did not pretend he had paid the amount in money, and as the accounts which he endeavoured to establish were not proved to the satisfaction of the commissioner and the Court, the land was held liable.

2. **Same—Interlocutory Decree—Appeal—Effect of Failure to Decree against Absent Debtor or Direct Security.**—In such case, upon an appeal from an interlocutory decree for the sale of the land, the appellate Court will not reverse the decree because the Court did not decree against the absent debtor or direct the giving the security as provided by law in behalf of absent defendants: The final decree may provide for these things.

This was a proceeding by foreign attachment in the Circuit court of Botetourt county, by John Linkenhoger who sued for the benefit of George W. Carper, against George W. Kelly, as an absent debtor, and John Q. A. Kelly, a home defendant. The plaintiff charged that George W. Kelly owed him the sum of 100 dollars, due by bond executed the 28th January 1839, and payable on the first of May 1842. That Kelly had removed from the Commonwealth and resided in Georgia. That he was the owner of an interest in a tract of land in the county of Botetourt and in two slaves, which had been the property of his father; and that he had conveyed his interest in said land and slaves to the defendant John Q. A. Kelly, without consideration,
105 and *for the purpose of enabling him to sell and convey it for George W. Kelly.

The home defendant answered denying that he had anything in his hands belonging to George W. Kelly; and insisted that he had bought the land for 500 dollars, which was a full price; the land being sold subject to a debt due from the estate of John Kelly, the father, from whom the land was derived.

The Court below directed a commissioner to enquire and report what was the consideration on which the land in the bill mentioned was conveyed by George W. Kelly to John Q. A. Kelly. In obedience to this order the commissioner reported that al-

though the conveyance purported to be in consideration of 500 dollars, and there was a receipt of George W. Kelly to John Q. A. Kelly for that sum, yet that the services which the latter claimed to have rendered to the former, for which there was due this sum of 500 dollars, were sustained by evidence entirely too indefinite to be the foundation of a statement of an account between the parties; and he therefore reported that the conveyance was without consideration.

This report was excepted to by the defendant, on the ground that the commissioner had not stated the accounts between the parties; and it was insisted that the evidence was sufficient to enable the commissioner to make the statement.

The cause came on to be heard in April 1848, when the Court overruled the exceptions to the commissioner's report, and held that the plaintiff was entitled to have satisfaction of his claim out of the land in the bill and proceedings mentioned. And it was decreed that, unless the defendants should within sixty days from the expiration of the present term of the Court, pay to the plaintiff the sum of 100 dollars, with interest thereon from the 1st of May 1842 till paid, and his costs, a commissioner named, should, after advertising, &c.,
106 sell the *said tract of land at public auction on the premises on a credit of six, twelve and eighteen months, in equal instalments for the residue, after requiring so much of the purchase money to be paid in hand as might be necessary to defray the expenses and charges of sale. From this decree John Q. A. Kelly applied to this Court for an appeal, which was allowed.

F. T. Anderson, for the appellant, and Boyd, for the appellee, submitted the case.

BALDWIN, J., delivered the opinion of the Court.

The Court is of opinion, that the appellant has in his hands of the purchase money of the land in the proceedings mentioned, more than enough to satisfy the debt and interest thereon, due from the absent defendant George W. Kelly to the appellee Linkenhoger; and therefore that the decree of the Circuit court is right upon the merits; and that the said decree being only interlocutory, it will be time enough upon the final hearing of the cause, to decree against said absent defendant and to direct in his behalf the security provided by law in behalf of absent defendants. It is therefore adjudged, ordered and decreed, that the said decree of the Circuit court be affirmed, with costs to the appellee Linkenhoger.

107 ***Adams v. Martin.**

July Term, 1851, Lewisburg.

(Absent CABELL, P.)

1. **Unlawful Detainer—Evidence—Nature of Possession—Parol Lease.***—Upon the trial of a writ of unlawful

*See monographic note on "Attachments" appended to *Lancaster v. Wilson*, 27 Gratt. 624.

*See monographic note on "Unlawful Detainer" appended to *Dobson v. Culpepper*, 23 Gratt. 352.

detainer, defendant sets up title in himself. Plaintiff may prove that the defendant entered on the premises under a parol lease from himself; though the lease proved was to continue more than one year.

2. Same—Same—Witnesses—Joint Tenant.—The defendant claiming title under a deed made to himself and another as joint tenants, that other person is not a competent witness for him to sustain his right of possession.

This was a proceeding by writ of unlawful detainer in the County court of Lee, in which William Adams was plaintiff and Wilkerson Martin was defendant. On the trial the defendant claimed to hold the land in controversy under a deed from David H. Campbell, administrator with the will annexed of Arthur Campbell, to himself and Joseph P. Bishop, bearing date the 28th November 1844. The plaintiff alleged that there existed a verbal contract between the plaintiff as landlord and the defendant as tenant of the land in controversy, commencing in the year 1840; and to prove the same, introduced a witness who stated that the defendant had informed him that he had come in possession of the land in controversy upon an oral contract with the plaintiff, that the defendant should proceed to improve the land and premises; and that he was to enjoy the use and occupation thereof until he should be thus paid for all the improvements he should make. And the defendant contending that from the statements made by the witness it appeared that the time of the continuance of the alleged lease was indefinite, and from

108 its character *not to be performed as an agreement or terminate as a lease within the period of one year from the alleged commencement thereof, he by his counsel objected to the introduction of oral testimony to prove such lease, on the ground that it was in violation of the statute of frauds and perjuries. But the Court overruled the objection and admitted the evidence: and the defendant excepted.

In the further progress of the cause the defendant offered to introduce Joseph P. Bishop as a witness, but the plaintiff objected to his introduction, upon the ground that the witness was interested in the result of the suit; the land having been conveyed by Campbell to the defendant and the witness jointly, under which conveyance they claimed title; and which was relied upon and given in evidence on the trial by the defendant. The Court sustained the objection and excluded the witness: And the defendant again excepted.

There was a verdict and judgment for the plaintiff; and Martin thereupon obtained a supersedeas to the judgment from the Circuit court of Lee county: And when the cause came on to be heard in that Court, the judgment was reversed for the refusal of the County court to admit Joseph P. Bishop as a witness. From this judgment Adams applied to this Court for a supersedeas, which was allowed.

J. W. Sheffey, for the appellant, and S. Logan, for the appellee, submitted the case.

ALLEN, J., delivered the opinion of the Court.

Inasmuch as it appears from the 2d bill of exceptions taken by the defendant in error to the decision of the County court excluding Joseph P. Bishop as a witness on the ground of incompetency, that said Bishop was a joint tenant with said defendant of the premises, the possession whereof 109 was the subject in controversy, *that the defendant had relied upon the deed which constituted said joint tenancy with said Bishop in his defence, it seems to the Court here that said Bishop was directly interested in the result of the suit, being seized with his co-jointtenant per my et per tout, the possession of the defendant was his possession, and his evidence tending to maintain such possession in the said defendant was evidence tending to establish a fact enuring to his own benefit; and that he was properly excluded as an incompetent witness.

And it further seems to the Court, that the County court did not err in overruling the objection of the defendant in error to the testimony set out in his first bill of exceptions, inasmuch as although the contract the evidence tended to prove may have been void under the statute of frauds, it was still competent for the plaintiff to shew that the defendant had entered under an agreement to rent the premises, and stood in the relation of tenant to the plaintiff; and whether such tenancy was to endure for a year or a longer period, could not affect the question depending on the relation the parties bore to each other when the defendant entered upon the premises.

It is therefore considered by the Court that the judgment of the Circuit court reversing the judgment of the County court is erroneous; and the same is reversed with costs to the plaintiff in error. And this Court proceeding to render such judgment as said Circuit court should have done, it is further considered that the judgment of the County court be affirmed, and that the plaintiff in error recover of the defendant in error his costs by him about his defence in the Circuit court expended.

BALDWIN, J., dissented.

He said he thought the judgment of the Circuit court was wrong in holding 110 that Bishop was an incompetent *witness, whatever might be the rule in regard to other actions. That by express provision of the statute regulating writs of unlawful detainer, a judgment in such a proceeding concluded nothing in regard to the title or the right of possession, the effect being only when for the plaintiff, to give him the mere possession, and when for the defendant to leave him in the possession; but in no wise affecting the title or right of possession in any higher action between the same parties. That the judgment, if for the plaintiff, would give him no action against

the defendant or the witness for mean profits, and if for the defendant, no protection to him or the witness in respect to future profits; and that in this case a judgment for the defendant would be no evidence between him and the witness as to the title or right of possession, nor give any possession to the witness if he should be kept out by the defendant.

Bell v. Crawford.

July Term, 1851, Lewisburg.

(Absent CABELL, P.)

1. **Pleading and Practice—Assumpsit—Plea of Nonassumpsit—Set-Off.***—In *assumpsit* defendant pleads *nonassumpsit*, and with it files affidavit of set-off, and the set-off, which is a note. Though there is no plea of set-off or bill of particulars, the evidence in relation to the set-off is properly admitted.

2. **Statute of Limitations—When Removed by Promise to Pay Debt.**†—A promise which will remove the bar of the statute of limitations, must be a promise to pay a debt: And a promise to settle with the claimant is not sufficient.

3. **Same—When Prevented by Part Payment.**—If a part payment will take a case out of the statute, it must be a payment upon the specific debt, and not a payment upon account.

111 *This was an action of *assumpsit* brought in July 1845, in the Circuit court of Augusta county, by James Bell against John Crawford. There was no question about the debt claimed by the plaintiff from the defendant; but the contest arose upon a set off relied upon by the defendant, and which was objected to by the plaintiff as being barred by the statute of limitations. The question whether it was barred depended upon whether there was a sufficient promise in writing to pay the debt, or a sufficient part payment, to take the case out of the statute. The facts of the case are sufficiently stated in the opinion of Judge Moncure; and

***Pleading and Practice—Set-Off.**—An imperfect statement of such a payment, as a set-off, might perhaps, have been aided by its being proven, without objection. *Merchants', etc., Bank v. Evans*, 9 W. Va. 387; *Bell v. Crawford*, 8 Gratt. 110.

And in *Smith v. Pattle*, 81 Va. 665, it is said: "It is, therefore, clear that it is the duty of a personal representative, when sued at law, to plead the statute of limitations as to all claims which were barred at the time of action brought, though when he is plaintiff the statute may be relied upon in an action at law, to a matter of set-off, without formal plea. See *Trimyer v. Pollard*, 5 Gratt. 460; *Bell v. Crawford*, 8 Gratt. 110." The principal case is cited in *Moses v. Trice*, 21 Gratt. 566, to the point that the court no more invades the province of the jury by excluding evidence, than by pronouncing it insufficient in law; by one course the evidence is thrown out of the case, by the other it is destroyed, which in effect is the same thing.

†**Statute of Limitations—When Promise to Pay Not Sufficient to Remove.**—The principal case, upon the authority of *Bell v. Morrison*, 1 Pet. 351, *Aylett v. Robinson*, 9 Leigh 45, and *Sutton v. Burruss*, 9 Leigh

the statement of facts is so mingled with his views of the law, that they cannot be separated. There having been a verdict and judgment for the defendant, the plaintiff applied to this Court for a supersedeas, which was awarded.

Michie and Fultz, for the appellant, insisted:

1st. That if part payment would take a case out of the statute under our act of 1838, it must be a payment in part of the very debt, and not a payment generally on account. And for this they referred to *Tippetts v. Hearne*, 4 Tyrw. R. 775; S. C., 1 Crompt. Mees. & Ros. 252; *Joynes on Lim.* 124, 126; *Waugh v. Cope*, 6 Mees. & Welsb. 824; *Beirn v. Bolton*, 52 Eng. C. L. R. 476.

2d. That a promise to settle, or the acknowledgment that there will be something due upon a settlement of accounts, though in writing, will not take a case out of the statute. And for this proposition they referred to *Wetzell v. Bussard*, 11 Wheat. R. 309; *Bell v. Morrison*, 1 Peters' R. 351; *Aylett v. Robinson*, 9 Leigh 45; *Sutton v. Burruss*, Id. 381; *Linsell v. Bonsor*, 29 Eng. C. L. R. 319; *Angel on Lim.* 300; *Joynes on Lim.* 278-285; *Buckett v. Church*, 38 Eng. C. L. R. 83.

112 *Fultz further insisted:

3d. That a part payment did not remove the bar of the statute. That the English statute did not exclude from its operation mutual accounts and accounts stated. *Jones v. Ryder*, 4 Mees. & Welsb. 32; *Mills v. Fowkes*, 35 Eng. C. L. R. 175; *Waller v. Lacy*, 39 Id. 349; *Cottam v. Partridge*, 43 Id. 146; *Angel on Lim.* 302. That the statute had received this construction when the act of 1838 was passed, adopting the *Tenterden* act, but omitting the proviso: and according to a well settled principle we adopt the construction with the statute. And now by the Code of 1850, no doubt is left on the question.

Baldwin and Hugh W. Sheffey, for the appellee, insisted:

1st. That a part payment takes a case out of the statute; and they referred to the English decisions on the *insimul computas* set count, as analogous in principle. These were *Smith v. Forty*, 19 Eng. C. L. R. 305; *Ashby v. James*, 11 Mees. & Welsb. 542; *Worthington v. Grimsditch*, 53 Eng. C. L. R. 479.

881, holds that, a promise to settle, or an acknowledgment that something is due, but mentioning no certain amount, although in writing, will not remove the bar of the statute of limitations. See 4 Min. Inst. (3d Ed.) 616; Va. Code 1887, sec. 2922. This proposition is approved in the following cases citing the principal case: *Dinguid v. Schoolfield*, 32 Gratt. 808; *Horner v. Speed*, 2 P. & H. 643; *Switzer v. Noffsinger*, 82 Va. 523; *Gover v. Chamberlain*, 83 Va. 385. 5 S. E. Rep. 174; *Rowe v. Marchant*, 86 Va. 183, 9 S. E. Rep. 995, citing the principal case for the converse doctrine that where the promise is certain it will remove the bar; *Coles v. Martin*, 90 Va. 233, 37 S. E. Rep. 907; *Abrahams v. Swann*, 18 W. Va. 280; *Quarrier v. Quarrier*, 86 W. Va. 317, 15 S. E. Rep. 156. See also, *Tazewell v. Whittle*, 13 Gratt. 329, and *note*.

2d. That though the part payment must be upon a specific debt; and though the proof of the acknowledgment of the payment must be in writing, yet the writing need not state the amount of the debt; or refer in terms to it. And they referred to *Beirn v. Bolton*, 52 Eng. C. L. R. 476; *Buckett v. Church*, 38 Eng. C. L. R. 83; *Gardner v. McMahon*, 43 Id. 867; *Frost v. Bengough*, 8 Id. 317; *Pierce v. Brewster*, 22 Id. 452; *Waller v. Lacy*, 39 Id. 349; *Hooper v. Stevens*, 32 Id. 504; *Ilsey v. Jewett*, 2 Metc. R. 168.

3d. That the statute does not change the nature of the acknowledgment which will take a case of the statute; but requires it to be in writing. This was clearly intended by the provision which declared that
113 *the acknowledgment should draw down the original consideration; and thus established the Mansfield doctrine in opposition to the doctrine broached in *Butcher v. Hixton*, 4 Leigh 519; and *Farmers Bank v. Clarke*, Id. 603. And they insisted that the acknowledgment of the debt proved in this case was clearly sufficient. They referred to *Lechmere v. Fletcher*, referred to in *Joyues on Lim.* 273; *Hartley v. Wharton*, 39 Eng. C. L. R. 276; *Waller v. Lacy*, Id. 349; *Hooper v. Stevens*, 32 Id. 504; *Ilsey v. Jewett*, 2 Metc. R. 168.

MONCURE, J. In April 1844 the appellee Crawford bought of the appellant Bell a parcel of horses, at the price of 725 dollars, promising to pay the money "punctually at six months," and to give security for its payment. On the 18th of July 1845, Bell brought an action of assumpsit against Crawford, in the Circuit court of Augusta, to recover the money. On the 15th of November 1845, the defendant plead non assumpsit; and at the same time filed an affidavit stating that he had a defence consisting of a set off, to an amount greater than the whole amount of the plaintiff's demand, which in the opinion of his counsel constituted a good legal defence to the action; and also filed, as the set off referred to in the affidavit, a note of the defendant to B. Davis dated the 24th of December 1839, for 1700 dollars, payable by draft, one half on the 1st of April, and the other on the 1st of May next after the date. This set off was the only defence relied on by the defendant; though no notice seems to have been taken of it upon the record. It was resisted by the plaintiff on the ground that it had been paid, and also that it was barred by the act of limitations. The defendant insisted that it was taken out of the operation of the act, by an acknowledgment or promise in writing,
and also by part payment. The case
114 was tried at November *term 1848, when a verdict and judgment were rendered for the defendant. Exceptions were taken by the plaintiff to various opinions given by the Court upon the trial, and to the opinion of the Court overruling his motion for a new trial; and these opinions are now to be reviewed by this Court. I will notice them, or such of them at least, as I deem it necessary to notice, in the order in which they are presented on the record.

1. The plaintiff moved the Court to exclude from the jury, all evidence introduced by the defendant to prove his set off, upon the ground that he had not filed with his plea an account of the set offs, as the statute directs.

The Court overruled this motion; and I think rightly overruled it. The defendant, substantially if not literally, complied with the directions of the statute by filing with his plea the note in writing which was the subject of his set-off. The statute does not require the set-off to be noticed on the order book. It requires an account to be filed "stating distinctly the nature of the set-off, and the several items thereof." The object of this requisition is to give the plaintiff full notice of the character of the set-off. If the set-off consist of a single item, as of a promissory note, the best notice which can be given of the character thereof, is to file the note with the plea. No description of the note which could be given in an account could be more plain and particular than the note itself. The record shews that the plaintiff had full notice of the character of the set-off, and that he was not taken by surprise on the trial. He did not object that an account had not been filed until after all the evidence and arguments had been fully heard, and to have allowed the objection then, would have been to have taken the defendant by surprise.

2. The plaintiff moved the Court to exclude from the jury all the evidence introduced by the defendant, in *support of
115 the set-off, on the ground that it was barred by the statute of limitations; and that said evidence in law was not sufficient to remove the bar.

The cause of action on the set-off accrued on the first days of April and May 1840, and the suit having been instituted on the 18th of July 1845, it was conceded that the set off was barred unless it could be taken out of the operation of the statute. The defendant insisted that it was taken out, on the ground, either of a new acknowledgment or promise in writing, or of a part payment, made within five years before the institution of the suit. The new acknowledgment or promise relied on by the defendant consisted of a letter from the plaintiff to him in these words:

"Mr. John Crawford.

I give you above 6 drafts for \$300 each, payable at 40, 50, 60, 70, 80 and 90 (days,) which I hope will suit you. It is the shortest time I could draw to be ready to pay; when you come back we can settle. Take care of this, and it will shew what you have received.

James Bell."

The part payment relied on consisted of the drafts mentioned in said letter, which were proved to have been drawn on and paid by Jacob Shook of the City of Richmond. The letter has no date. But it appearing that the draft at 40 days was paid on the 19th December 1840, the fair presumption is that the letter was written forty days before, or on the 9th November 1840; which was within five years before the institution of the suit; but not the filing of the set-off.

Conceding, for the present at least, that the time of the institution of the suit, and not of the filing of the set-off, is the period to which the limitation of the set off is properly referrible, and also that a part
 116 payment *will take a debt out of the operation of the statute; let us proceed to enquire whether there was such an acknowledgment or promise in writing, or such a part payment, in this case, as it will take the set off out of the operation of the statute? To avoid confusion I will consider the questions separately.

First. As to the acknowledgment or promise in writing. Shortly after the passage of the act of 9 Geo. iv., ch. 14, called "Lord Tenterden's act," it was stated by its author, Lord Tenterden, that the object of the act was the prevention of fraud and perjury in proving an acknowledgment, or a new promise, by rendering it necessary to procure that in writing for which words were previously sufficient. *Dickenson v. Hatfield*, 24 Eng. C. L. R. 204. And it was said by Tindal, Chief Justice of the common pleas, that the statute did not intend to make any alteration in the legal construction to be put upon acknowledgments or promises made by the defendants, but only to require a different mode of proof. To enquire therefore whether, in a given case, the written document amounts to a written acknowledgment or promise, is no other enquiry than whether the same words if proved, before the statute, to have been spoken by the defendant, would have had a similar operation and effect. *Haydon v. Williams*, 20 Eng. C. L. R. 86. Our act of 3d of April 1838, was copied, with some alterations, from Lord Tenterden's acts; and having been passed after the above cited cases were decided, should, I think, receive the same construction, which in those cases was put upon the English act. In deciding therefore whether the letter from Bell to Crawford before mentioned, is a sufficient acknowledgment or promise to take the set off out of the operation of the statute of limitations, it is necessary to enquire whether the words of the letter if proved before the act of April 1838, to have been spoken by Bell, would have had a similar effect.

117 *The operative words of the letter are, "when you come back we can settle." And the question is, whether by the words "we can settle," the plaintiff promised to pay to the defendant a particular debt, or made a direct, unqualified admission of a present, subsisting debt from which a promise to pay would naturally and irresistibly be implied; or merely promised to settle accounts with the defendant for the purpose of ascertaining and paying what might be due to him.

If the former be the true construction of the words used, I admit that the set off is thereby taken out of the operation of the statute of limitations. It was not necessary that the amount of the debt should have been specified in the letter. The particular debt to which the letter refers may be identified by extrinsic evidence; and has been so identified to be the amount of the set-off, if the

words aforesaid imply a promise to pay a debt, and not to settle an account.

But if by the words in question the plaintiff merely promised to settle accounts with the defendant for the purpose of ascertaining and paying what might be due to him, I am clearly of opinion that the set off is not thereby taken out of the operation of the statute.

In the case of *Bell v. Morrison*, 1 Peters R. 351, it was proved that one of the defendants expressed his willingness "to settle with the plaintiff," but the books and papers were in the hands of another of the defendants; said "he was anxious that the plaintiff's account should be settled;" that he knew the defendants were owing him; that he was "getting old and wished to have the business settled;" and proposed to give the plaintiff 7000 dollars, in satisfaction of the claim; and letters of several of the defendants, containing admissions of a like nature, were exhibited and proved on the trial. The Supreme court decided that this evidence was insufficient to take the case out of the statute of limitations;

and Story, Justice, in delivering the
 118 opinion *of the Court, comments at length on the wisdom and policy of the statute; and makes several observations which are so appropriate to the present case that I hope I may be excused for quoting some of them. On page 360 he says, "If we proceed one step further and admit that loose and general expressions from which a probable or possible inference may be deduced of the acknowledgment of a debt by a Court or jury; that, as the language of some cases has been, any acknowledgment however slight, or any statement not amounting to a denial of the debt; that any admission of the existence of an unsettled account, without any specification of amount or balance, and however indeterminate and casual, are yet sufficient to take the case out of the statute of limitations, and to let in evidence aliunde to establish any debt, however large and at whatever distance of time; it is easy to perceive that the wholesome objects of the statute must be in a great measure defeated, and the statute virtually repealed." Again on page 366 he says, "The evidence is clear of the admission of an unsettled account as well from the letters of Butler as the conversation of Morrison. The latter acknowledged that the partnership was owing the plaintiff, but as he had not the books he could not settle with him. If this evidence stood alone it would be too loose to entitle the plaintiff to recover anything. The language might be equally true whether the debt were one dollar or ten thousand dollars. It is indispensable for the plaintiff to go farther and to establish by independent evidence the extent of the balance due him, before there can arise any promise to pay it as a subsisting debt. The acknowledgment of the party then does not constitute the sole ground of the new implied promise; but it requires other intrinsic aid, before it can possess legal certainty. Now if this be so, does it not let in the whole mischief intended to be guarded against by the statute? Does it not enable the party

119 *to bring forward stale demands, after a lapse of time when the proper evidence of the real state of the transaction cannot be produced? Does it not tend to encourage perjury, by removing the bar upon slight acknowledgments of an indeterminate nature? Can an admission that something is due, or some balance owing, be justly construed into a promise to pay any debt or balance which the party may assert or prove before a jury?" &c.

Bell v. Morrison has, ever since its decision in 1828, been regarded in the United States as a leading case on the statute of limitations; and as Angell truly says in his work on Limitations, p. 245, upon the authority of the language of the Court by Mr. Justice Story in that case, the State courts in many instances have relied with emphatic confidence. Of none of them is that remark more true than of the Courts of Virginia. In this State the doctrine settled in that case has been recognized, and carried to its fullest extent, as the two cases next cited will shew.

In Ayletts v. Robinson, 9 Leigh 45, the action was assumpsit on an account for carpenter's work amounting to 320 dollars, commencing in March 1823 and ending in June 1825. The debtor died in 1831. The suit was brought in 1833, against his executor. The defence relied on was the statute of limitations. To take the case out of the statute, the plaintiff proved in 1829 he applied to the debtor to settle the account; and the debtor said, "I am too unwell to do business now, when I am better I will settle your account." The Court decided that the evidence was insufficient to take the case out of the operation of the statute. Parker, J., cited with approbation the modern cases which decided that a "promise or acknowledgment to take the case out of the statute must be an express promise, or such an acknowledgment of a balance then due, unaccompanied by reservations or conditions, as that a jury

120 ought *to infer from it a promise to pay." "It is plain," he said, "that the declarations of the testator in the case now before us were made in reference to an unsettled demand, and therefore very unsatisfactory evidence of the quantum of damages." If the promise to be inferred from these declarations "is to be taken," he further said, "as a promise to pay any balance that may be found due on a future settlement between the parties, then that settlement ought to be averred, and that a certain balance was found thereupon to be due." See his opinion in full, and also the opinions of Brockenbrough and Brooke, in same case.

In Sutton v. Burruss, 9 Leigh 381, the action was assumpsit on an open account. Plea, the statute of limitations. Proof, that within five years the defendant acknowledged the items of the plaintiff's account to be just, but said that he had some offsets; and that at a subsequent time, the defendant promised the plaintiff that he would settle all their accounts and differences fairly, and would not avail himself of the act of limitations. It was held that this proof was not sufficient to justify the jury in finding for the plaintiff.

Parker, J., after shewing that the proof was insufficient to sustain the count of insimul computasset, said, "I am inclined indeed to think that under no form of pleading, could the acknowledgments and promises proved in this case, coupled with a claim of offsets to an indefinite amount, have had the effect of taking the case out of the statute of limitations. I had occasion to advert to the modern decision on this subject in the recent case of Ayletts v. Robinson, and I heartily approve their spirit. If an acknowledgment is relied on, it ought to be a direct and unqualified admission of a present subsisting debt from which a promise to pay would naturally and irresistibly be implied. When the amount is left open and is to depend on proof aliunde, the wholesome objects of

the statute in affording security against 121 *stale demands would be defeated,"

&c. Cabell, J., who did not sit in the case of Ayletts v. Robinson, after citing with approbation a portion of Story's opinion in Bell v. Morrison, said, "If this principle be correct, (and I believe it to be incontrovertibly so,) no promise which is founded merely on the consideration of the old debt, and which still leaves the party exposed to the inconveniences which the statute was intended to remedy, ought to revive the old debt, and take the case out of the statute." And after stating the facts of the case, he further said: "The utmost that ever a jury could infer from all this is, a promise to pay an unascertained balance. That balance might be one cent only; or it might be within one cent of the original amount of the plaintiff's demand. What it really was, depended on testimony aliunde. This promise then certainly left the defendant exposed to all the inconveniences arising from the loss of testimony in relation to his offsets; and we cannot therefore give effect to it, without frustrating the great object of the statute," &c. Tucker, P., who had dissented from the opinion of the Court in Ayletts v. Robinson, said he felt bound to follow the decision in that case, and did not see how the acknowledgment in the case of Sutton v. Burruss could be considered as taking the demand out of the operation of the statute.

I have stated these two cases so much at length because they seem to me to be directly in point, and to have settled the law of Virginia upon the subject. The statute of April 1838 was passed about the time they were decided; and was dictated by the same policy of giving effect to the statute of limitations and the intention thereof, and of avoiding the frauds and perjuries which had arisen in regard to parol promises and acknowledgments. I think there is nothing in the proviso to that statute, "that every such written promise or acknowledgment shall be 122 held and taken to be a *drawing down of the original debt or contract to the date of the said promise or acknowledgment," which can have the effect of reviving the doctrine of what were called in the argument "the Mansfield cases," or of taking any case out of the statute of limitations which would not have been taken out by the same promise

or acknowledgment if made before the act of 1838 was passed. Such a construction of the proviso would be opposed to the obvious intention of the legislature and, as has been properly said, would "contribute as much to thwart the policy of the statute of limitations as the rest of the act will to advance it." Joynes 225, 226. That proviso was, I think, produced by the opinions expressed by several of the Judges in *Butcher v. Hixton*, 4 Leigh 519, and *The Farmers Bank v. Clarke*, Id. 603, that the new promise does not bring down the old cause of action but creates a new one, on which the action must be brought; and that in an action of debt on a promissory note the case will not be taken out of the statute by proof of a new promise, unless there be a general indebitatus count in the declaration. And I think the object of the proviso was, and its proper construction is, to authorize, if not require, the suit to be brought on the original cause of action, wherever, and only wherever, the new promise or acknowledgment would have been sufficient, if the proviso had not been adopted, to have taken the case out of the statute of limitations. So that in an action of debt on a promissory note, counting only on the note itself, proof of a new promise in writing would under the proviso, take the case out of the operation of the statute. So also in any action of debt in assumpsit on a simple contract, counting on the original cause of action, proof of a new promise in writing and of the performance of any conditions annexed thereto, would under the proviso, take the cause out of the operation of the statute. In fine, the operation of

123 the proviso, according to my construction *of it, is to authorize a recovery only to the same extent and against the same parties in a suit upon the original cause of action, as in a suit upon the new promise. This construction gets rid of a technical difficulty, is consistent with the words and intention of the act of April 1838, and does not thwart the policy of the statute of limitations.

I think therefore it may be fairly concluded that in Virginia a promise in writing to settle an account, however plain and positive such promise may be, is not sufficient to take the account out of the operation of the statute. And now let us see whether the written promise in this case was to settle an account or pay a debt. I think it was clearly the former. The proper meaning of the operative word in this case "settle" is, "to go into a settlement, to adjust, to fix or determine a balance, which may be on the one side or the other." But it is certainly a word of somewhat equivocal import, and may by the context or the surrounding circumstances be explained to mean "pay." In each of the cases of *Bell v. Morrison*, *Ayletts v. Robinson*, and *Sutton v. Burruss*, the word "settle" was the operative word used, and the question arose whether it was used in its ordinary acceptation or was intended to imply a promise to pay, and in each of them it was construed in the former sense. In *Ayletts v. Robinson*, Parker, J., said, "I do not mean to say that a promise to settle an account may not under some circumstances, be equivalent to a promise to pay, so

as to take a case out of the statute of limitations. It depends upon the nature of the application and the terms of the answer; as evincing a mere intent to adjust the account and see where the balance lies, or an acknowledgment of a stated balance; which to settle means to pay. Thus if one, upon an account being presented to him says, 'it is right and I will settle it at a future day,' there could be no doubt about his meaning, and a 124 *jury would infer a promise. But in the present case," &c. Is the proper meaning of this word "settle" varied in this case either by the context or the surrounding circumstances?

It is not varied by the context. The words of the letter are not, "your account is right, and I will settle it:" nor even, "I will settle your account." But the words are, "when you come back we can settle." This form of expression "we can settle," plainly implies an accounting together, and not a promise of payment by one to another. These words, whether taken alone or in connection with the context, can hardly be said to be of equivocal import, so as to admit of extrinsic evidence to explain them.

But let us look to the extrinsic evidence in the case and see if it will shew that the words were used in any other than their ordinary and proper sense of "accounting together."

Two witnesses were relied on by the defendant to furnish means of explaining the sense in which the words were used, and of shewing that the plaintiff thereby intended to promise payment of the former's set-off. The first was Jacob C. Roler, who proved that in November 1840, at the defendant's request, he presented to the plaintiff an account amounting to 2504 dollars 7 cents, consisting of four different items, of which the note now claimed as a set-off was one; at the foot of which account was an order signed by the defendant, requesting the plaintiff to draw on Mr. Shook at sight for 2504 dollars, and hand over the draft to the witness. That the plaintiff examined the account and order, but told witness he did not know what he could do till he heard from his agent Shook in Richmond; that he was going to Staunton that day and expected a letter from Shook; and if he heard from him would send to defendant, or witness for him, drafts for as much as it would be safe for him to draw on Shook for. That

125 *he raised no objection to said account, and did not deny that he owned the amount, although he did not say that it was right. That a day or two thereafter witness received from the plaintiff a letter enclosing the letter in question from the plaintiff to the defendant, and the six drafts for 300 dollars each therein referred to; and that witness handed the said letter in question and the said account and order, to the defendant, in whose custody he supposes them to have since remained. I think there is nothing in this evidence which can have the effect of explaining the words of the letter so as to make them imply a promise of payment. The mere failure to dispute an account, or to claim offsets against it, is slight evidence of an

acknowledgment; and instead of having the effect of varying the ordinary meaning of words used by the supposed debtor in a letter to the creditor concerning the debt, written about the time of the presentation of the account, could itself be explained away by such letter, if the natural and ordinary import of the words of the letter excluded the idea of such an acknowledgment. The account was not left in the plaintiff's hands. A day or two after it was presented to him, probably the next day, he wrote the letter in question and enclosed that and the six drafts on Shook, to the witness for the defendant. That letter affords written and positive evidence of a promise, not to pay, but to settle an account; and repels the parol and negative evidence of a promise to pay, which might be implied from a mere failure to dispute the account. So much for the evidence of Roler. The other witness was George W. Hulvey, who proved that in the fall of 1840 the defendant received from the plaintiff six drafts for 300 dollars each, and not being satisfied with the amount sent witness to see the plaintiff with a statement in writing, intended to shew how much more he desired to have. That he shewed the statement to

the plaintiff, who upon examining it, 126 remarked that he could not do *anything more at that time, as he had no more money in Mr. Shook's hands; and that he wanted to have a settlement with Mr. Crawford, by which time he would probably have more money in Shook's hands. And that he, the witness, thought he left the statement in the plaintiff's hands. If there were any doubt as to the meaning of the words "we can settle" in the letter, I think it would be completely removed by the evidence of Hulvey, who proved that the plaintiff said "he wanted to have a settlement with the defendant;" that he wanted such settlement to precede any further payment: and therefore that he could not have intended by the words "we can settle," used in the letter, to promise to pay the entire balance of the defendant's account after crediting the amount of the six drafts.

The other facts proved in the case, instead of shewing that the plaintiff intended in his letter to promise to pay the entire balance of the account after crediting the drafts, I think, strongly tend to shew not only that the plaintiff never intended to promise to pay such balance, or to admit that he owned it; but even that the defendant considered his accounts with the plaintiff unsettled, and the balance due upon them, if any, uncertain. The note of the defendant to the plaintiff on which the suit was brought, tends strongly to that conclusion. That note is dated April 4th, 1844, and by it the defendant promised to pay to the plaintiff 725 dollars, the purchase money of the horses, punctually at six months. It was proved by a witness that the defendant agreed if he bought the horses to give security for the purchase money and pay it punctually when due. It

was proved by another witness that the note for 725 dollars was assigned to him by the plaintiff in part payment for cattle. That some time thereafter, and before the note became payable, he enquired of the defendant about it, who told the witness that the claim was right and would be paid

when due: that there were unsettled 127 matters *between the plaintiff and defendant, and that he did not think there was much coming either way on that account; and witness understood from defendant that that account would not prevent him from paying the 725 dollars when due. That when the note became due the witness called on defendant for payment, who refused to pay the note, alleging that there were unsettled accounts between the defendant and plaintiff: that he had an offset against the claim and did not consider that he owed the plaintiff anything. It did not appear from any evidence in the cause that after the interview between the witness Hulvey and the plaintiff before referred to, there was ever any settlement of accounts between the plaintiff and defendant; or, until after the purchase of the horses in 1844, any demand by the latter of the former for such a settlement, much less for the payment of a specific debt, or an ascertained balance of an account. It was proved by a witness that the deputy sheriffs of Augusta of whom the defendant was one, were in the habit during the year 1838 and previous years of letting the plaintiff, who was largely engaged in the cattle business, have as much money as they could spare, with the understanding that he would have funds ready for them to pay in the revenue. That prior to 1838, there had been no disappointment: but that in December of that year his drafts on Shook were not paid. Among those drafts was one in favour of the defendant for 2490 dollars, which was introduced as evidence by the defendant, and is copied in the record. It is dated November 22, 1838, and the 2490 dollars is therein expressed to be "the sum he had paid for me, and I am bound to pay him in Richmond, that sum, so much of the revenue of Augusta." It was proved by a witness that on the 3d of January 1839, the plaintiff paid into the auditor's office 2298 dollars 81 cents, being that part of the revenue from Augusta for 1838 which was due by the defendant. No evidence was 128 offered *to shew the particulars of the sum of 2490 dollars mentioned in the draft. It was contended by the counsel for the appellant that at least one of the items of the account presented to the plaintiff by the witness Roler, to wit: the bond of plaintiff to defendant for 368 dollars 50 cents, was settled in that draft. The bond is copied in the record, is dated the 12th of August 1838, and the amount is therein expressed to be money borrowed of the defendant, "to be returned in time to pay the revenue of this year." The account aforesaid consisted of four items, two of which had accrued before the date of the draft for 2490 dollars, and were supposed in the

argument of the appellant's counsel to have been settled therein. The other two consisted of the note to Davis for 1700 dollars, dated 24th December 1839, payable in April and May 1840, and being the set-off now claimed by the defendant, and a bond of 71 dollars dated 15th November 1839. The appellant's counsel contended that the six drafts of 300 dollars each were paid on account of the two last mentioned items. Davis proved that he assigned the note which is the set-off in this case to the defendant. That when he assigned it he thought it would be punctually paid, and so told the defendant. That sometime after it was due, the defendant informed him that the plaintiff had not paid it, and requested him to urge the plaintiff to do so; saying nothing of any other claim he had against the plaintiff. That witness did urge the plaintiff to pay it, and plaintiff afterwards informed the witness that he had given the defendant drafts to pay the note. That witness told defendant what plaintiff said, and defendant replied that plaintiff had let him have some drafts but that he had applied, or intended to apply them in part to pay some other debts which plaintiff owed him.

Upon the whole I think that whether we look to the letter itself or to the declarations and conduct of both of the parties and the other extrinsic evidence in the case, we can come to no other conclusion than that the plaintiff did not intend by his letter enclosing the six drafts to promise to pay the balance of the account or to acknowledge it as a subsisting debt. It was argued by the counsel for the appellee that there were but four items of the account and that the plaintiff had never disputed either of them. He did not dispute them because they were doubtless originally just. If he had expressly admitted them to be originally just that would not have been sufficient. In *Clementson v. Williams*, 8 Cranch's R. 72, Chief Justice Marshall said, "It is not sufficient to take the case out of the act, that the claim should be proved or be acknowledged to have been originally just; the acknowledgment must go to the fact that it is still due." In *Sutton v. Burruss*, 9 Leigh 381, the defendant acknowledged the items of the plaintiff's account to be just; but said at the same time that he had some offsets. This was held by a unanimous Court not to be sufficient even to put the defendant on the proof of his offsets. Judge Cabell said, "This promise then certainly left the defendant exposed to all the inconveniences arising from the loss of testimony in relation to his offsets; and we cannot therefore give effect to it without frustrating the great object of the statute." These four items may have been and doubtless were very proper items of an account between the parties; but they may not have been all the items that would have been proper in such an account. There may have been payments and set offs. There was a palpable error on the face of the account which

might have been detected almost at a single glance. The plaintiff was charged with one year's interest too much on 1700 dollars. That this error was not detected, shews that the plaintiff had no idea of assuming to pay the balance of the account; and paid *no attention to it except to see that he owed as much as 1800 dollars, which he paid by the drafts on Shook.

There was then no such acknowledgment or promise in writing as will take the set off out of the operation of the statute.

Secondly. Has there been such a part payment of the set off as will take it out of the statute?

I will have very little to say in answer to this question, as most of what I have said in answer to the preceding applies with at least as much force to that now under consideration. A part payment can have no effect in taking a case out of the statute, except so far as it implies an acknowledgment of a debt, and promise to pay it. If a part payment be made of a particular debt as of a promissory note, it affords strong evidence of an acknowledgment of the balance as a subsisting debt. But the mere fact of payment is insufficient. It must be shewn that the payment was made in part discharge of a larger debt, and of the particular debt sued for. *Joynes*, p. 124; *Tippetts v. Hearne*, 4 Tyrw. R. 772. "The part payment," as Mr. *Joynes* correctly says, "being only evidence of a promise to pay, gives a new action only for so much as the party thereby admits himself to be liable for." "Thus when a defendant pays money into Court he does not thereby lose the benefit of the statute, as to the residue of the plaintiff's demand, because the only effect of the payment into Court is to admit the defendant's liability for the sum so paid." See the cases cited by *Joynes*, p. 130. A payment made on account may or may not amount to an acknowledgment of the balance of the account. "If the part payment is made under circumstances which shew that the debtor did not intend to recognize his liability, or admit his willingness to pay the balance, it will not avail the creditor against a plea of the statute." *Joynes*, p. 128; *Linsell v.*

Bonsor, 29 Eng. C. L. R. 319. We must therefore always look *not only to the fact of the payment, but to all the surrounding and attending circumstances to see whether a payment on an account implies an intention to acknowledge the balance of the account and promise to pay it. What the debtor says at the instant of making the payment is the best evidence of his intention, and usually sufficient to explain it. In this case the payment was accompanied by a letter which affords the best possible evidence of the character of the payment and the intention of the plaintiff in regard to the balance of the account. What the meaning of that letter is in this respect, whether construed alone or in reference to all the surrounding circumstances, has already been considered. And the questions whether a promise to pay the bal-

ance of the account is implied by the letter as an acknowledgment or promise in writing under the act of April 1838; and whether such promise is implied by part payment, arising out of the drafts enclosed in that letter, are in effect one and the same question, and must receive the same answer. Having already answered the former in the negative, I therefore answer the latter in the same way.

Then did the Circuit court err in refusing to exclude from the jury all evidence introduced by the defendant in support of the set off on the ground that it was barred by the statute of limitations, and that said evidence in law was not sufficient to remove the bar? I think it did; and that this conclusion necessarily follows from what I have already said. If the evidence taken (and I have taken it) to be all true, shews neither such an acknowledgment or promise in writing, or such a part payment as can take the set off out of the operation of the statute, then the set off must of necessity fall, and with it the evidence offered in its support. If the Court had been moved to instruct the jury that even if they believed the whole of the said evidence it was not

sufficient to justify them in finding
132 that the set off was not barred by the statute of limitations, it would have been the same in form with the motion in the case of Sutton v. Burruss, 9 Leigh 381; for overruling which, the judgment of the Circuit court was unanimously reversed by this Court. The motions in that case and this, though different in form, are I think the same in substance. The Court no more invades the province of the jury by excluding evidence than by pronouncing it insufficient in law. By one course the evidence is thrown out of the case, and by the other it is destroyed: which in effect is the same thing. In Bell v. Morrison, 1 Peters. R. 351, the motion was to exclude the evidence in the very form in which it was made in this case, and the evidence was accordingly excluded. No objection was made by the Supreme court to the form of the motion or instruction in that case.

In the view I have taken of this case, I deem it unnecessary to consider the other questions which arise on the first bill of exceptions. Two of them are important questions; as 1st. Whether the five years limitation to an offset is to be computed from the time of commencing the action or filing the set off; and, 2d. Whether a promise implied from part payment is within the operation of the act of April 1838. In regard to the first question it was decided by this Court in Trimyer v. Polard, 5 Gratt. 460, that if the set off accrued before the action was brought, the limitation is to be computed from the commencement of the action. There may be some doubt as to whether more than two Judges so far concurred in that decision as to make it a binding authority. However that may be, and whatever might be my own opinion of the question as an original one, (and I have not so far considered it as to have

formed a decided opinion on the subject,) I am willing to consider it as settled by that case: for I consider it more important that the question should be
133 settled, than that it should be settled in any particular way. In regard to the second question it has never been decided by this Court and is one of very great doubt and difficulty. It can never arise under our new Code, and is therefore becoming daily a question of less importance. For the present I forbear to express even the inclination of my own mind upon it.

I think the Court erred in overruling the plaintiff's motion for a new trial for the same reasons for which I think it erred in not excluding the evidence introduced by the defendant in support of the set off.

On the whole I am for reversing the judgment.

DANIEL, J., concurred in the judgment of the Court.

ALLEN, J., concurred in the opinion of Moncure, J.

BALDWIN, J., dissented.

The judgment of the Court was as follows:

The Court is of opinion that the Circuit court did not err in overruling the motion of the plaintiff "to exclude from the jury all evidence introduced by the defendant to prove his set off, upon the ground that said defendant had not filed with his plea an account of the set offs, as the statute directs." The defendant, substantially if not literally, complied with the directions of the statute, by filing with his plea the note in writing which was the subject of his set off, and the record shews that the plaintiff had full notice of the character of the set off, and that he was not taken by surprise on the trial.

But the Court is further of opinion that, upon the facts certified by the said Circuit court as proved in the case, the said set off is barred by the statute of limitations; and therefore that the said Court erred in overruling the motion of the plaintiff to
134 exclude from the jury all the evidence introduced by the defendant in support of the said set off, on the ground that it is barred by the statute of limitations; and that the said evidence in law is not sufficient to remove that bar; and also erred in overruling the motion of the plaintiff for a new trial on the ground that the verdict was contrary to the evidence.

Therefore it is considered that the said judgment be reversed and annulled; and that the plaintiff recover against the defendant his costs by him expended in the prosecution of his writ aforesaid here. And this Court proceeding to enter such judgment as the said Circuit court ought to have entered, it is further considered that the verdict of the jury be set aside. And the cause is remanded to the said Circuit court for a new trial to be had therein.

Meeks' Adm'r &c. v. Thompson & als.

July Term, 1851, Lewisburg.

[56 Am. Dec. 134.]

(Absent CABELL, P.)

1. **Executors*—Sale of Realty—Application of Purchase Money—Liability of Purchaser.**—Where the charge upon land by will, for the payment of debts, is general, the purchaser from the executor or the administrator with the will annexed is not bound to see to the application of the purchase money.

2. **Same*—Same—Same—Effect on Vendee's Title.**—In such case if the sale was necessary at the time it was made, and was fairly made; and the purchase money has been paid; the failure of the executor or administrator to account for and pay over the proceeds to the creditors of the estate, will not impair the title of the vendee.

135 3. **Same*—Same—Accounting—Credits—Dower Interest.**—Land in which a widow is entitled to dower, being sold by an executor under a charge for payment of debts, he should be credited in his account of the proceeds, for the amount he has paid the widow in satisfaction of her dower interest.

This case was before this Court in 1836, and is reported in 7 Leigh 419. That report gives a sufficiently full statement of the case up to the period when that appeal was taken; and the decision of this Court only left open the question whether the sale of the land to Joseph Meeks was necessary.

When the cause went back, the infant children of James P. Thompson having attained the age of twenty-one years, the suit was carried on in their names, and Joseph Meeks dying it was revived against his executor James Meeks, and on his death, it was revived in the name of Thomas J. Boyd administrator of James, and administrator de bonis non with the will annexed of Joseph Meeks.

In 1841 the commissioner John P. Matthews returned his report of the administration of William P. Thompson upon the estate of James P. Thompson. By this report a balance appeared against the administrator on the 1st of January 1823, of 1600 dollars 40 cents. In this account the administrator was charged with the purchase money of the land sold Meeks in 1814, and also with the purchase money of other lands sold in 1821 to Adam Waterford, William Hinnegar and James Day, amounting to 981 dollars. There was also a special statement of debts which the defendant insisted were due from the estate of James P. Thompson, amounting to 6843 dollars 46 cents.

At the April term of the Court for 1845 the commissioner made another report in which he stated that at the period of the sale of the land to Meeks, there was no personal estate of James P. Thompson unadministered, and that all of the personal estate was charged in the report of 1841. He reported also that at the

136 *time of the sale to Meeks there was unsold the lands afterwards purchased by Waterford, Hinnegar and Day: And that there was still other lands belonging to the estate, though of very little value; they being in very small parcels, and valued at twenty-five cents an acre; some of which had been sold for taxes.

The report of 1841 was excepted to by both plaintiffs and defendants. The third exception of the plaintiffs, was "to allowing any of the claims reported by the commissioner in his special statement, of unsatisfied debts due from the estate of James P. Thompson," as valid or just claims against the estate. Among the claims reported in that special statement is one of 535 dollars, which was paid by Joseph Meeks to H. Smith the marshal of the Chancery court under a decree of the Court to foreclose a prior mortgage upon a part of the land purchased by Meeks. Another claim reported in that special statement, was for 200 dollars which Meeks had paid to Mrs. James P. Thompson for her dower interest in the land purchased by him.

The second exception of Meeks' administrator was to the failure of the commissioner to allow for the deficiency in the quantity of land purchased by Meeks; twenty-two acres of the land so purchased being covered by the better title of Lewis Smith, which at the average price of the whole tract amounted to 133 dollars 73 cents. The fourth exception was because the commissioner failed to embrace in his special statement the amount of a bond from James P. Thompson to Robert Sayers dated the 4th of October 1813 for 180 dollars, the existence of which was proved by Sayers' executor. The fifth exception was to the refusal of the commissioner to allow to Meeks a credit for the 200 dollars paid to Margaret Thompson the widow of James P. Thompson, for her dower interest in the land sold to him.

137 *The cause came on to be heard in April 1845, when the Court overruled the first and second exceptions of the plaintiffs and sustained the third, and overruled all the exceptions of the defendant Meeks' administrator, and made a decree by which the sale of the land to Joseph Meeks was set aside; and an account of the moneys paid by Meeks which went to the extinguishment of the debts of James P. Thompson, and also an account of the rents and profits of the land, together with the permanent improvements made by Meeks thereon, was directed. And the commissioner was directed to ascertain the location and quantity of any of the lands of James P. Thompson, directed to be sold in the first instance for the payment of debts which remained unsold. From this decree Meeks' administrator applied to this Court for an appeal, which was allowed.

B. R. Johnston, for the appellant.
Fulton, for the appellees.

ALLEN, J., delivered the opinion of the Court.

*See monographic note on "Executors and Administrators."

It appearing that when this case was before this Court on a former occasion, it was held that the grant of administration with the will annexed to William P. Thompson was not a void grant, and that the administrator was empowered to make sale of the land charged by the testator with the payment of his debts; and that as the will charged all the lands, the administrator was authorized to sell the whole thereof if such sale became necessary to pay the debts; this Court is of opinion that in the case of such a general charge upon the lands it was not incumbent on the purchaser to look to the application of the purchase money. If the condition of the estate rendered such sale necessary at the time the same was made, and the sale was fair, and the purchase money has been paid, the

failure of the administrator to account
138 for and pay over the proceeds to *the

creditors of the estate should not impair the title of the vendee. The sale in the present case is shewn to have been for a full price; and the only enquiry left open by the decree of this Court is whether the sale was necessary for the payment of the debts of the testator. In determining this question it is necessary to ascertain what debts were chargeable to the estate, and whether the same could have been discharged without a sale of the land in the proceedings mentioned sold to Joseph Meeks. To the debts appearing due and credited in the administration account, there should, in the opinion of this Court, have been added the debt of 535 dollars paid to H. Smith, the marshal, being the amount of the mortgage on a part of the land sold to Meeks; and also the debt due to Sayers, designated in the 4th exception of the appellants. And there should have been deducted from the amount of assets charged to the administrator the 200 dollars paid to the widow for her dower in the land sold, and the sum claimed for the deficiency in the quantity of the land. It is shewn by the administration account as settled since the former decree of this Court, and which was approved by the Circuit court, that after charging the administrator with the personal assets and the proceeds arising from the sale of the real estate, including the land in controversy, he is in arrear the sum of 1600 dollars 40 cents. This balance would be nearly if not quite extinguished by the proper charges before referred to. The unsold lands are proved to be of but little value; so that without reference to the other debts alleged to have been outstanding and still unsatisfied, it is manifest that the condition of the estate required a sale of the whole of the lands devised, to satisfy the debts of the testator. The Court is therefore of opinion that the Circuit court erred in holding that such sale was unnecessary, and in setting the same aside for that cause: And the sale not being

impeached in the bill for any other
139 cause, the bill *of the plaintiffs should have been dismissed as against the representative of Joseph Meeks.

And the Court is further of opinion, as to so much of the bill as seeks an account from the administrator, and the decree in respect to that branch of the case, there is no error in so much thereof as overrules the 1st and 2d exceptions of the appellees and the 1st and 3d exceptions of the appellant to the report of master commissioner Matthews; but the said Court erred in overruling the 5th exception of the appellant for the failure to allow the administrator credit for 200 dollars, the sum paid the widow for her relinquishment of dower in the lands sold. The 2d and 4th exceptions of the appellant and the 3d exception of the appellees, do not relate to the debits or credits on the administration account, but refer to that branch of the case respecting the indebtedness of the estate and the necessity of a sale of the lands in controversy, and have been before adverted to.

By overruling and sustaining the exceptions applicable to the administration account the balance of 1600 dollars 40 cents ascertained to be due by the report of the master commissioner, and the decree affirming the same, will be reduced by the sum of 200 dollars as aforesaid with interest. For the residue of said sum of 1600 dollars 40 cents reduced as aforesaid, together with any other sums since received by the administrator, he is responsible.

It is therefore adjudged and ordered that said decree, so far as it conflicts with this opinion and decree, is erroneous, and that the same be reversed with costs to the appellant; and this Court proceeding to render such decree as the said Circuit court should have done, it is further adjudged and ordered that the bill of the appellees be dismissed as against the appellant, the representative of said Joseph Meeks, with costs in the Chancery court.

140 *And the cause is retained as against the said William P. Thompson, the administrator, and remanded with instructions to recommit the same to the commissioner to reform and settle the account according to the principles of this decree, and with instructions to said Court to give notice by proper publication to creditors, if any, whose claims are still valid and unsatisfied, to appear, assert and establish their claims within a period to be prescribed by the Court, and for a decree against said administrator for any balance ascertained upon the principles of this decree, to be due from him, to be applied to the payment of such debts; or paid over to the appellees as the rights of the parties may require.

Pinckard v. Woods & C.

July Term, 1851, Lewisburg.

(Absent CABELL, P.)

Executors—Sale of Personalty—Devastavit—Liability of Purchaser*—Case at Bar.—An executor who is

*Executors—Devastavit—Liability of Participants.—

It is a well-settled doctrine that all who participate in a breach of trust are jointly and severally liable;

also a legatee of one moiety of his testatrix's estate, sells the property and purchases about one half of it himself. He takes bonds from the purchasers of the other part of the estate, which shew upon their face that they are executed to him as executor. Afterwards he sells these bonds at a discount of from eighteen to twenty per cent., the purchaser knowing that the liabilities of the estate of the testatrix were very inconsiderable, and that the sale of the bonds was not necessary for any purposes of the administration. At the time of the sale the executor was solvent and his solvency was not questioned; but he afterwards failed, without paying the legatees of the other moiety of the estate. **HOLD:** That the sale of bonds at such a discount when the circumstances of the estate did not require it, was a *devastavit* by the executor; and that the purchaser having

141 *purchased with a knowledge of the fact will be compelled to pay the amount of the bonds (if they do not amount to more than the *devastavit* of the executor), to the legatees. Or if they have been paid by the sureties of the executor, the sureties are entitled to be substituted to the rights of the legatees.

Some time in the year 1836 Mary Crafton died, having first made her will which was admitted to probat in the Circuit court of Franklin county. No executor being named in the will, Tyree G. Newbill qualified as administrator with the will annexed, and entered into a bond in the penalty of 7000 dollars, with Wiley P. Woods and Joseph Rives as his sureties. By her will after directing her debts to be paid, she gave one half her estate to Newbill, and the other half to Mary and Catharine Phillips, in equal proportions.

In November 1836 Newbill sold the whole property, all of which was personal, and nearly all of it slaves, upon a credit of

thus, a party knowingly dealing with the executor in such a way as to enable him to commit a *devastavit* may be held liable therefor. As authority for this proposition, see the principal case cited in *Hunter v. Lawrence*, 11 Gratt. 184; *Barksdale v. Finney*, 14 Gratt. 338, 349, and *foot-note*; *Davis v. Christian*, 15 Gratt. 49; *Jones v. Clark*, 25 Gratt. 658, 662, 666, 667, 669, and *foot-note*; *Tosh v. Robertson*, 27 Gratt. 279; *Asberry v. Asberry*, 33 Gratt. 470; *Patteson v. Bondurant*, 30 Gratt. 96; *Lingle v. Cook*, 32 Gratt. 271; *Boisseau v. Boisseau*, 79 Va. 77; *Edmunds v. Venable*, 1 P. & H. 140. In *Utterback v. Cooper*, 28 Gratt. 286, it is said: "If there is any proposition which ought to be regarded as settled law in Virginia, it is that a party concerting with an executor or administrator in a breach of trust, cannot claim credit for the money actually advanced by him. It is not for him to say the fiduciary ought to have applied the money to the purposes of the estate. When he aids him in any manner contrary to the duty of the executor, he takes upon himself all the hazards of a misapplication of the fund. All the cases, including *Graff v. Castleman*, 5 Rand. 195; *Pinckard v. Wood*, 8 Gratt. 140; *Fisher v. Bassett*, 9 Leigh 119; *Cocke v. Minor*, 25 Gratt. 246, and *Jones v. Clark*, 25 Gratt. 642, established that proposition." The principal case was distinguished in *Mills v. Mills*, 28 Gratt. 502.

And the conversion into money by a trustee of

twelve months. The sales amounted to 5014 dollars 8 cents, of which Newbill purchased to the amount of 2335 dollars 25 cents. One of the slaves was bought by Hopkins Nowlin at the price of 1200 dollars, and another was purchased by Robert T. Woods for 1250 dollars, and each of them gave his bond with security to Newbill as administrator for his purchases: And on the 10th of February 1837, these bonds were sold by Newbill to Charles Pinckard at a discount of between eighteen and twenty per cent. The debts due from the estate amounted to but about 185 dollars, all of which seems to have been paid off at an early day by the administrator.

Newbill not having paid to Mary and Catharine Phillips their proportion of Mrs. Crafton's estate, they instituted a suit against him and his sureties Woods and Rives, and in May 1844 they obtained a decree for the sum of 2391 dollars 85 cents, with interest thereon from the 28th day of October 1837 until paid and their costs.

142 Although Newbill seems to have been in 1836, *and for some time afterwards, entirely solvent, and although he was in good credit until the year 1840, yet when this decree was obtained he had become insolvent, and had absconded from the country; and the amount of the decree was paid by the sureties Woods and Rives in August 1844.

A few days after the decree in favour of the Phillips had been paid by them, Woods and Rives instituted a suit on the chancery side of the Circuit court of Franklin county against Newbill and Charles Pinckard, seeking to set aside the sale by Newbill to Pinckard of the bonds of Nowlin and Robert T. Woods. In their bill, after stating substantially the foregoing facts, they

well-secured bonds belonging to the trust fund by a sale thereof at a large sacrifice, to a purchaser with full notice of the trust, constitutes such an improper dealing with, and *devastavit* of, the trust subject, as will render both purchaser and trustee *prima facie* responsible therefor. For, from the great sacrifice at which the property is sold, and the profit which the purchaser is thus allowed to make, he is, as it were, put upon his guard, and he should stay his hands until he can ascertain, by the requisite inquiry, whether the sale is necessary for the purposes of the estate, and the sacrifice to be incurred is indispensably necessary to prevent a greater sacrifice. *Cocke v. Minor*, 25 Gratt. 256; *Jones v. Clark*, 25 Gratt. 659, 661, 664, 671; *Brockenbrough v. Turner*, 78 Va. 448, 450, all citing the principal case.

For the proposition, that, if the sureties of the delinquent fiduciary pay the amount of the *devastavit* to the legatees, they are entitled to be substituted to the rights of the legatees against the party uniting with the fiduciary in the breach of trust, the principal case was cited in *Jones v. Clark*, 25 Gratt. 667; *Asberry v. Asberry*, 33 Gratt. 471; *Sherman v. Shaver*, 75 Va. 5, 11.

See also, monographic *note* on "Executors and Administrators"; monographic *note* on "Guardian and Ward" appended to *Barnum v. Frost*, 17 Gratt. 398.

charged that the condition of the estate of Mary Crafton did not render a sale of the bonds necessary: That Newbill was not in advance to the estate, and that he had purchased at his sale of the property to about the amount of his legacy. They charged that at the time of the purchase of these bonds by Pinckard he knew that he was dealing with an administrator for the assets of his testatrix's estate; and that by the sale the administrator was committing a devastavit and a fraud upon the legatees of the testatrix and upon his own sureties; and that independent of this personal knowledge on the part of Pinckard, the bonds shewed on their face that they were due to Newbill in his character of administrator of Mary Crafton deceased; and were thus notice to Pinckard that they were assets of her estate; and that by buying the bonds at a discount he was aiding Newbill to convert the same to his own use, and to commit a devastavit and a fraud upon the legatees of his testatrix as well as the sureties of Newbill.

The prayer of the bill was that Pinckard should be compelled to account for and pay to the plaintiffs the amount of money due upon the bonds and received by him, with interest thereon, or so much as should be sufficient to satisfy the plaintiffs for 143 what they had been *compelled to pay to Mary and Catharine Phillips, with interest; and for general relief.

The defendant Pinckard in his answer admitted that the bonds of Nowlin and Robert T. Woods were given for purchases of the slaves of the testatrix of Newbill, and were payable to Newbill as administrator with the will annexed of Mary Crafton; and that he purchased the bonds from Newbill at a discount of from eighteen to twenty per cent., which he considered their fair cash value. He said that at the time of purchasing the bonds he knew nothing of the state of the assets of the testatrix's estate, nor of any waste or mismanagement committed by Newbill. He knew that after paying the debts of the testatrix which he believed to be inconsiderable, that the residue of the estate was to go by one moiety to Newbill and by the other to Mary and Catharine Phillips; and he considered that the bonds purchased as aforesaid would not overgo the part of the estate bequeathed to Newbill. In making the purchase he had no idea of committing a fraud, or of being instrumental in aiding the administrator in committing a devastavit.

It is unnecessary to detail the proceedings in the cause. It is enough to say that a commissioner's report ascertained that after crediting on the amount paid by the plaintiffs to the Phillips some small sums of money received by them from the property of Newbill, there remained of that debt the sum of 3542 dollars 66 cents due on the 10th day of June 1847. In August 1848 the Court made a decree against Newbill and Pinckard, in favour of the plaintiffs, for this sum, with interest on 3397 dollars 20 cents,

a part thereof, from the 10th day of June 1847 until paid, and their costs. And liberty was reserved to Pinckard, if he should pay the said debt to the plaintiffs, hereafter to apply to the Court for a decree against Newbill for the amount so paid by him. From this decree Pinckard applied to this Court for an appeal, which was allowed.

144 *Boyd and Patton, for the appellant, insisted that the only ground upon which a purchaser from an executor can be held liable to creditors or legatees, is that the executor was guilty of a fraud in the sale, and the purchaser had with knowledge participated in it. That a fraud by the executor was not enough, but that there must have been a participation with knowledge in the execution of the fraud. And they went into an examination of the facts to prove that Pinckard was not a participator in any fraud in the purchase of the bonds, even if Newbill intended to commit a fraud: which they did not admit. They referred to *Nugent v. Gifford*, 1 Atk. R. 463, and note; *Mead v. Lord Orrery*, 3 Atk. R. 235; *McLeod v. Drummond*, 14 Ves. R. 352; *S. C.* 17 Ves. R. 153; *Field v. Schieffelin*, 7 John. Ch. R. 150; 1 Story's Equ. Jur. § 422-23, 580; 1 Lomax Ex'ors 346-7-8, and note.

Cooke, for the appellee, admitted there was no doubt of the administrator's right to sell, and that the purchaser was not bound to look to the disposition of the purchase money; but with the exception that if there is anything unfair in the sale, the purchaser is liable for the amount of the property. And he referred to 2 Wms. Ex'ors 611; 1 Story's Equ. Jur. § 422; *Scott v. Tyler*, 2 Dick. R. 712. And he reviewed the facts and insisted that according to *Fisher v. Bassett*, 9 Leigh 119, the sale of the bonds at a discount of eighteen per cent. was itself a fraud in the administrator, and that Pinckard participated with knowledge in the fraud.

BALDWIN, J., delivered the opinion of the Court.

It is the duty of an executor, not to sell, but to collect, the debts due to the estate of his testator, including those arising out of sales of goods made by the executor in the course of his administration; and if he sells such debts at a price below their 145 value he thereby *commits a devastavit, unless he makes it appear that such sale was manifestly required by the interests of the estate: And this he can never do without shewing, in the first place, that the proceeds thereof have been applied to the purposes of the estate. The appropriation by the executor of the proceeds of such a sale to his own individual uses, presents the case of a fraudulent breach of trust on his part, for which of course he is personally liable to creditors, legatees and others, injuriously affected by such improper diversion of the assets. And the purchaser himself, so acquiring such debt at a profit,

if he has reason to believe at the time that the same belongs to the estate, and is so disposed of by the executor, for his individual uses, thereby concurs in such fraudulent breach of trust by the executor, and therefore incurs the like liability.

In this case the bonds purchased by the appellant from Newbill, the administrator with the will annexed of Mary Crafton deceased, were executed by the obligors for the prices of certain slaves belonging to the testatrix's estate, and sold by the administrator under the authority of her will; which bonds are on their face payable to Newbill in his character of administrator. The appellant had therefore the best reason to believe that the bonds belonged to the testatrix's estate, when he purchased them from the administrator at a discount of 18 or 20 per cent., and from the profit he was thus allowed to make, he had good reason to believe that the administrator was selling them for his own individual uses; a fact which the result and the condition of the estate have abundantly shewn. Under these circumstances, it was incumbent upon the appellant to stay his hand, until he should ascertain by the requisite enquiries, that the sale was to be made for the purposes of the estate, and the sacrifice to be incurred indispensably necessary to prevent some still greater sacrifice. He must have

known that it was not in the
146 *usual course of administration for an executor to sell debts due the estate at a sacrifice, and he was bound to know that such a sale cannot be tolerated unless under very peculiar emergencies of the estate. If he had made the enquiry, he would have ascertained that the condition of the estate did not require the sale of the bonds. But in truth he knew it without the necessity of enquiry; for he says in his answer that "he was aware that after satisfying the debts of the testatrix, which he believed to be inconsiderable, and the specific legacy of the bed and furniture, the residue of her estate was to go by one moiety to the said Newbill, and by the other to Mary and Catharine Phillips, and he considered that the bonds he was purchasing would not overgo the part of the estate bequeathed to Newbill;" and so defending himself upon the ground that his speculation was warranted, as he believed, by the administrator's individual interest in the estate. But he ought to have known that the administrator had no right to appropriate the assets to the satisfaction of his own legacy, to the entire exclusion of the other legatees; and he was bound to ascertain that Newbill's legacy had not already been satisfied, as in fact it was by his individual purchases at the public sale of the property of the estate; unless indeed he chose to apply them by actual payment to the satisfaction of his co-equal legatees.

It is no valid defence for the appellant that at the time he purchased the bonds, it was his belief and that of the public generally that the administrator was then in solvent circumstances. Such belief may

have induced him to look to the individual responsibility of the administrator as a guarantee against the failure of his speculation, and to that responsibility he must still look, and its having proved abortive furnishes no reason for throwing the consequent loss upon those whom he has aggrieved by his intermeddling with the affairs of the estate, from no other
147 motive than the desire of gain *to himself, and careless as to its effects upon the rights of others.

Nor does the statute of limitations afford protection to the appellant, for the appellees have no remedy but in equity, which will not allow its application to such a case as this.

The decree therefore of the Circuit court is proper, in holding the appellant responsible to the appellees for the money paid by them as sureties of the administrator to Mary and Catharine Phillips, in discharge of the decree of the Circuit court of Campbell county. But there is error therein to the extent of 38 dollars 75 cents, the costs recovered against the appellees, in their unsuccessful injunction suit with Garland's ex'or &c. there being no propriety in subjecting the appellant therefor. This error is, however, more than counterbalanced by another against the appellees to the extent of 136 dollars 81 cents, by crediting the appellant twice with that sum on account of the funds received by the appellees for their indemnity as sureties in the administration bond, under the deed of trust from Newbill in the proceedings mentioned, which error is made to appear by a note of appellees' counsel filed with the record, and marked J. R. C.

And the appellees, by their counsel, not desiring to disturb the said decree because of the said error to their prejudice; and the Court being of opinion that there is none to the prejudice of the appellant; it is adjudged, ordered and decreed that the same be affirmed, with costs to the appellees.

148 *Lewis & als. v. Caperton's Ex'or & als.

July Term, 1851, Lewisburg.

(Absent CABELL, P., and MONCURE, J.*)

1. Deeds of Trust—Postponement of Sale—Effect as to Creditors.—A deed executed *bona fide* to secure a loan of money, not to be enforced for ten years, is a valid deed as against creditors of the grantor.
2. Same—Same—Same.—A deed which conveys without a schedule, household furniture, the various kinds of stock on a farm, bacon and lard, to secure a *bona fide* debt, but not to be enforced for eighteen months after its execution, is valid against creditors, though the deed was made without the knowledge of the creditor, and the grantor was indebted to insolvency at the time of the conveyance.
3. Same—Same—Same.—A deed which conveys land to secure a *bona fide* debt, which is not to be en-

*The cause was argued before JUDGE MONCURE's appointment.

forced for two years, and only then or afterwards upon a notice of the sale for one hundred and twenty days is valid against creditors.

4. **Same—Same—Reservations—Effect.**—Such a deed is valid though the execution of the deed is postponed for five years from the date of the conveyance; and the rents and profits of the property in the meantime, is reserved to the grantor.

5. **Same—Reservations—Effect.**—A deed which conveys future rents and profits of property conveyed in other deeds, which were reserved to the grantor in the previous deeds, for the purpose of paying a *bona fide* debt, is valid against creditors of the grantor.

6. **Sale of Land—Title Retained—Other Surety Given—Effect.**—A vendor of land retains the title in accordance with the contract. He has a lien on the land for the purchase money, as against creditors or incumbrancers of the vendee; and this though

†**Deeds of Trust—For Benefit of Creditors—Postponement of Sale—Reservation in Favor of Grantor.**—On this subject the principal case is cited in the following cases: *Dance v. Seaman*, 11 Gratt. 782, and *note*; *Gordon v. Cannon*, 18 Gratt. 398, and *note*; *Sipe v. Earman*, 26 Gratt. 509, and *note*; *Brockenbrough v. Brockenbrough*, 31 Gratt. 590, and *note*; *Young v. Willis*, 82 Va. 299; *Paul v. Baugh*, 85 Va. 900, 9 S. E. Rep. 329; *Keagy v. Trout*, 85 Va. 894, 7 S. E. Rep. 329; 3 Va. Law Reg. 298; *Gardner v. Johnston*, 9 W. Va. 407; *Cohn v. Ward*, 32 W. Va. 39, 9 S. E. Rep. 43. See also, *foot-note* to *Wickham v. Lewis Martin*, 13 Gratt. 427; *Livesay v. Beard*, 22 W. Va. 590; *Klee v. Reitzenberger*, 23 W. Va. 755; *Harden v. Wagner*, 23 W. Va. 365, 371; *Shattuck v. Knight*, 25 W. Va. 597; *Knight v. Capito*, 23 W. Va. 643. See monographic *note* on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 848; monographic *note* on "Assignments for the Benefit of Creditors" appended to *French v. Townes*, 10 Gratt. 513.

‡**Sale of Land—Title Reserved—Other Security—Effect.**—In *Mansfield v. Dameron*, 42 W. Va. 796, 26 S. E. Rep. 527, it is said: "Under the old law giving an implied lien for purchase money on conveyance of the legal title, as under the present law, where a lien is reserved, it is a difficult matter to show a waiver of a lien; it must be clear. But it is more so where the title is reserved—First, because the very retention of title plainly manifests an intent to still hold the land liable; and, second, a court of equity is so unwilling to make a man give up his land for nothing. The force of this fact—the retention of the legal title—will be found often emphasized as of controlling influence. See *Coles v. Withers*, 33 Gratt. 186, 193; *Lewis v. Caperton's Ex'or*, 8 Gratt. 148; *Hess v. Dille*, 23 W. Va. 90; *Warren v. Branch*, 15 W. Va. 28; JUDGE ALLEN's opinion in *Yancey v. Mauck*, 15 Gratt. 300; *Bart. Ch. Prac.* 936; 1 *Lomax Dig.* (2d Ed.) 266. Where the vendor has a lien and a bond, he has two securities, as in this case, and could resort to either; the lien being a security, not for the note, but for the very debt. 33 Gratt. 195. So long as that debt exists, the courts will not presume that the chief security has been surrendered, unless upon the clearest and most convincing testimony. 1 *Hil. Mortg.* 448-453. Same in *Yancey v. Mauck*, 15 Gratt. 310." See, in accord, citing the principal case, *Yancey v. Mauck*, 15 Gratt. 307, and *note*; *Day v. Hale*, 22 Gratt. 163; *Coles v. Withers*, 33 Gratt. 194, and *note*; *Stoner v. Harris*, 81 Va. 460; *Dunlap v. Shanklin*, 10 W. Va. 662.

the vendee has subsequently executed a deed by which he conveys other property to secure the purchase money.

7. **Postnuptial Settlement—Failure to Record—Effect as to Creditors.**—A postnuptial settlement made by a husband on his wife, of personal property derived from her father's estate, but of which he retains possession, not having been properly recorded, is void as against the creditors of the husband.

149 *8. **Fraudulent and Voluntary Conveyances—Conveyance of Proceeds of Wife's Lands in Trust for Husband and Wife—Effect as to Creditors.**—A deed made by a husband embarrassed at the time, by which he conveys the proceeds of his wife's land which had been sold, and the note for the purchase money made to him, in trust for himself and his wife for their lives and the life of the survivor, and during his life to be under his control and management, is voluntary and fraudulent as to creditors.

9. **Same—Knowledge of Grantee—Effect.**—A deed which conveys land to secure a *bona fide* debt due to the grantee, and also a debt to the grantor's wife, which is voluntary and fraudulent as to his creditors, and the nature of which debt is known to the grantee, is null and void as a security for the first as well as the last mentioned debt, as against subsequent incumbrancers and creditors of the grantor.

10. **Same—Proof That Consideration Bona Fide—Declarations of Wife.**—The declarations of a wife at the time she executes a deed or at other times, that she has executed or does execute the deed because her husband had promised that he would settle or because he had settled upon her certain property derived from her father's estate is not sufficient evidence of a contract between them for such a settlement in consideration of her relinquishment of her right of dower in her husband's land, and thus to support such settlement if made, against creditors or incumbrancers, even to the extent of

§**Fraudulent Conveyances—Settlement on Wife—Proof of Consideration—Declarations of Wife.**—The declarations of the wife at the time of executing a deed, or at other times, that it was executed in consideration of a promise of the husband, to make a settlement upon her, or because he had made such a settlement, are not sufficient evidence of a contract to support such a settlement, if made, even to the extent of reasonable compensation for a right of dower relinquished by her. *William & Mary College v. Powell*, 12 Gratt. 884, citing *Blow v. Maynard*, 2 Leigh 29; *Lewis v. Caperton*, 8 Gratt. 148. The above proposition is quoted in *Perry v. Ruby*, 81 Va. 326, citing, in addition to those cases above, *Price v. Thrash*, 30 Gratt. 523; *Campbell v. Bowles*, 30 Gratt. 668; *Fink v. Denny*, 75 Va. 668; *Hatcher v. Crews*, 78 Va. 465.

Postnuptial settlements are presumed to be voluntary, and the burden of proving valuable consideration rests on those claiming under them; and where the bill alleges them to be voluntary, the answer denying the allegation does not shift the burden, but the defense must be proved. *Lewis v. Mason*, 84 Va. 738, 10 S. E. Rep. 529, citing, in addition to the authorities above, 1 *Dan. Ch. Pr.* 848, *note*, 7 and cases there cited; 2 *Story's Eq.* 1529; 2 *Rob. Pr.* (old Ed.) 320; *Paynes v. Coles*, 1 *Munf.* 373; *Ruth v. Owens*, 2 *Rand.* 507; *Beckwith v. Butler*, 1 *Wash.* 224; 4 *Min. Inst.* (2d Ed.) 1193. See, in accord, *Robbins v. Arm-*

a reasonable compensation for the right of dower which she relinquished.

11. **Same—Successive Deeds Conveying Same Property—Effect When Some Are Declared Void.**—There being several deeds, conveying in succession the same property, and not merely the equity of redemption therein, every successive incumbrance binds all the property not absorbed in satisfaction of the previous valid incumbrances. And if some of the incumbrances are declared void at the suit of a creditor of the grantor, such creditor is not entitled to have his debt substituted in the place of such void incumbrance to the extent thereof; but the subsequent valid incumbrancers have preference.

12. **Deeds of Trust—Several Deeds Enforceable at Different Times—Rents and Profits—Case at Bar.**—Property covered by various deeds of trust which may be enforced at different periods, having been sequestrated at the suit of a judgment creditor of the grantor; when the Court disposes of the trust subjects and the rents and profits thereof, the creditor will only be entitled to the rents and profits of the different trust subjects up to the earliest period when either of the valid incumbrances covering such subject was authorized to be enforced. And the different incumbrancers will each be entitled to the rents and profits of the subject covered by his deed from the time he was authorized by the terms of the deed to enforce it.

strong, 84 Va. 812, 6 S. E. Rep. 180, citing the principal case, and, among others, *Armstrong v. Lachman*, 84 Va. 726, 6 S. E. Rep. 120; *Jones v. Degge*, 84 Va. 685, 5 S. E. Rep. 700.

[Deeds of Trust—Equity Practice—Several Deeds Enforceable at Different Times—Rents and Profits.—See principal case cited in *Hudson v. Dismukes*, 77 Va. 248; *Baughner v. Eichelberger*, 11 W. Va. 226.

Deeds of Assignment—Preference of Creditors.—In *Evans v. Greenhow*, 15 Gratt. 156, it is said: "A pre-existing debt is, of itself, a valuable consideration for a deed of trust executed for its security; which deed, if it be duly recorded, and was not executed with a fraudulent intent, known to the trustee or the beneficiaries therein, will be valid against all prior secret liens and equities and all subsequent alienations and incumbrances. It is not necessary to the validity of the deed, that it should be executed by the trustee of the beneficiaries, or even that they should know of its existence before the intervention of subsequent claims. The deed being apparently for the benefit of the creditors thereby secured, their acceptance of it will be presumed, until the contrary appears. If any of them refuse it, their refusal will relate back to the date of the deed, and avoid it *ab initio* as to them. A debtor, even though he be in failing circumstances, may lawfully prefer one creditor to another, and make a valid deed of trust for that purpose. These principles are now well settled in this state, as the following cases sufficiently show: *Garland v. Rives*, 4 Rand. 282; *Skipwith's Ex'or v. Cunningham*, etc., 8 Leigh 271; *McCullough*, etc., v. *Sommerville*, *Id.* 415; *Lewis v. Caperton's Ex'or*, etc., 8 Gratt. 148; *Phippen v. Durham*, etc., *Id.* 457; *Dance*, etc., v. *Seaman*, etc., 11 *Id.* 778; and *Wickham*, etc., v. *Lewis Martin & Co.*, 13 *Id.* 427." See also, on the question of preference of creditors, *foot-note* to *Sipe v. Earman*, 26 Gratt. 563; article in 2 Va. Law Reg. 717.

13. **Same—Failure of Wife to Join in First Deed—Joining of Wife in Second—Effect.**—The wife of the grantor not having joined in the first deed conveying land to secure a debt; but uniting in a second deed conveying the same land to secure another creditor, the second incumbrancer is entitled to the value of the wife's contingent right of dower in the land, to be paid out of its proceeds, as against and in preference to the first incumbrancer.

14. **Same—Relinquishment of Dower—Settlement on Wife—Consideration.**—**QUARRIE:** If the wife's relinquishment of her contingent right of dower in land, where there is no complete alienation of the estate by the husband, but a mere incumbrance given for the security of a debt, constitutes a sufficient consideration for a settlement on the wife.

This was a bill filed in the Circuit court of Monroe county in October 1842 by Hugh Caperton against John B. Lewis and the trustees and cestuis que trust in twelve deeds executed by Lewis, eleven of which were charged to be fraudulent and intended to hinder and delay the plaintiff, a creditor of Lewis, in the recovery of his debt. The pleadings and proofs exhibit the following facts:

John Lewis devised to his two sons John B. Lewis and Thomas P. Lewis, the Sweet springs, in the county of Monroe, with a considerable body of land in Monroe and Alleghany counties; the Sweet springs tract proper containing one hundred and fifty-nine acres. By an agreement under their hands and seals bearing date the 25th of September 1834, Thomas P. Lewis sold to John B. Lewis all Thomas's right and title in and to the Sweet springs, together with all other lands bequeathed to him by his father, situate in the counties of Monroe and Alleghany, for the sum of 20,000 dollars, with legal interest from the first day of the next January 1835; the amount to be paid by annual payments extending to the year 1846; but no conveyance was made.

By deed poll bearing date the 9th day of February 1837, and prepared and probably executed in South Carolina, John B. Lewis conveyed to William E. Haskell, the Sweet springs tract of land containing one hundred and fifty-nine acres, for the purpose of securing to Haskell the payment of 10,000 dollars with its interest, which he at that time borrowed from Haskell, and for which he gave his bond with his brother William L. Lewis as his surety, payable in ten years; the interest thereon to be paid annually. Mrs. Caroline S. H. Lewis, the wife of John B. Lewis was not a party to this deed, but she signed it, and her privy examination having been taken before two justices of the peace for the county of Monroe, the deed with the certificate of the privy examination of Mrs. Lewis, was admitted to record in the clerk's office of the county of Monroe.

By deed poll executed in South Carolina and bearing date the 11th day of January 1839, John B. Lewis, upon the consideration

as expressed in the deed of natural love and affection, and of one dollar, conveyed to William L. Lewis twenty-four slaves by name, which the deed stated had been allotted to John B. Lewis in right of his wife, on a division of the negroes of the estate of her father William R. Thomson of South Carolina; also the sum of 7000 dollars, then vested in a note drawn by William S. Thomson and others in his favour, the consideration of which was the interest of Mrs. Lewis in the real estate of her father William R. Thomson. This conveyance was in trust for the use and benefit of himself and wife during their lives and the life of the survivor, and during his life to be under his control and management; and if he should invest the said 7000 dollars in property the same was to be subject to the same trusts; and upon their death to their children who should survive either of them.

This deed was admitted to record in the Orangeburgh district, South Carolina, on the day of its date, upon proof of its execution by a witness thereto; and was recorded in the clerk's office of the County court of Monroe on the 9th of January 1840. The endorsement of the clerk on the deed is: "The foregoing was presented in this office, and which, together with the certificate of its acknowledgment, was admitted to be recorded, which was done." The

152 clerk who was examined *as a witness, stated that John B. Lewis took the deed to the clerk's office and handed it to the clerk with a request that he would record it, and give it to him before he left; which was done. The deed was not reported to the Court or advertised at the courthouse door; but this omission was accidental.

Between the period when John B. Lewis purchased the interest of Thomas P. Lewis in the Sweet springs property, and the end of the year 1841, he proceeded to make improvements upon it at great cost; and in 1841 he was largely indebted: Among his creditors was Hugh Caperton of Monroe county. In February 1841 Lewis executed to Caperton two single bills, one for 5641 dollars 57 cents, and the other for 13,102 dollars 83 cents. And about the same time he with James L. Woodville as his surety, executed another single bill to Caperton for about 4520 dollars 25 cents. In December 1841 Caperton instituted suits upon the first two of these single bills, and recovered judgments thereon in May 1842.

Soon after the service of the process upon Lewis at the suit of Caperton, he seems to have visited South Carolina; and whilst there he executed two deeds poll bearing date the 24th of February 1842. The one reciting that he was indebted to William L. Lewis of Orangeburgh district, South Carolina, as trustee of the wife of John B. Lewis, in the sum of 7000 dollars, by a promissory note bearing date the 1st day of June 1839, with interest, and also in the further sum of 5200 dollars, by a promissory note in favour of William L. Lewis, dated the 1st of September 1841, with interest; for the purpose of securing the said sums of

money with interest, he conveyed to said William L. Lewis a tract of one thousand acres of land, including the Sweet springs tract. This deed was admitted to record in South Carolina; and was also admitted to record in the clerk's office of the 153 County court of Monroe on the *15th of March 1842, upon the certificate by two justices of the acknowledgment thereof by John B. Lewis. And although Mrs. Lewis was not a party to the deed, and did not sign it, her privy examination was taken and certified.

The other deed executed at the same time conveyed to William L. Lewis for the same purposes, all the grantor's household and kitchen furniture used at his dwelling or other houses on his plantation in Monroe county, and his horses, mules, cattle, hogs, sheep, wagons, gear and all the plantation tools and implements belonging to said plantation. This deed was also recorded in South Carolina, and afterwards in the proper office here upon the certificate of John B. Lewis' acknowledgment before two justices of the peace for the county of Monroe.

By another deed which bore date the 11th of March 1842 John B. Lewis, reciting that he was indebted to John Cochran in the sum of 500 dollars, conveyed to Henry Massie all his personal property, described as consisting of household furniture of all the varieties of such property, and bacon, lard, hogs, mules, horses, cattle and sheep, in trust that if the said Lewis should on or before the 1st day of October 1843, pay to John Cochran the sum of 500 dollars, with interest from the 11th of March 1842, then the indenture to be void, otherwise the trustee should after the said 1st of October 1843, proceed to sell &c., and pay to Cochran the said sum of 500 dollars with the interest due thereon. This deed was duly admitted to record on the 15th of March.

By another deed dated the 16th of March 1842, Lewis reciting that he was indebted to Thomas P. Lewis 16,000 dollars, conveyed to Massie the Sweet springs with all the lands attached thereto either by purchase or inheritance, lying in the counties of Monroe and Alleghany, and all the right, title and estate of the said Lewis therein, and all his hogs, horses, cattle, 154 *sheep, plantation utensils of every kind, wagons &c., bedsteads, beds, mattresses, &c., &c., &c., carriage and harness, kitchen furniture and cooking utensils, and table furniture of every kind, books and paintings, in trust to secure the execution of the agreement between himself and Thomas P. Lewis for the purchase of the moiety of the Sweet springs property. And if the said John B. Lewis failed to comply with that agreement then the trustee was authorized to sell after giving six months notice.

On the same day John B. Lewis and Caroline his wife conveyed to James L. Woodville the same lands mentioned in the last deed, in trust to secure a debt of 8500 dollars due to the branch of the Bank of Vir-

ginia at Buchanan: This deed provided that upon a failure to pay the interest on the 17th of December of each year, or the failure to pay the principal on the 20th of March 1844, the trustee should proceed to sell upon one hundred and twenty days notice; and pay to the bank the said sum with the interest due.

On the same day Lewis conveyed to Henry Massie the same lands to secure a debt of 5535 dollars due to William P. Phillips of the town of Charlottesville, with interest from the 1st of October 1841. This trust was not to be executed before the 1st of October 1845, and in the meantime Lewis was to take the profits of the property for his own use and benefit. And the same provision was contained in the preceding deeds. The three last mentioned deeds were admitted to record on the 17th of March 1842.

On the 4th of April 1842, Lewis conveyed the Sweet springs land to Massie for the purpose of indemnifying James L. Woodville as his surety in a bond to Hugh Caperton for 4520 dollars 25 cents, dated the 24th of February 1841. This trust was not to be executed before the 4th of April 1844; and

in the meantime Lewis was to take the profits to his own use. This deed was recorded on the 11th of April. And on the 29th of the same month, Lewis for the purpose of securing the same debt, conveyed to Massie the Sweet springs tract, and also all his lands adjoining the Sweet springs, and especially a tract below the Sweet springs called the lower place, and a tract of four hundred acres above the Sweet springs next the mountain, with all the furniture on the premises at the Sweet springs, upon trust that Lewis should be permitted to retain possession of the property, giving to the trustee for the further security of Woodville, the profits of said springs for two years from the date of the deed after defraying the necessary expenses of keeping the same. And if any part of the debt remained due on the 29th of April 1844, then that the trustee should proceed, upon ninety days notice, to sell and pay &c. This deed was recorded on the 5th of May.

On the 5th of April 1842, Lewis and wife, for the purpose of securing Andrew Allen and numerous other creditors, conveyed to Massie all Lewis's lands in the counties of Monroe and Alleghany, being the same lands before conveyed, upon trust to sell after the 5th of April 1843, for the purpose of paying two small debts due to Samuel Price and Joseph Damron; and in trust to sell after the 5th of April 1847, to pay the other creditors mentioned in the deed. In this deed John B. Lewis warranted the property conveyed, against all claims except such persons as claimed under and by virtue of deeds of trust then of record in the clerk's office of the County court of Monroe. This deed was admitted to record on the 11th of April.

On the 1st of May 1842 Lewis, for the purpose of securing a debt of 590 dollars

due to John H. Peyton, conveyed to Massie, beds, bedsteads, mattresses, pillows &c. &c. &c., groceries of every kind, bacon, salt, lard, table furniture, cooking utensils, plantation tools, sheep, cows, calves, stock cattle, together with old hay standing

156 *in the meadows, also the crop of grain then growing upon the plantation, with the then present growing crop of grass, upon trust to sell after the 1st of May 1844, upon a notice of two months, and to pay the debt. This deed was admitted to record on the 9th of May.

On the 5th of April 1842, John B. Lewis executed another deed to Massie and William L. Lewis, in which after reciting that his wife Caroline S. Lewis in consideration that said John B. Lewis would convey in trust for her use the slaves therein after named, did join in a deed conveying the Sweet springs and all other real estate belonging to John B. Lewis in the counties of Monroe and Alleghany to James L. Woodville in trust for the benefit of the banks, and that she had on like consideration on the same 5th of April 1842 joined to convey the same real estate to Henry Massie in trust to secure various and numerous creditors, and in a deed conveying to Charles R. Thomson real estate in South Carolina devised to her by her father William R. Thomson, in consideration of the premises and of one dollar, conveyed to Massie and William L. Lewis twenty-six slaves, by name, being the same mentioned in the deed of 11th of January 1839, upon trust that the said slaves should remain in the joint possession, use and enjoyment of John B. Lewis and his wife Caroline S. during their joint lives, for their support, and to enable them to support and educate their children, and upon the death of John B. Lewis in the lifetime of his wife, for her support and that of her children; and at her death to be divided among the children. This deed was recorded the 11th of April 1842.

By another deed bearing date the 18th of August 1842, John B. Lewis, reciting that it was his intention by the deed of the 5th of April, to secure the slaves therein mentioned to the exclusive use of Mrs. Lewis and her children, but that by a mistake of the draftsman *of that deed an interest was reserved to John B. Lewis, and he considered himself morally and legally bound to secure the said slaves with their future increase for the exclusive use and enjoyment of his wife and her children, she having given an ample consideration therefor in the relinquishment of her right of dower in his estate and in the conveyance of her maiden lands in South Carolina, in consideration of the premises and of one dollar conveyed the same slaves with their future increase to Massie and William L. Lewis, for the exclusive use, benefit and enjoyment of the said Caroline S. Lewis and her children by John B. Lewis. This deed was admitted to record the 22d of August 1842.

The deeds to secure Cochran, Peyton and

Phillips seem to have been executed without the knowledge of these gentlemen; and Mr. Peyton states in his answer he did not see the deed to secure him until he saw it as an exhibit in this cause; though the debts were no doubt due to them from John B. Lewis. And although some of the creditors in the general deed, may have known that Lewis was about to execute a deed to secure them, none of them were informed of or assented to its provisions before the deed was executed.

It appears that Mrs. Thomson the mother of Mrs. John B. Lewis died in 1838, and that upon her death the land and slaves devised to her for her life, passed under the will of her husband, to his children, of whom Mrs. Lewis was one. Mrs. Lewis's interest in the land was sold to William S. Thomson and two others for 7000 dollars, and they executed their note to John B. Lewis for that sum. The slaves except perhaps three, mentioned in the deed of January 1839, were slaves derived by Mrs. Lewis from the estate of her father, and it appears that Mrs. Thomson had put into Mrs. Lewis's hands 800 dollars of the assets of her husband's estate with directions to invest it in negroes, and that this sum
158 *was invested in the three negroes not derived from Mr. Thomson's estate.

It appears further that about the time of the division of the slaves and the sale of the land, John B. Lewis declared his purpose to convey his wife's property in trust for her; and accordingly after the division and sale, and before taking actual possession of the slaves, he executed to William L. Lewis the deed of the 11th day of January 1839. And soon thereafter, he was permitted to take possession of the slaves and bring them to Virginia; and to receive from the purchasers of the land the 7000 dollars which they owed therefor; he executing to William L. Lewis as trustee of Mrs. Lewis, his note for the same amount, as a borrower of the trust fund.

The only evidence other than that furnished by the deeds, that John B. Lewis executed the deeds in favour of his wife, upon any valuable consideration, were the declarations of Mrs. Lewis. One witness stated that in May or June 1837 she had heard Mrs. Lewis say in the presence of her husband, that she had made over her right in the Sweet springs upon the condition that he was to make over to her all the property that was coming to her from her father's estate. And that in 1842 she heard Mrs. Lewis say again, that she made over her right to the Sweet springs in another deed, because her husband had told her he had made over to her by deed the property coming from her father's estate. So the justices of the peace by whom the privy examination of Mrs. Lewis was taken as to her execution of the deeds to Haskell, to Charles R. Thomson for her land in South Carolina, and to secure the Bank of Virginia and the general creditors of her husband, stated that at the time Mrs. Lewis

executed the three last deeds and immediately before signing them, she stated that she was induced to execute them in consideration of Dr. Lewis's securing
159 *to her the negroes made over in the deed of January 11th, 1839, and the price of her land in South Carolina, but that she made no such statement in relation to the deed to Haskell.

When Caperton recovered judgments against John B. Lewis in May 1842, he sued out executions both of fieri facias and capias ad satisfaciendum; but the first were returned "no effects," and the latter, "not found." At a subsequent day Thomas P. Lewis his bail, surrendered him into custody, and he took the benefit of the act for the relief of insolvent debtors, surrendering nothing but his equity of redemption in the deeds herein before mentioned.

When the plaintiff filed his bill he prayed for an injunction to restrain the defendant Lewis and all others from selling, conveying away or otherwise disposing of the slaves and other personal property mentioned in the deeds aforesaid. This injunction was awarded by one of the Judges of the Circuit court; and it was ordered that unless John B. Lewis or some one for him, should enter into bond with good security in the penalty of 15,000 dollars, with condition to have the slaves and other personal property forthcoming to abide the future order of the Court, the sheriff should take possession, and make out an inventory thereof, and hire out the slaves until the next term of the Circuit court of Monroe county; and make report of his proceedings to Court.

Subsequently in December 1842, upon the application of Caperton to the same Judge, the prior order was modified so as to authorize Lewis to retain the slaves in his possession until the next term of the Circuit court of Monroe, upon his executing a bond with security in the penalty of 5000 dollars. And it was further ordered that the sheriff should sell the live stock, other than slaves, and the hay and other
160 provender, on a credit of *six and twelve months; and if John B. Lewis should consent thereto, that the sheriff should rent out the springs and the appurtenances and fixtures until the 1st day of January 1844.

At the October term of the Court for 1843 the cause came on to be heard on a motion to dissolve the injunction, when the Court being of opinion that the deed of the 11th of January 1839 was void as to the creditors of John B. Lewis, because it was not properly recorded, overruled the motion. And not deciding whether the deeds of the 5th of April and the 18th of August 1842, were good either in whole or in part, referred it to a commissioner to ascertain the value of Mrs. Lewis's dower interest in the Sweet springs property on the 16th day of March 1842, the period at which she united in the deed to secure the debt due to the Bank of Virginia; and also to ascertain the value of the slaves conveyed in trust for the

benefit of Mrs. Lewis by the said deeds of the 5th of April and 18th of August 1842, at the time they were conveyed. And it was further ordered that A. Dunlap who was appointed a commissioner for the purpose, should proceed to hire out the said slaves for one year from the termination of the period for which they were then hired out; and also to rent out the Sweet springs property and the land adjoining with the furniture thereto belonging, for one year from the termination of the then existing lease.

The commissioner appointed to ascertain the value of Mrs. Lewis's dower interest in the lands, and the value of the slaves conveyed in trust for her, reported the value of the dower interest of Mrs. Lewis in the property at 952 dollars 25 cents; and the value of the slaves conveyed in trust for her at 6900 dollars.

This report was excepted to by the counsel for Mrs. Lewis; but as this Court does not consider or pass upon the question

as to the value of Mrs. Lewis's dower
161 *interest, it is unnecessary to state the principles or facts upon which the commissioner based his report, or the exceptions to it.

The property was regularly rented and hired out from year to year under the directions of the Court. And in the progress of the cause Thomas Henning having recovered a judgment against John B. Lewis for about 188 dollars 90 cents with interest and costs, on which Lewis took the benefit of the act for the relief of insolvent debtors, said Henning was made a defendant in the suit. And the cause came on to be heard in May 1847, when the Court made a decree, by which Mrs. Lewis's exceptions to the commissioner's report were overruled, and the statement fixing Mrs. Lewis's dower interest at 952 dollars 25 cents was confirmed; the deed of the 11th of January 1839 was held to be void as to creditors because not duly recorded; and the deeds of settlement of the 5th of April and the 18th of August 1842, to be valid to the extent, but only to the extent of the value of Mrs. Lewis's contingent dower interest in the estate of her husband, which appeared to have been the consideration of said deeds. It was further held that Caperton and Henning had liens for the payment of their debts upon the said slaves, subject to the aforesaid claim of Mrs. Lewis, and also upon the equity of redemption in the real and personal property conveyed by John B. Lewis in the deeds herein before mentioned, and also upon any other property held by said Lewis. And it was decreed that Caperton recover from John B. Lewis the sum of 18,758 dollars 88 cents, with interest and costs; and that Henning recover from said Lewis the sum of 205 dollars 54 cents, with like interest and his costs.

The decree further authorized Mrs. Lewis to take slaves to the amount of her interest, or to take the money; and directed

a commissioner to sell the slaves not
162 *taken by Mrs. Lewis, and if she

elected not to take slaves, to pay to her from the proceeds of the sale the said sum of 952 dollars 25 cents, with interest from the 1st of January 1843; and to pay the remainder of the proceeds of the sale of said slaves to Caperton and Henning ratably upon their debts aforesaid.

And it was further held that all the other deeds, except the deed given to secure the debt due to John H. Peyton, were valid, and that the creditors in said deeds were entitled to satisfaction of their several debts therein mentioned out of the proceeds of the sale of the property according to their respective priorities; but that Caperton and Henning were entitled to the rents and profits of the said mortgaged and trust property since the same had been sequestered and leased out under the control of the Court. And the decree directed the said rents and profits to be paid ratably to them.

It was further held, that the property conveyed to secure the debt of John H. Peyton was of a kind so perishable as to be unfit to be conveyed as a security, and that deed was therefore declared to be void, and the proceeds of the sale of that property and of all the other personal property of John B. Lewis, which was not embraced in any of the deeds declared to be valid, was decreed to be divided ratably between said Caperton and Henning. And the decree then proceeded to direct certain commissioners to sell the real and personal estate conveyed in the several deeds aforesaid in the mode prescribed in the decree; and then proceeded to direct the application of the proceeds of sale among the various creditors mentioned in the deeds; and the remainder after satisfying them to be paid to Caperton and Henning. From this decree separate appeals were obtained, first, by John B. Lewis and his wife and her trustees William L. Lewis and Henry Massie; second, by Allen T. Caperton, executor of Hugh Caperton;

third, by James L. Woodville, who
163 complained that by the *decree he had been deprived of the rents and profits of the springs, which had been conveyed in the deed given to secure him; and fourth, by the Bank of Virginia, which claimed that as in none of the deeds prior to that to secure the bank, Mrs. Lewis had relinquished her right of dower, the bank was entitled to have the value of that interest applied to the payment of its debt.

Baldwin, Price and Cooke, for Mrs. Lewis and her trustees.

Eskridge, Boyd and Price, for Woodville and the Bank of Virginia.

The Attorney General and Patton, for Caperton's executor.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion that the mortgage deed to William E. Haskell, of the 9th February 1837; the deed of trust to Henry Massie, for the benefit of John Cochran, of the 11th March 1842; the deed of trust to James L. Woodville, for the benefit of the Bank of

Virginia, of the 16th March 1842; the deed of trust to Henry Massie, for the benefit of William B. Phillips, of the 16th March 1842; the deed of trust to H. Massie, for the benefit of James L. Woodville, of the 4th of April 1842; the deed of trust to H. Massie, for the benefit of Andrew Allen and others, of the 5th of April 1842; and the deed of trust to H. Massie, for the benefit of James L. Woodville, of the 29th of April 1842, are valid and binding incumbrances on the property conveyed by and embraced in said deeds.

The Court is further of opinion, that as Thomas P. Lewis, by the articles of agreement between him and John B. Lewis, of the date of the 25th September 1834, was not bound to convey the lands thereby contracted to be sold to John B. Lewis, until

the last instalment of the purchase money was paid, and as he still retains the legal title as a security for the purchase money, he stands on higher ground than a vendor who, having parted with the legal title, is seeking the aid of a Court of equity to set up and give effect to the implied lien for the purchase money. Holding the legal title, the vendor is not claiming an equity; and he cannot be required to surrender that legal title until the purchase money is paid according to the stipulations of the contract: and the doctrine of the waiver of the implied equitable lien of the vendor who has parted with the legal title, when a different security has been taken for the purchase money, does not apply to such a case. The Court is therefore of opinion that the lien for the whole of the unpaid purchase money due to Thomas P. Lewis and his assignees is, so far as regards the property sold by him, paramount to all the other incumbrances, and must be first satisfied out of the proceeds arising from the sale thereof. And this being so, it is unnecessary to express any opinion as to the deed of trust to H. Massie, for the benefit of Thomas P. Lewis, of the 16th March 1842. For if valid, the Court in marshalling the incumbrances, would require him to look to his first and paramount lien, so as to leave any other fund embraced in his said deed of trust to be applied to subsequent incumbrances; and as it is manifest the property sold will raise a sum more than sufficient to pay off the purchase money, the said deed of trust, whether valid or invalid, can have no effect upon the rights of the parties.

A majority of the Court is further of opinion, that as the said John H. Peyton has not appealed from said decree, and the decision that the deed of trust in his favour to Henry Massie, of the 1st May 1842, is null and void, not being prejudicial to the rights of any of the other parties before this Court, or complained of by them as erroneous, the correctness of the decree in holding said deed null and void cannot be enquired into upon the present appeals.

165 *The Court is further of opinion, that the deed of the 11th January

1839, referred to in the answer of John B. Lewis, is void as against the creditors of said John B. Lewis, because the same was not recorded according to the laws of Virginia; and also because the same was a voluntary post-nuptial settlement, made by an embarrassed man, and which, upon its face, attempts to secure the benefit of the property settled, for himself during life, and retains the control over the same in his own hands. By the sale of the patrimonial estate of the said Caroline S. his wife, and the payment of the purchase money to him, his marital rights had attached thereon, and he could not by a voluntary deed made in fraud of the rights of his creditors withdraw the same from their reach.

And the Court is further of opinion, that as said John B. Lewis was in possession of said slaves in said deed mentioned, the unrecorded and fraudulent deed of the 11th January 1839, could not intercept the marital rights of the husband, so as to exempt the same from the claims of his creditors.

And the Court is further of opinion, that the deeds of mortgage by John B. Lewis to William L. Lewis of the 24th February 1842 were fraudulent and void as against the creditors of said John B. Lewis, so far as regards the alleged debt of 7000 dollars, described as being due to said William L. Lewis as trustee of the wife of said John B. Lewis: The said debt being for the price of the maiden lands of said Caroline S. the wife of said John B. received by him and attempted to be settled and secured for the benefit of said Lewis and family by the deed of the 11th of January 1839.

And the Court is further of opinion, that although the debt of 5200 dollars attempted to be secured by said mortgages of the 24th February 1842, was justly due, yet as the mortgagee accepted said mortgages with a knowledge of the fact that said settlement of the *7000 dollars was a voluntary post-nuptial settlement, reserving the benefit and control of the property to the use of the grantor for life, and as this fact rendered the same fraudulent and void as against creditors so far as respects the 7000 dollars, the same must be regarded as null and void as it respects the debt due to the mortgagee. The Court is therefore of opinion, that said mortgages of the 24th February 1842, upon the real and personal estate therein described to said William L. Lewis, as mortgagee, to secure the debts therein set forth, are null and void, as against the subsequent incumbrancers and the creditors of said John B. Lewis.

And without deciding the question whether a relinquishment of a contingent right of dower, where there is no complete alienation of the estate by the husband, but a mere incumbrance given for the security of a debt, constitutes a sufficient consideration for a settlement on the wife, as in such case the husband by discharging the debt and procuring a release of the incumbrance, would be reinvested with his whole estate, in which the wife would have a claim of dower; the Court is further of

opinion, that there is no sufficient evidence of any contract or agreement between said John B. Lewis and his wife, to make upon her a settlement of the slaves named in the deeds of trust to Henry Massie and William L. Lewis, for the benefit of C. S. Lewis, wife of J. B. Lewis, the first of said deeds dated on the 5th April 1842, and the second on the 18th August 1842, in consideration of her release of her contingent dower interest in the estate of her husband. The loose conversations of the parties as proven, furnishes no evidence of such a contract; and though the wife, when she made such relinquishment as set forth in the deeds referred to, may have entertained the expectation that a settlement would be made, such hope and expectation cannot detract from the effect of her solemn relinquishment, or entitle her against
 167 creditors *or incumbrancers, without notice of her declarations at the time of making such relinquishment, to any relief against the effect thereof. The relinquishment as to them is to be taken according to its legal effect, as a voluntary act of the wife. The Court is therefore of opinion, that the deeds of trust to Henry Massie and William L. Lewis, dated the 5th April 1842, and the 18th August 1842, for the benefit of said C. S. Lewis, are null and void as against the creditors of the husband; and cannot be regarded as valid to the extent of the value of her contingent right of dower.

The Court is further of opinion, that as the various incumbrances herein declared to be valid, were taken upon the property conveyed thereby respectively, and as there is no evidence that any of the subsequent incumbrancers took by express agreement subject to the prior incumbrances, the proceeds arising from the sale of the property are to be applied to the payment of the valid incumbrances according to their several priorities. The judgment creditors have no right to be substituted to the position occupied by any of the incumbrances declared to be void: The various incumbrancers not having contracted with respect to the equity of redemption alone, have a right to charge the whole subject not covered by previous valid incumbrances. Nor is the right of the general creditors secured by the deed to H. Massie, of the 5th April 1842, to come in according to the order of their incumbrance, impaired in consequence of the grantor having excepted from his warranty the claims of such persons as claimed under deeds of trust of record: Such exception being merely personal to the grantor and no evidence of any agreement recognizing the validity of all previous incumbrances.

The Court is further of opinion, that the sequestration made at the instance of the judgment creditors, did not change the
 168 rights of the parties; and as the incumbrancers *by mortgage or deed of trust, were arrested by such sequestration and suit from proceeding to subject said property to sale, they are as against

the judgment creditors, entitled to the rents and profits of the property from the time they could have proceeded under their incumbrances. The rents and profits accruing before that time were interests remaining in the grantor, to which the judgment creditors in virtue of their judgments, executions and the release of the debtor under the insolvent act, are entitled.

The Court is further of opinion, that the question as to the claim for the value of the contingent right of dower raised by the exception of the Bank of Virginia, can only become material in the event of the real estate not producing a sum sufficient to pay Thomas P. Lewis's lien for the purchase money, and the mortgage in favour of Haskell. In that event, and as Haskell's mortgage is subject to the contingent right of dower, there being no valid relinquishment of dower in the deed to him, the Bank of Virginia and the subsequent incumbrancers would be entitled as against Haskell to the contingent value of the dower interest first relinquished by the deed for the benefit of the bank. But the Court perceiving that the fund will be certainly ample to pay off the two first incumbrances, there is no necessity to make any enquiry as to the value of such contingent claim of dower.

The Court is further of opinion, that in conformity with the principles aforesaid, the proceeds arising and to arise from the sale of the property in the proceedings mentioned, and the interest, rents, hires and profits thereof, should be applied as follows:

1. Out of the proceeds of the sales of the perishable property the debt secured by the deed in favour of John Cochran should be first paid.
2. The residue of the proceeds of the perishable property other than the furniture rented with the springs, *after
 169 the satisfaction of the Cochran debt, should be applied to the judgments of Caperton and Thomas Henning pro rata.
3. The proceeds arising from the sales of the slaves and their increase, together with the hires which have accrued or shall accrue, should be applied to the judgments of Caperton and Henning as aforesaid.
4. The rents arising from the springs and other property up to the 20th March 1844, to be applied to the judgments of Caperton and Henning as aforesaid, subject however to a deduction therefrom of a sum sufficient to pay the debts of Samuel Price and Joseph Damron, creditors secured by the deed to Henry Massie for Andrew Allen and others, of the 5th April 1842; the said Price and Damron being authorized to enforce said deed for their benefit on the 5th April 1843.
5. That an account should be taken to ascertain how much of the rents of real estate and furniture should be apportioned after the 20th March 1844, to each of these subjects, and the rents so ascertained and allowed for the use of the furniture after the 20th March 1844, and also the proceeds arising

ing from the sales of the furniture to be applied to the payment of the debt secured by the deed of trust to Henry Massie to secure James L. Woodville, of the 29th April 1842, and should there be any residue remaining of such rents and proceeds arising from the sale of the furniture, after satisfying the debt secured by said last mentioned deed, such residue to be paid over to the judgment creditors, Caperton and Henning, as aforesaid.

6. The rents accruing from the realty to be ascertained as aforesaid, after the 20th of March 1844, to be applied to the debt due to the Bank of Virginia secured by the deed to J. L. Woodville, of the 16th of March 1842.

7. The proceeds arising from the sale of so much of the real estate as was purchased from Thomas P. Lewis *to be applied first to the payment of the purchase money payable to the said Thomas P. Lewis and his assignees. And in applying the proceeds aforesaid to the payment of the purchase money, the proceeds arising from the sale of said Thomas P. Lewis's interest in the real estate, other than the tract of 159 acres, known by the name of the Sweet springs, embraced in the mortgage to William E. Haskell of the 9th February 1837, to be first appropriated for that purpose; and if any thing remains unpaid, the balance so remaining to be satisfied out of the proceeds arising from the sale of the moiety of said tract of 159 acres, sold by Thomas to John B. Lewis; the Court being of opinion that as Haskell's lien extends to but part of the subject, he has a right to require the application of the proceeds in the manner aforesaid, so as to enlarge the fund out of which he alone can look for satisfaction.

8. After the payment of the purchase money the residue of the fund arising from the sale of the entire tract of 159 acres, known by the name of the Sweet springs, to be applied to the payment of the debt secured by the mortgage to Haskell.

9. After the satisfaction of the purchase money and the Haskell debt, the residue of the fund arising from the sale of the lands aforesaid, and all the real estate described in the deed of John B. Lewis to James L. Woodville for the Bank of Virginia, of the 16th March 1842, to be applied to the payment of the balance of the debt due to said bank, after crediting the amount applied thereto arising from the rents as aforesaid, and the debt of William B. Phillips secured by the deed to H. Massie for the benefit of Phillips of the 16th March 1842; and should the fund be insufficient to discharge both debts the proceeds to be ratably divided between the debt of Phillips and the balance due to the bank after deducting the credit for rents.

171 *10. The residue of the proceeds arising from the sale of said real estate, to be applied next after the debts due the Bank of Virginia and Phillips are satisfied, to the satisfaction of the debt secured by the deed to H. Massie for J. L.

Woodville, of the 4th April 1842, or the balance unpaid after crediting the same with the rents and proceeds of the sale of the furniture as aforesaid.

11. The general creditors secured by the deed to H. Massie of the 5th April 1842, except the said Price and Damron who are to be paid out of the rents as aforesaid, will be next entitled to come in, the fund to be distributed pro rata among them, if insufficient to pay all the debts; and if any of such debts have been discharged by any security, he is to be entitled to stand in the shoes of the creditor paid.

12. Next the judgment creditors Caperton and Henning will be entitled to payment of any balance due on their judgments, after crediting the same with the proceeds arising from the sales of negroes, hires, personal property and rents as aforesaid.

13. And the residue, if any remain, after satisfying all the other creditors, to be applied to the debt due William L. Lewis in his own right, and the debt due to him as trustee of C. S. Lewis, secured by his mortgages, which though void as against subsequent incumbrancers of the whole subject, and creditors, is good as between the parties.

14. And lastly, if any surplus should remain after the payment of all of said incumbrances and judgments, the same or so much thereof as may be equal in value to the price of the slaves and their increase, to be settled and secured upon C. S. Lewis, the wife of John B. Lewis, to be held according to the terms and stipulations of the deed of the 5th of April 1842, as explained by the deed of the 18th August 1842.

172 *But before any distribution is made, the sums heretofore allowed under interlocutory orders, are to be deducted, and all the costs incurred in the prosecution of these suits in said Circuit court, are to be paid out of the funds arising and to arise from sales and rent of real estate, the sales and rent of perishable property, and sales and hires of negroes; the three funds to contribute ratably to the payment of the costs in the Circuit court.

It is therefore adjudged and ordered that said decree, so far as it conflicts with the principles herein above declared, is erroneous, and that the same be reversed and annulled; and that the appellees in the case of Lewis and wife and others against Caperton and others, as the parties substantially prevailing, recover of the appellants their costs here expended, and that the appellants in the other cases recover of the appellees their costs here expended.

And this cause is remanded with instructions, to direct an account to ascertain the proportions of rent to be credited to the real and personal fund as aforesaid; and also to ascertain the whole amount of funds in hand and arising from the sales to be directed, which will remain for distribution after deducting the sums heretofore allowed by the Court, and all costs; and the amount of the several debts towards which the same is to be applied; that a proper conveyance

be executed by the said Thomas P. Lewis, or a commissioner, to the said John B., and acknowledged and filed, so that when a sale is made and confirmed, the same may be withdrawn and recorded; and that in the meantime commissioners to be appointed by the Court be decreed to make sale of the real property embraced in the several mortgages and deeds of trust herein declared to be valid; and after allowing a proper time to redeem the property by payment of the debts charged thereon, and also to make sale of the perishable property unsold, the furniture, *and the slaves named in the deeds of January 11th, 1839, and of April 5th, 1842, together with their increase; the slaves and personal property to be sold for cash; and the real estate to be sold in the following order: first, the tract of 159 acres known as the Sweet springs tract; second, the residue of the tracts of which said Thomas P. and John B. Lewis were joint owners, dividing such residue in such mode as will be best calculated to enhance the price; third, any other lands of John B. Lewis embraced in the deed of trust to secure the Bank of Virginia; the sales of the real estate to be on a credit of 1, 2, 3 and 4 years, the purchasers giving bond and good security for the amount of the purchase money; and a lien being retained on the lands sold for the security thereof, and that said commissioner report, &c.

DANIEL, J., concurred in all respects, in the opinion of the Court, except as to the deed of trust of the 11th day of March 1842, made to secure the debt of Cochran. The want of a schedule, the vague manner in which the property is described, the perishable character of said property, the long time given before a sale could be made, and the circumstances under which the deed was executed, rendered it in his opinion fraudulent and void, as a security for the payment of the debt to secure which it purports to have been made.

BALDWIN, J., dissented from so much of the opinion of the Court as avoids the mortgage security given by J. B. Lewis, of the 24th day of February 1842, in regard to the debt due to William L. Lewis.

174 *Wadsworth & als. v. Allen &c.

October Term, 1851, Richmond.

[56 Am. Dec. 137.]

(Absent CABELL, P.)

1. Letters of Credit—Mistake in Address—Case at Bar.—A letter of credit addressed to W & W may be proved to have been intended for W, W & Co., so as to hold the writer bound to the latter upon it.
2. Same—Specifications by Guarantor—Effect of Compliance.—A guarantor may specify in the letter of credit which he gives, the terms on which he will be bound; and if these terms are complied with he is bound, though the law, in the absence of all prescription of terms in his letter of credit, would have prescribed the performance of other acts by

the party seeking to subject him upon his guaranty.

3. Guaranty—Notice of Acceptance—Waiver.—A guarantor undertaking to pay upon receiving reasonable notice of the failure of the principal debtor to pay the debt when due, dispenses with notice of the acceptance of the guaranty by the parties to whom it is addressed; even if the law would have required such notice.
4. Same—Reasonable Notice of Default of Principal—Question for Jury.—What is reasonable notice of the failure of the principal to pay is a question for the jury upon the testimony.
5. Same—Taking Other Security for Debt—Effect on Guarantor.—The fact that the principal gave his bond for the goods he purchased did not release the guarantor.

This was an action brought in the Circuit court of Cumberland county by John E. Wadsworth, Daniel B. Turner and George S. Palmer, surviving partners of themselves and Orren Williams, late merchants and partners doing business under the name of Wadsworth, Williams and Co. against Charles B. Allen and William Phaup. The declaration counted on the following letter of credit:

175 *Raines' Tavern, October 27th, 1840.
Messrs. Wadsworth & Williams, Richmond.

Gentlemen,

Please to deliver to Mr. Daniel Totty, or to his order, merchandise to an amount not exceeding in value, in the whole, five hundred dollars; and on your so doing, we hereby hold ourselves accountable to you for the payment of the same, in case Mr. Daniel Totty should not be able so to do, or should make default; of which default you are required to give us reasonable and proper notice.

Your obd't serv'ts,

Charles B. Allen,
William Phaup.

On the trial of the cause, after the above paper had been read, and the handwriting of the defendants proved, the plaintiffs offered to read the deposition of William B. Isaacs, which had been taken by consent to be read as evidence on the trial, subject to any legal objections to which the testimony would be subject if given in Court. Whereupon the defendants moved the Court to strike out the following passages, viz:

"That the said John E. Wadsworth and Orren Williams had, previous to the year 1840, transacted business as merchants and partners under the name of Wadsworth & Williams; which firm was dissolved in the year 1836, and succeeded by the said Wadsworth, Williams and D. B. Turner, under the name of Wadsworth, Williams & Co.; and in 1839 they were succeeded by the same parties and George S. Palmer; the name of the firm continuing as last mentioned. The plaintiffs were frequently addressed and spoken of as Wadsworth & Williams, but that was not the style of the firm in 1840, nor has it been since 1836; but the successors were in the habit of recognizing letters and orders addressed *to

Wadsworth & Williams, as intended for themselves; and of acting under them. That the said Wadsworth & Williams were not, either jointly or separately, engaged in the sale of merchandise on their individual account, or in any other connexion after the year 1836, except as members of the firm of Wadsworth, Williams & Co."

The Court sustained the motion, and excluded the evidence; and the plaintiffs excepted.

The plaintiffs then proved, that in the year 1840, Orren Williams then being alive, Daniel Totty of the county of Cumberland, exhibited to the concern of Wadsworth, Williams & Co. the letter of credit above given. That on the faith of that letter they sold and delivered to Totty goods to the value of 395 dollars 47 cents, for which they took his bond dated the 30th of October, payable in six months. That on the 30th of April 1841, they wrote to Messrs. Allen and Phaup, referring to the letter of credit, stating the amount of Totty's purchases upon the faith of that letter; and that the money was due that day and had not been paid: But there was no proof that the letters had been received. They proved further, that on the 31st of May 1841, their agent called on Phaup, at his house, and informed him that the money had not been paid by Totty, and asked for payment of it by Phaup. That on the same day the agent went to the house of Allen, to see him on the same subject; but he was not at home. That the agent saw Allen at the March term of the Court for 1842, when he attended as a witness in the case, when Allen told him that Totty had placed claims in Allen's hands to pay the said debt. That he saw Allen again in 1842, when Allen told him that he did not then have the money to pay the debt, but that he would pay it in a short time if the agent would have the suit dismissed. And it was also proved by the plaintiffs' counsel, that either at the June or July

177 term of the *County court of Cumberland in 1841, he met with the defendant Allen, and exhibited to him the letter of credit and bond of Totty, and informed him that he held them for collection.

After the plaintiffs had introduced their evidence the defendants moved the Court to exclude from the jury the letter of credit hereinbefore mentioned, as incompetent to charge the defendants in this cause; which motion the Court sustained, and excluded the letter; and the plaintiffs again excepted.

There was a verdict and judgment for the defendants; whereupon the plaintiffs applied to this Court for a supersedeas, which was allowed.

Lyons, for the appellants.
Garland, for the appellees.

ALLEN, J., delivered the opinion of the Court.

It seems to the Court here that although the guaranty offered in evidence by the

plaintiffs in error was addressed to Wadsworth & Williams, and not to the plaintiffs in error, Wadsworth, Williams & Co., yet it was competent for the plaintiffs in error to prove that at the time the same was so addressed to Wadsworth & Williams, they were partners in the firm of Wadsworth, Williams & Co.; and were not engaged in the mercantile business on their own account, or in connection with any other mercantile firm in the city of Richmond; and that said letter of guaranty being presented to the plaintiffs in error the same was accepted by them, and the goods furnished for the price of which this suit was brought. The Court is therefore of opinion, that as the evidence set forth in the first bill of exceptions taken by the plaintiffs in error on the trial of the issue, tended to prove the facts aforesaid, the Circuit court erred in excluding the same from the jury.

178 *And it further seems to the Court, that said Circuit court erred in excluding from the jury as evidence the said letter of credit in the second bill of exceptions mentioned, as incompetent to charge the defendants in error. By the terms of the letter of credit the defendants in error waived all right to notice of the acceptance of the guaranty, if they would otherwise have been entitled to require it; a question upon which the Court expresses no opinion. By their engagement the defendants in error agreed to hold themselves accountable for the payment of the price of the goods to an amount not exceeding the sum therein mentioned, in case the purchaser should not be able to pay for the same or make default; of which default they required reasonable and proper notice to be given them. It was competent for the defendants in error to specify the conditions upon which their accountability should depend; and having done so, if those conditions have been complied with, they cannot object the failure of the plaintiffs in error to comply with other terms which the law might have imposed, but a compliance with which the defendants in error have waived.

Whether there was reasonable and proper notice of the default, was a question for the jury upon the testimony, upon proper instructions from the Court.

Nor did the fact that the purchaser gave his bond for the price of the goods discharge the defendants in error from liability on their guaranty; the question between them and the plaintiffs in error being not what evidence of the debt the latter may have taken from the purchaser, but whether the price of the goods has been paid at the time stipulated in the contract of sale.

It is therefore considered that said judgment is erroneous, and that it be reversed with costs to the plaintiffs in error, and that the verdict be set aside, and the cause remanded for a new trial of the issues joined; *on which trial the part of the deposition of William B. Isaacs, as set forth in the first bill of exceptions,

and the letter of guaranty referred to and set forth in the second bill of exceptions, if again offered in evidence, and not objected to for any other cause than is disclosed by said bills of exceptions, are to be permitted to go in evidence to the jury.

Jones &c. v. Myrick's Ex'ors.

Myrick's Ex'ors v. Epes & als.

October Term, 1851, Richmond.

(Absent CABELL, P.)

1. **Forfeited Forthcoming Bond—From What Time a Lien on Land ***—A forthcoming bond forfeited has the force of a judgment so as to create a lien upon the lands of the obligors, *only* from the time the bond is returned to the clerk's office.
2. **Same—Presumption as to Return.**—There being no evidence that the bond was returned to the clerk's office before the day on which there was an award of execution thereon by the Court, it will be regarded as having been returned to the office on that day.
3. **Same—Judgment by Confession—Priority.†**—A judgment confessed in Court in a pending suit and the oath of insolvency taken thereon by the debtor upon his surrender by his bail, has relation to the first moment of the first day of the term; but a forfeited forthcoming bond which is not returned to the clerk's office until some day in the term after the first, when there is an award of execution thereon, has no relation; and therefore the assignment by operation of law under the first

***Forfeited Forthcoming Bonds—From What Time a Lien upon Land.**—For the proposition that a forfeited forthcoming bond is a lien upon land from the date of its return to the clerk's office, see the principal case cited in *Terry v. Wooding*, 2 P. & H. 188; *Cabell v. Given*, 30 W. Va. 770, 5 S. E. Rep. 447, 448. For all matter pertaining to forthcoming bonds, see monographic *note* on "Statutory Bonds" appended to *Goolsby v. Strother*, 21 Gratt. 107.

†Judgments—Relation Back.—In *Hockman v. Hockman*, 93 Va. 457, 25 S. E. Rep. 534, it is said: "At common law, all judgments were, by legal fiction, it is said, supposed to be entered on the first day of the term of the court at which they were recovered. This rule has always prevailed in this state whenever the action, in which the judgment was rendered, was in such condition that it might have been then tried, if it had happened to occupy the first place on the docket. And the law, not regarding fractions of a day, the lien of a judgment began by relation at the first moment of the first day of the term. *The Mutual Assurance Society v. Stanard*, 4 Munf. 539; *Countts v. Walker*, 2 Leigh 268; *Skipwith v. Cunningham*, 8 Leigh 271; *Horsley v. Garth*, 2 Gratt. 474; *Withers v. Carter*, 4 Gratt. 407; *Jones v. Myrick's Ex'or*, 8 Gratt. 179; *Brockenbrough v. Brockenbrough*, 31 Gratt. 580; *Yates and Ayers v. Robertson & Berkeley*, 80 Va. 475; and *Janney's Ex'or v. Stephen's Adm'r*, 2 Pat. & H. 11."

The principal case was also cited on this point in *Yates v. Robertson*, 80 Va. 477. See also, *foot-note* to *Brockenbrough v. Brockenbrough*, 31 Gratt. 580.

As to judgments by confession, see monographic *note* on "Judgments by Confession" appended to *Richardson v. Jones*, 12 Gratt. 53.

has preference over the lien of the forthcoming bond.

4. **Same—Obligors Insolvent—Equity Practice.‡**—Though a forthcoming bond is forfeited, and not quashed, yet in equity the lien of the original judgment still exists; and if the obligors in the bond prove insolvent, so that the debt is not paid, a Court of law will quash the bond so as to revive the lien of the original judgment. And a Court of equity, having jurisdiction *of the subject, will treat the bond as a nullity, and proceed to give such relief as the creditor is entitled to under his original judgment.

5. **Sale of Lands Subject to Lien—Order of Liability between Alienees.§**—Lands subject to a judgment lien which have been sold or encumbered by the debtor, are to be subjected to the satisfaction of the judgment in the inverse order in point of time of the alienations and incumbrances: The land last sold or encumbered being first subjected.

6. **Same—Same—Waiver of Right against Alienees Primarily Liable—Effect.**—A judgment creditor having by his conduct waived or lost his right to subject the land first liable to satisfy his judgment, is not entitled to subject the lands next liable for the whole amount of his judgment, but only for the balance after crediting thereon the value of the land first liable.

‡Equity Practice—Forfeited Forthcoming Bonds—Obligors Insolvent.—BURKS, J., in delivering the opinion of the court in *Rhea v. Preston*, 75 Va. 774, said: "A forfeited forthcoming bond stood as a security for the debt, and though, while in force, no execution can be taken out or other proceedings be had at law to enforce the original judgment; yet the bond is not an absolute satisfaction. For if it be faulty on its face, or the security when taken be insufficient, or the obligors, though solvent when the bond is taken, become insolvent afterwards, the plaintiff may, for these or other good reasons, on his motion, have the bond quashed and be restored to his original judgment. And though the bond be not quashed, if it appear that it may properly be, a court of equity, which looks to substance rather than form, and, when occasion requires, treats that as done which ought to be done, will regard the bond as a nullity, and the original judgment in full force. *Garland and Others v. Lynch*, 1 Rob. Rep. 545; *Jones, etc., v. Myrick's Ex'ors*, 8 Gratt. 179, 211, 212." See also, *Cooper v. Daugherty*, 85 Va. 351, 7 S. E. Rep. 387, citing the principal case.

§Sale of Lands Subject to Lien—Order of Liability between the Alienees.—In *McClaskey v. O'Brien*, 18 W. Va. 839, the principal case was cited to the point that, where land, which is subject to the lien of a mortgage or other paramount encumbrance, is sold in parcels successively to different persons, the buyers are *prima facie* chargeable in the inverse order of alienation. Again, in *Gracey v. Myers*, 15 W. Va. 202, it is said: "In *Henkle's Ex'or, etc., v. Allstadt et al.*, 4 Gratt. 284, it was held, that where a tract of land is subject to a mortgage, and the owner of the land sells a part thereof, and conveys it with general warranty, and then sells the remainder of the tract, 'the part last sold is primarily liable for the satisfaction of the mortgage debt.' See also, *Jones, etc., v. Myrick's Ex'ors*, 8 Gratt. 179." The principal case was also cited as authority on this point in *Kelly v. Hamblen*, 98 Va. 390, 36 S. E. Rep. 491.

7. Decree—Conclusion as to Judgment Creditor]—Case at Bar.—A judgment creditor having the prior lien on the lands of his debtor, files a bill against his debtor and other creditors having incumbrances on his debtor's lands. Pending this suit another creditor of the same debtor files a bill against him and his creditors, and among them the judgment creditor, seeking to subject the lands under his lien; and in this suit the proceeds of the whole lands which were sold by the sheriff under the insolvent laws, or by the trustees in the deeds, are distributed by the decree of the Court to other creditors. The judgment creditor afterwards matures his suit and brings it on for hearing.

Same—Same—Same.—HELD: That the decree in the other cause concludes him, so that he is not entitled to recover from the creditors who received them, the proceeds of the land sold by the sheriff; nor is he entitled to have the land sold, as against the purchaser thereof.

On the 24th of June 1828 John Myrick instituted a suit in the late District court of chancery at Richmond against William D. Epes and others, the creditors of Epes. The bill was filed at the following August rules, and charged that at the September term of the Superior court of Nottoway county, in the year 1827, he recovered a judgment against Epes for 1160 dollars 1 cent, with interest thereon from the 12th of May 1827, and 7 dollars 51 cents costs. That an execution issued on this judgment and was levied, and a forthcoming bond was given by Epes with Samuel G. Williams and Joseph G. Williams as his sureties; and was forfeited. That this bond bore date the 25th of October 1827, 181 *and was forfeited on the first Thursday in December following. That a judgment was obtained on this forthcoming bond at the April term of the Superior court in 1828; but that both principal and sureties were insolvent.

The bill further charged that at the time of executing the forthcoming bond Epes was possessed of several tracts of land in the county of Nottoway, in all but one of which he had but a life estate; that was a tract of eight hundred acres on which he resided; and that he also owned a tract in the county of Dinwiddie in which he had a life estate. And that when the forthcoming bond was forfeited there were no other liens on the land than that created by the forfeiture of the bond. That Epes was very much embarrassed, and from the 14th of February 1828 to the 25th of April, he executed five several deeds of trust which were recorded anterior to the April term of the Superior court. And that at the April term of the Court Epes took the oath of an insolvent debtor in several cases.

The bill further stated that the deed con-

See further on this subject, *foot-note* to *Alley v. Rogers*, 19 Gratt. 366, and cases there cited.

[Degrees—Conclusiveness.—See principal case cited and approved in *Tilson v. Davis*, 82 Gratt. 104, 105. See monographic note on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

veying the Dinwiddie land was not recorded until two days after the oath of insolvency had been taken by Epes; and that this land had been sold and conveyed by the sheriff to satisfy the judgments on which Epes had taken the oath of insolvency. That although the plaintiff's lien was prior to that under which this land was sold, yet he was not disposed to interfere with said land if he could be decreed his money, to be raised from the other tracts, as they would produce much more than sufficient for this purpose; and as to this matter he submitted to the Court to decide as equity should dictate.

The bill further charged that an execution issued on the judgment recovered on the forthcoming bond aforesaid which went into the hands of the sheriff of Dinwiddie, whose return thereon was referred to as shewing that the plaintiff was entitled 182 to have the slaves *mentioned therein subjected to the satisfaction of his debt, the sheriff returning that he had seen the slaves and endeavoured to levy upon them, but that they had run from him and hid themselves, and had gone into the county of Nottoway. That at the same term of the Superior court of Nottoway the plaintiff had recovered another judgment against Epes, that an execution was issued thereon which went into the hands of the sheriff of Dinwiddie, and the same return was made upon it as upon the other, except that a part of the money was made. That the slaves mentioned in the return of the sheriff on these executions were not embraced in any deed recorded in Dinwiddie county before the executions went into the hands of the sheriff of that county, in which the slaves were living at the time. That the slaves were therefore liable to satisfy the plaintiff's debts; if not in preference to those creditors at whose suit Epes took the oath of insolvency, certainly he will be entitled to any balance arising from the sale of these slaves, towards the satisfaction of his said executions, and in the first place to the satisfaction of the balance due on the latter.

The bill made William D. Epes, the trustees and creditors in the several deeds, and the creditors at whose suit the insolvent debtor's oath was taken by Epes, defendants, and prayed for a sale of the lands to satisfy any prior liens; that the slaves too might be sold, and the proceeds distributed according to the rights of the parties; and that as the creditors at whose suit Epes took the oath of insolvency, had obtained the proceeds of the land in Dinwiddie, that the plaintiff's small judgment might be satisfied out of the proceeds of the slaves; and for general relief.

Of the deeds executed by William D. Epes, one bore date the 14th of February 1828, and by it he conveyed to Francis Epes the tract of eight hundred acres of land in the county of Nottoway, of which he 183 owned *the fee, and a number of slaves, in trust to secure David G. Williams and Edward Bland, as his en-

dorsers upon a note for 4300 dollars, discounted at the Bank of Virginia at Petersburg. Another deed bore date the 25th of April 1828, and by it William D. Epes conveyed to Bartelot P. Todd another tract in the county of Nottoway containing four hundred and eighty acres, and the tract in Dinwiddie containing twelve hundred acres, in both of which he held but a life estate, and also a number of slaves, in trust to secure to Archer Jones the payment of a debt of 4420 dollars. And another deed bore the same date, by which William D. Epes conveyed to the same trustee his crops on hand in Nottoway and Dinwiddie, and also the growing crops, with his household and kitchen furniture, stock, &c., and a tract of seventy-five acres of land in which he held a life estate, to secure a debt of 366 dollars 50 cents, due to Edward Bland, and to indemnify Francis Epes as his surety to the amount of 3940 dollars. A fourth deed was of the same date, and conveyed to Todd any balance that might remain in his hands of the proceeds of the property conveyed to secure the debt due to Archer Jones, after the payment of that debt, in trust to secure a number of his creditors among whom was John Myrick. All these deeds were lodged with the clerk of the County court of Nottoway on the 26th of April, to be recorded.

The Superior court of Nottoway seems to have commenced its term on the next day; and on the 28th William D. Epes was surrendered into custody by his bail in six several actions pending against him in that Court, and he thereupon took the oath of an insolvent debtor, and was discharged. On the same day the plaintiff Myrick obtained an award of execution on the forthcoming bond which had been taken upon his execution against Epes, and at the same term he recovered a judgment against Epes for 184 262 dollars 62 cents, with *interest and costs. On the first of these executions the sheriff of Dinwiddie returned that he went to the plantation of Epes in the county of Dinwiddie, on the 3d of May, when he saw several slaves whom he named in his return; and that he exerted himself to levy the execution upon them; but that they all ran for the woods and secreted themselves, so that he could not find them.

The deed conveying the land in the county of Dinwiddie to secure the debt due to Archer Jones, was not recorded in that county until after Epes had taken the oath of insolvency. The sheriff therefore proceeded on the 2d of July 1828, to sell the life estate of Epes in the land, when Jones became the purchaser at the price of 753 dollars 75 cents net; and it was conveyed to him by the sheriff. It was after this sale and conveyance that the bill of the plaintiff was filed.

The only defendant who answered the bill was David G. Williams, who was the surety secured by the first of the before mentioned deeds. He, whilst he admitted the facts stated in the bill, denied that the plaintiff had a lien upon the property real or personal, conveyed to indemnify him.

He insisted that there was no lien by force of a judgment where there was no capacity to take out an execution; and that consequently the plaintiff lost his lien on the lands of Epes when the forthcoming bond was executed, which, although it is declared by the statute that it shall have the force of a judgment, was nevertheless a judgment on which an execution could not issue until it was awarded by the Court: And before that time the deed conveying the eight hundred acres of land for the indemnity of the respondent had been executed and recorded.

In June 1832, the plaintiff Myrick died, and the cause was revived in the name of his executors: And on their motion the case was transferred to the Superior court of Nottoway county. In April 1833, the 185 cause *came on to be heard in that Court, when a commissioner was directed to ascertain and report the yearly value of the lands in which William D. Epes was interested at the date of the delivery bond referred to in the bill; and also at the time the original judgment was obtained.

The case seems to have slept from that time until April 1839, when it was again heard, and the Court being of opinion that the delivery bond and judgment thereon operated as a lien on the lands owned and unincumbered by William D. Epes, at the date of the forfeiture of the bond, directed a commissioner to enquire into and report the amount of the sales of the real estate of Epes, owned by him and not incumbered at the date of the forfeiture of the bond, the time when the said lands were sold, to whom sold and conveyed, and the prices at which each tract was sold, to whom the purchase money thereof was paid, and the proportion paid to each. A report was made by a commissioner in obedience to this order, but it is not in the record.

Before a final decree was made in this case, the record of a cause which had been finally decided in the same Court, was filed. This was a case in which Francis Epes in his own right, and as administrator of Thomas R. Epes, and Samuel Scott, as executor of John F. Epes, were plaintiffs, and William D. Epes and the trustees and creditors in his several deeds, were defendants. The plaintiffs claimed as sureties, or representing sureties, of William D. Epes, in a bond which had been transferred to Joseph Cooper, one of the creditors at whose suit William D. Epes had taken the oath of insolvency; and they alleged that Francis Epes, and Scott as executor of John F. Epes, had been compelled to pay the debt; and asked to be substituted to Cooper's rights. The defendants among whom was John Myrick, answered and contested their right to be substituted to the rights of 186 Cooper: And Myrick stated *the fact that he had obtained two judgments against William D. Epes at the same term at which he had taken the oath of insolvency; and he also stated the facts as to the issue of the executions, and the return of

the sheriff thereon. And he claimed to have decreed to him the amount arising from the sale of the slaves made by the sheriff of Nottoway, after satisfying the claims which had preference to his under the assignment of William D. Epes on taking the oath of insolvency.

This case was finally decided in 1834, when the Court distributed the proceeds of the Dinwiddie land, 753 dollars 75 cents, and of the slaves sold by the sheriff of Nottoway, 1099 dollars 86 cents, among the creditors at whose suit William D. Epes had taken the oath of an insolvent debtor.

The record of this suit also shewed that all the lands conveyed by William D. Epes, except the Dinwiddie land, had been sold by the trustees, and the proceeds distributed. The Dinwiddie land was sold by the sheriff, and its proceeds distributed as before stated. It appeared that the proceeds of the sale of the tract of eight hundred acres had been paid to D. G. Williams, by the trustee Francis Epes; that Todd had paid to Archer Jones and to Francis Epes, the proceeds of the lands conveyed for their benefit, except the Dinwiddie land.

The cause came on to be finally heard in October 1845, when the Court being of opinion that the Dinwiddie land, having been sold by the sheriff of said county, under the schedule of said William D. Epes, before the institution of this suit, and the purchaser thereof not having been made a party, no recovery could be had for the said land, or the proceeds thereof in this cause. And being of opinion also, that the plaintiff had waived his right to the sum of 753

187 dollars 75 cents, the proceeds of said land, and had no right to call upon the defendants to pay said amount, on account of the lands sold for their benefit under the deeds of trust exhibited with the bill; and the Court being further of opinion, that the defendants Archer Jones and Francis Epes were liable on account of the lands purchased by them under the deeds made by William D. Epes for their benefit, before the defendant D. G. Williams could be called upon on account of the land sold under the deed of trust for his benefit; the deeds of said Jones and Francis Epes being of posterior dates, decreed that the defendant Jones should pay to the plaintiffs the sum of 906 dollars 68 cents, with interest on 426 dollars 15 cents, part thereof, from the 2d day of October 1845, until paid; and that the defendant Francis Epes should pay to the plaintiffs the sum of 217 dollars 3 cents, with interest on 116 dollars 25 cents, part thereof, from the same date; and that they should pay to the plaintiffs their costs, provided Francis Epes should not be required to pay more than 17 dollars 81 cents, or Jones more than 67 dollars 9 cents, which sums remained in their hands after paying the amounts above decreed to the plaintiffs. From this decree, both the plaintiffs and Jones and Francis Epes applied to this Court for an appeal, which was allowed.

The case was argued in writing by

Gholson and James Alfred Jones, for Jones and Epes, and by Spooner, for Myrick's executors.

For Jones and Epes.

First. If Myrick's executors succeed at all, it must be by force of the lien of the forfeited forthcoming bond.

They do not claim any lien under the original judgment. On the contrary they found their claim entirely on the bond: which they do not object to as faulty, but set up as good. They set forth in 188 their bill, that, "on the original judgment, a fi. fa. was issued, and 'duly levied,' that 'a forthcoming bond was duly executed by W. D. Epes, Joseph G. Williams and Samuel G. Williams, and the said bond was duly forfeited, on the first Thursday in December 1827;" and they exhibit copies of the fi. fa. delivery bond, and judgment on the bond, which, they say, was obtained at April term of the Superior court in 1828. They set forth the amount of the judgment on "the delivery bond," and insist that for this amount they have a lien on the lands of W. D. Epes, by reason of their "judgment aforesaid" (i. e. on the delivery bond); which has priority, they say, over the deeds of trust.

The very main object of the suit was to get the benefit of the forthcoming bond. The plaintiff was not content to take merely the amount of the original judgment. It is very clear, then, that in this suit the Court cannot proceed to quash the forthcoming bond as faulty, and enforce the lien of the original judgment.

In the Court below, the plaintiffs did not ask it;—it was inconsistent with their bill to ask it; the defendants had no notice that any such thing would be asked, that they might come forward and resist it; and the Court not pretending to quash the bond, enforced the lien claimed under it, and gave a decree for the full amount of the bond.

The forthcoming bond then remaining unquashed, the original judgment is so far satisfied that no new execution could issue on it. *Taylor v. Dundas*, 1 Wash. 92; *Downman v. Chinn*, 2 Wash. 189; *Garland v. Lynch*, 1 Rob. R. 545. And no lien can be claimed by virtue of it, since the lien of a judgment is a mere consequence of the right to sue out an elegit. *United States v. Morrison*, 4 Peters' R. 124. The executors then are remitted to, and must depend entirely on the lien of the bond.

189 *In the bill it is alleged that the bond was forfeited on 1st Thursday in December 1847, but not that it was returned to the clerk's office. They set forth the judgment on the forthcoming bond, which appears to have been rendered on the 28th day of April 1828.

But where the bond was in the meantime, whether in the clerk's office, or with the sheriff or the plaintiff who had the right to demand it of him, 1 Rev. Code 531, § 17, is not alleged and does not appear. It is argued by the counsel of Myrick's executors

that the fact of the return of the forthcoming bond to the clerk's office before the recordation of the deeds of trust sufficiently appeared on the record, and the reasons given to prove it, are that the sheriff was bound under a penalty to return the bond on the return day of the execution; that in fact it was in Court on the first day of April term 1828, that a copy of it was made by the clerk and filed in this cause; and that no objection was made in the Court below that the bond was not returned to the clerk's office according to law.

These reasons are quite unsatisfactory.

In the first place, the sheriff is not bound to return the bond to the clerk's office. He may deliver it to the "creditor, his agent or attorney, or other legal representative," 1 Rev. Code 531, § 17, and whatever may be his duty, it is known to the practitioner in Virginia, that the habit of many sheriffs is to retain the forthcoming bonds until Court, that they may give the notices of the motion for award of execution.

In the next place, the fact that the bond was in Court on the first day of the April term 1848, does not shew where it was before that time. Nor does the fact that a copy was made by the clerk, and filed in this cause, shew anything more than that, at the time when the copy was made, which was long since these transactions took place, the bond was in the office.

190 *Nor can anything be inferred from the failure of the appellants to appear in the Court below and object that the bond was not returned to the office before their deeds were delivered there. It was not for them to deny what the plaintiff in his bill did not allege. They had no notice that it was pretended that the bond was returned to the clerk's office before Court, or that any benefit was claimed therefrom. The plaintiff can claim the benefit of the admission of the facts alleged, and none other. It is submitted then, that it by no means appears in the record that the forfeited forthcoming bond was returned to the clerk's office before the deeds were recorded.

But, suppose it did, it is admitted by the counsel that there is not an allegation in the bill that the bond was so returned; and this is plain enough on the face of the bill.

If the fact be material, the omission of the averment in the bill is fatal and cannot be supplied by proof.

Is it then a material fact in this cause that the forfeited forthcoming bond should have been returned to the clerk's office before the deeds of trust were recorded.

And this turns on the enquiry when a forthcoming bond creates a lien on the land of the obligors. Is it as soon as forfeited, or is it only after being forfeited and also returned to the clerk's office? Or is it even then until execution has been awarded on it?

If the lien is created as soon as the bond is forfeited, then the fact of the return to the clerk's office is not material, and need not be averred; otherwise it is.

The lien of a judgment is a mere conse-

quence of the right to sue out an elegit on it and extend the debtor's lands.

When may an elegit be sued out on a forthcoming bond? Only after award of execution by the Court, made upon motion after notice. Can the lien, which is the mere consequence of the right to sue 191 the elegit, *exist before the right to sue the elegit exists? It is submitted not. And that if it were conceded that the forthcoming bond had the force of a judgment as soon as forfeited, yet it lacks the quality of a judgment essential to create a lien on lands.

In the language of Tucker, J., in Lipscomb's adm'r v. Davis's adm'r, 4 Leigh 303: "Admitting, however, that the bond has to some intents the force of a judgment as soon as it is filed, I think it obvious it has not all the effect of a judgment until there has been an award of execution. No execution can be sued out at the mere will of the party; the authority of the Court must first be obtained by motion."

But has the bond the force of a judgment to any intent until it has been returned forfeited to the clerk's office? Neither the terms nor the objects nor the policy of the law favour such a conclusion.

The sheriff is to return "the bond to the office of the clerk of the Court, whence the execution issued, to be there safely kept, and to have the force of a judgment," i. e. in order to be there safely kept and have the force of a judgment; for the purpose of being there safely kept and having the force of a judgment. To the argument that the provision as to the return is merely directory to the sheriff, the reply is that the whole proceeding is the proceeding of the sheriff, and for it to have the effect given to it by the law, he must proceed according to law. It is a summary extraordinary proceeding given by statute, and all the provisions of the statute should be complied with to make it valid. If it had been elsewhere declared that the bond should, when forfeited, have the force of a judgment, and then been added that the sheriff should return it to be safely kept and have the force of a judgment, there would be more reason to contend that the provision as to the return and safe keeping was merely directory.

192 But the only words of the law giving the character of a judgment *to the bond are those quoted. They follow the provision requiring the return; and there exists between them the relation of an act and its consequence.

And the object of the law was not merely to give the effect of a judgment to the bond.

If the creditor preferred it, the law provided that he might take the bond himself. 1 Rev. Code 531, § 17, that he might use it as he pleased. That, if he pleased, he might treat it as a common law bond, and sue on it and hold the obligors to bail and have the other privileges of a bond creditor, that do not belong to a judgment creditor. This was the object, and not to convert the

bond into a judgment the moment it was forfeited.

The policy of the law too in respect to third persons, is averse to creating judgments with their unknown liens and preferences out of these private bonds. Read the remarks of Tucker, J., in Lipscomb's adm'r v. Davis's adm'r, 4 Leigh 303. Hence our recording acts and our act for docketing judgments, which are in striking contrast with this rule of construction giving a bond in the pocket of the sheriff or creditor the full effect of a docketed judgment.

The counsel of Myrick's executors has cited the law, as it now is, under the new Code, to shew that the opinion of the revisors as to the import of this provision was in support of their proposition. But it seems to be clearly against it.

By the new Code, "the clerk shall endorse on the bond the date of its return, and against such of the obligors therein, as may be alive, when it is forfeited and so returned, it shall have the force of a judgment." Under the law, as it is in the Code, the bond is not to have the force of a judgment, even after forfeiture, and return, unless the obligor is alive at the return. If he dies after the forfeiture, and before the return, the bond has not the force of a judgment. How then can
193 it be *said, that from the forfeiture the bond has the force of a judgment?

The apprehension expressed by counsel, "that judgment debtors and securities in forthcoming bonds might play a deep and ruinous game by making and recording deeds in the interval between the forfeiture and return of the bond," is quite unwarranted; since the creditor has the right to demand the bond of the sheriff and may return it himself.

This view of the statute leads to the conclusion that a forfeited bond has not the force of a judgment in any respect until returned to the clerk's office; nor even then the force of a lien until there is an award of execution. And therefore that the averment was material, that the bond had been returned when the deeds were lodged for recordation, and also that there had been an award of execution on it: neither of which averments having been made the bill is materially defective and should be dismissed.

Secondly. There have been some fluctuations in the decisions, as to the question, whether alienees of land under the lien of a judgment shall contribute pro rata, or in the order of their purchases. If they contribute pro rata, the preference to Williams was wrong.

But, if it be conceded that the land last sold is to be first applied to the satisfaction of the judgment, the rule does not justify the preference given to Williams over Jones and Epes.

When the contest is between several deeds of trust, it is a misapplication of it to refer for the preference to the dates of the deeds. Applying the rule, with just regard to the

recording acts, we are to look, in determining the question of preference, to the time of the delivery of the bonds to the clerk to be recorded, after due acknowledgment, proof or certificate.

The act declares that "all deeds of trust and mortgages, whensoever they shall
194 be delivered to the clerk *to be recorded, and all other conveyances, &c., shall take effect and be valid, as to all subsequent purchasers for valuable consideration without notice, and as to all creditors, from the time when such deed of trust or mortgage or such other conveyance shall have been so acknowledged, proved or certified and delivered to the clerk of the proper Court to be recorded, and from that time only."

Now, under the act, the deed of trust first recorded, is the first to "take effect" and become "valid" as to the creditors, that is, the deed first recorded first passes the property of the debtor as against the creditor. And the land embraced by the deed first recorded, is really the land first aliened; and the land embraced by the deed last recorded, is last aliened, and therefore under the rule to be first applied to the satisfaction of the judgment.

The statute fixes the date of the alienation. Equity requires the alienees to pay successively, in the order of their respective alienations.

The rule of equity is thus preserved without frustrating the policy of the statute.

This too is in analogy to the law of executions. Suppose the creditor should choose to proceed by ca. sa. to make his debt instead of suing his elegit. The land embraced by a deed recorded would be exempt. That embraced by a deed unrecorded, though prior in execution, would go to satisfy the debt.

But if, without reference to the recording of the deeds, the deed last executed must satisfy a judgment lien before one first executed, why does not equity force the last alienee to exonerate the first from the judgment debt, notwithstanding the creditor has chosen to make it by ca. sa.? It is certainly a very ill defined and unsatisfactory equity, as between the several alienees, which depends entirely on the caprice of the judgment creditor, in the choice
195 of his execution: so that if he *sues his elegit one alienee pays, if he sue his ca. sa. another pays.

Very inconsistent consequences will flow from disregarding entirely the recording acts in enforcing the lien of judgments on several alienees.

This case furnishes an illustration. The Court held that the proceeds of the Dinwiddie land, 753 dollars 75 cents, were first of all liable to Myrick's lien. Why? Because those proceeds were from lands acquired by the sheriff under the assignment in insolvency, subsequent to the alienation of the other land. He was the last alienee, having no privity with the vendee under the unrecorded deed, but taking in despite of his deed, immediately under the debtor.

It was right that his land should be first subjected. But suppose the deed of trust embracing this Dinwiddie land had been antecedent to the other in date. According to the principle proceeded on by the Court, this deed being antecedent, would shift the lien from this land on the other lands. The lien attached to the other land to the relief of this.

Then when the sheriff took it, he would take it with the lien shifted off. And it would be wrong to hold that the proceeds of the land in his hands, were first of all, liable to the lien. They in fact would not be liable at all, until the other lands were exhausted. And thus, although last aliened, his land would be relieved from the lien, by the lands previously aliened.

This violation of the rule of equity results from holding the unrecorded deed valid against the judgment lien, while it is void as to a ca. sa. execution.

It would have been a striking result, in this case, if, when William Dandridge Epes took the oath of an insolvent debtor, the deed of trust, made for the benefit of Williams, had, like the deed embracing the Dinwiddie land, been unrecorded. The land embraced by it would have passed to the sheriff and Williams would have lost it.

196 *Then would the judgment lien have been satisfied first, out of this land, together with the Dinwiddie land, or first, out of the land conveyed to Jones and Epes?

The Court below would have held and held properly, that the land in the sheriff's hands must first be applied to satisfy the lien, because he would be the last alienee. But if as between Williams on the one hand, and Jones and Epes on the other, their relative responsibility for the lien in consequence of the land they took, was settled at the date of their deeds, so that the land of Jones and Epes was bound to pay before Williams's land, how could their land be relieved of this obligation and the same be shifted on Williams's land by the mere act of third persons? So that the rule of equity would require the judgment creditor to extend the land conveyed for Williams's benefit, or the lands conveyed for Jones and Epes, not as his deed or their deeds might be first recorded, in conformity with law, but as the judgment debtor might chance to be driven to the oath of insolvency or not.

These inconveniences are easily obviated if, in the application of the rule, Courts of equity shall consider no land aliened by deed of trust quoad creditors, until the alienee has used the means prescribed by law to make his deed take effect and be valid as to creditors, but remaining in the same plight as to their rights and liens as if the vendor still held it.

If then the rule be that the land last sold is to be first applied to the satisfaction of the judgment, it is submitted that it is to the time when delivered to the clerk to be recorded and not their date, that we must

look to determine when lands are aliened by deed of trust; and in this case, as the deeds were delivered on the same day to the clerk, that the beneficiaries under them ought to contribute in proportion to what they severally received.

197 *MYRICK'S EX'ORS v. JONES & EPES.

Thirdly. That portion of the decree which relieves these lands conveyed in trust for Williams and Jones and Epes, from 753 dollars 75 cents of Myrick's debt, seems to be quite defensible.

It is enough to know that, in the case of Epes and Scott v. Epes and als., in which Myrick was a party, the question of the disposition of the proceeds of this land was decided, that Myrick appeared, and, without pleading in abatement the pendency of this suit, insisted on his right to those proceeds, by reason of his two judgments, and that a decree was made disposing of those proceeds, which remains unreversed.

So far as the disposition of those proceeds is concerned, it is too late now for Myrick's executors to complain of it or seek to change it.

Nor can they ask, with any propriety, to set aside the sale to Jones. They acquiesced in that sale in the suit of Epes and Scott v. Epes and als. and claimed the benefit of it, insisting on a share of the proceeds. And, in this suit, they set forth that sale; and, instead of making the purchaser a party as purchaser, and seeking to set aside the sale, they omit to do it, and again claim the benefit of the sale; praying that they may be allowed a proper amount "of the proceeds of the sales of said land," in part of another judgment of theirs, which they affirm operated a lien on the Dinwiddie land.

It is too late then to have the sale set aside.

The enquiry then remains, whether Myrick's executors had a right to charge the 753 dollars 75 cents, or any part of it, on the lands conveyed in trust for Williams and Jones and Epes. And this question depends on another, whether the Dinwiddie land, the proceeds of which amounted to 753 dollars 75 cents, was first liable. If so,

a Court of equity will turn them over to it. 198 *Clowes v. Dickenson, 5 John.

Ch. R. 235. That land was conveyed by William Dandridge Epes in trust for the benefit of certain creditors; but the deed was not recorded in Dinwiddie, where the land lay, until he took the benefit of the insolvent debtor's oath. The deed then never took effect as to creditors.

Nor did the sheriff claim under it, but paramount to it, and by virtue of the assignment in insolvency. This assignment in insolvency to the sheriff was posterior to the execution and recording of the several deeds in trust for Williams and Jones and Epes. If then alienees are to pay in the order of their deeds, this Dinwiddie land being last assigned must be first applied to the satisfaction of Myrick's judg-

ment; and the Court did right to turn his executors off from the lands first aliened, to the extent of the value of this land, 753 dollars 75 cents.

Whether or not as between other alienees, the rule obtains that the elder is preferred to the junior, it would hardly seem questionable that, as between a prior alienee and a subsequent assignee in insolvency, the alienee would be preferred. For the assignee stands precisely in the shoes of the debtor; taking his property exactly in the plight he held it. And the land in the hands of the debtor, is always to be extended in satisfaction of the judgment before the land he has aliened.

For Myrick's executors.

As Jones and Epes obtained the first appeal, it seems proper to notice first, the objections to the decree in the cause, from which both parties have appealed, made by Jones and Epes.

1. The first point made by the appellants, Jones and Epes, is, as to the nature of the lien on the land produced by the execution, and forfeiture &c. of a forthcoming bond. There is no question as to the original lien on all the lands of William D. Epes, 199 by virtue of *the original judgment.

When did that lien cease or expire? The execution and forfeiture of the forthcoming bond did not amount to a payment or satisfaction of the original judgment. The cases of Taylor v. Dundas, 1 Wash. 92, and Downman v. Chinn, 2 Wash. 189, do not oppose this view. "The only effect of those decisions is, that a replevin or forthcoming bond, even if defective, is a bar to any further proceedings on the original judgment until quashed." Randolph v. Randolph, 3 Rand. 490; Garland v. Lynch, 1 Rob. R. 545.

The original judgment was obtained at September term 1827. The forthcoming bond taken by virtue of the fi. fa. which issued under that judgment, was dated the 25th of October 1827, and was forfeited the first Thursday in December 1827.

The execution aforesaid was returnable to the first Monday in December 1827. If it was returned by the sheriff to the clerk's office on the return day, or before the record of the first deed of trust, April 26th, 1828, even the appellants, in effect, admit the lien of the forthcoming bond would be preferable to the trust deed. Does not the fact of such return sufficiently appear on the record? The sheriff was bound by law under a penalty to return the fi. fa. on the first Monday in December 1827. He certainly made the return, although he did not date it. There is nowhere in the record an allegation or intimation that the sheriff did not strictly comply with the law and return the forthcoming bond and fi. fa. the first Monday in December 1827. It was in Court the first day of the April term. D. G. Williams one of the main defendants alone answered the bill. He makes no such objection that the bond had not been returned in due time, but relies on a different

point, and as far as any inference as to this point could be drawn from the answer, it would be that the forthcoming bond was duly returned and filed. It is true there is

not in the bill a special allegation, 200 that the *bond was returned before

the month of April 1828. But it was in the clerk's office and a copy was duly made by and obtained from the clerk, and filed in the cause, and no objection was made, or intimation given in the Court below, that the law had not been strictly complied with. No proof was called for as to this point, and no objection made till the case comes here. The counsel is aware that there were some dicta in relation to this point in Lipscomb's adm'r v. Davis' adm'r, 4 Leigh 303. The point was not discussed by counsel in that case, and the remarks of the judge were obiter dicta. It is humbly submitted, that the reasons for the opinion expressed by the Judge will not bear examination. How could executors or administrators be injured or entrapped? Could it have been possible in a case like this? And as to purchasers, suppose the parties for whose benefit the deeds of trust were executed, had gone to the clerk's office in April 1828, when the first deed was recorded, to enquire and ascertain what liens existed on the lands of William D. Epes. Was it possible for them to be entrapped or deceived? They must have ascertained that the original judgment existed and was rendered seven months previously. Surely that would have been notice enough to them. But if more was wanted, they had but to apply to the sheriff, if the execution and forthcoming bond had not been returned. In all such cases the original judgment would be ample notice, and if a case should happen, which would be very rarely, of a forthcoming bond being not returned for 12 months, the same rule perhaps might apply to such bond as would to a common judgment, where no execution was issued within the year. It is true that as to a security in the forthcoming bond the original judgment might not be considered as any notice, but it is generally but a short time between the forfeiting of a forthcoming bond and the judgment on it, and it is believed that rarely if ever, are the 201 forthcoming *bonds in a clerk's office examined by any body for the purpose of ascertaining whether there be any lien on a particular person's land. The counsel in this case has never heard of a single instance of such examination.

It is submitted, however, that in this case the Court should not, under the circumstances, require any farther evidence than what appears, that the forthcoming bond was returned with the fi. fa. on the first Monday in December 1827.

No objection was made, which if made, might have enabled the appellees to have proved when the bond was actually returned, if the fact was important. The point made in the answer was not of that character to lead the appellees to believe that any such objection would be made as is now made.

But was the lien of the original judgment in this case suspended after the forfeiture of the forthcoming bond till it was returned to the office, if it was not returned till Court so as to let in the deed of trust executed before the Court in April, according to the true meaning of the act of assembly? Could it have been intended that a creditor's lien by judgment should be vacillating and uncertain and depend at all on the strict compliance of the sheriff with the law? The lien to be good if the sheriff did his duty, but lost if he did not. It does not seem reasonable that such should have been the meaning of the legislature, and certainly they have never said so in plain terms. They have said the forthcoming bond shall be returned, and shall have the force of a judgment. The execution of a forthcoming bond is a favour granted the debtor: It is for his accommodation. Landed is generally better than personal security, and it is not reasonable to suppose that the legislature intended to deprive the creditor of his lien without some good cause and by the use of plain terms. The counsel sub-

202 mits with confidence *in this case, that whatever might have been the effect of the forthcoming bond while in the hands of the sheriff after forfeiture, till returned, that when returned, it had the force of a judgment from the time it was forfeited. If the lien in such cases under the then law did not relate back to the forfeiture, then how easy might this favour to a creditor have been made an instrument of injustice. In large counties and in other places where sales were fixed to take place at points remote from the clerk's office, and frequently fixed to take place after the return day of the execution, it might be very difficult, if not impossible, for the sheriff to return the forthcoming bond to the office for some days after the forfeiture, and creditors then upon the watch had nothing to do but in the interval between the forfeiture and the return of the bond, to obtain conveyances and have them recorded. According to the doctrine contended for by the appellants Jones and Epes, deeds recorded in such intervals, even the next day after the forfeiture, would overreach the lien of the original judgment, and of the forthcoming bonds forfeited, but still in the sheriff's hands. Judgment debtors and securities in forthcoming bonds might in this way play a deep and ruinous game: The security might have been taken in consequence of his landed estate, and putting a deed upon record during the interval, the security might become worthless.

The following extract from Judge Roane's opinion in *Lusk v. Ramsey*, 3 Munf. 454, seems not to be inappropriate here: "I entirely concur in opinion with one of the Judges in the case of *Cook v. Piles*, 2 Munf. 153, that a forthcoming bond is no satisfaction of a judgment, until the forfeiture: and I think it follows that, until such satisfaction has taken place, the lien created under the judgment is not extinguished. The old right does not cease until

the new one is authorized to succeed 203 it. No chasm between the two is *to be created by implication or construction." The old law says that a forfeited forthcoming bond shall have the force of a judgment, but it does not say it shall not have that force till returned. Such a meaning can only be made out by implication or construction, and then it is submitted against the principles of justice.

Under the law in the new Code, the forthcoming bond is to have the force of a judgment against the obligors who were alive when the bond was forfeited and returned, and the clerk is to note the date of the return of the bond. By the law the sheriff is allowed thirty days to return the bond after it is forfeited. It is evident that the legislature has not given any sanction to the doctrine contended for, by fixing the day of the return of the bond as the commencement of the lien. All the new law requires is, that the obligors shall be alive at the forfeiture and return, to have their lands affected by the lien. The meaning seems clear that the lien relates back to the forfeiture, if the obligors are alive at the return of the bonds.

This record shews that, when the judgment was rendered on the forthcoming bond taken in October 1827, only six months before, all the parties to the bond had become insolvent. It was then in the power of the Court on motion to have quashed the bond, on account of the insolvency of the obligors, and if the bond had been quashed, it would have restored to the appellees the lien of their original judgment. *Garland v. Lynch*, 1 Rob. R. 545. This suit was brought within nine months after the date of the original judgment, and if the forthcoming bond had been then quashed, as it might legally have been, the appellants Jones and Epes could not have complained. It is then submitted, that the Court below sitting as a Court of equity, if justice to the appellees required it, had a right to consider the bond as if actually quashed, and as a mere nullity,

204 in a case where all the parties interested were before the Court, *in accordance with the maxim, that a Court of equity will frequently consider that as done which could legally have been done, and ought to have been done.

In leaving this point, the counsel submits with confidence to this Court, that it is not the true meaning of the act of assembly, taking the plain import of the words, that forthcoming bonds should not have the force of judgments till returned to the clerk's office. The law directs the bonds to be returned with the executions to the office, and says they shall have the force of judgments. If the legislature had intended to restrict the meaning of the words as contended for, by using the word "there" before the words "force of a judgment," there might have been some ground for the meaning contended for: But such word is wanting. Again, by sec. 17, p. 531, 1 Rev. Code, 1819, the sheriff was ordered to deliver the forthcoming bond to the creditor if demanded.

If delivered to him, was it not to have the force of a judgment while in his hands, by relation back to the forfeiture, when it should be actually returned to the office? Could the legislature have intended when they made such a provision, that the bond should have no force of a judgment till actually in the office? The words directing forthcoming bonds to be returned and to be there kept, seem to be merely directory to the sheriff and clerk, and not intended to restrict the commencement of the lien, or the right to award execution.

The effect of the decision in *Epes's ex'or v. Colley*, 2 Munf. 523, cannot be got rid of by saying the motion is a mere remedy. If the word "thereupon" should be taken in a restrictive sense, and as a sort of precedent condition, the Court would not have decided as it did in that case. The Court of appeals by their decision in that case, shewed that the words directing the forthcoming bond to be returned &c. should be construed liberally for the creditor; not in a restrictive sense.

205 *MYRICK'S EX'ORS v. EPES & C.

The main question of dispute relates to the course pursued by the Court in reference to the disposition of the proceeds of the sales of the tract of land in Dinwiddie. When the judgment was obtained against *Epes* in September 1827, and when this suit was instituted in June 1828, that tract of land, in which *Epes* had but a life estate, was unsold. William D. *Epes* took the insolvent oath in April 1828, and as no deed of trust had been recorded in Dinwiddie, the whole remaining interest of *Epes* vested in the sheriff of Dinwiddie for the benefit of certain judgment creditors. One-half of *Epes's* interest was subject to the lien of the judgment obtained by *Myrick's* executor in September 1827, and the forthcoming bond taken under it. All the interest which vested in the sheriff of Dinwiddie by virtue of William D. *Epes's* insolvent assignment, was sold by the sheriff in July after this suit was brought, and was bought by *Archer Jones* one of the then defendants in this cause. But the bill in this cause was not filed till after said sale. It states the fact of that sale, and submits to the Court, in express terms to decide whether that tract of land, as far as *Epes's* interest extended and was affected by their judgment and forthcoming bond, should be made liable to help to pay the judgment relied on and set forth in the bill. The deed to *Archer Jones* for said Dinwiddie land was filed as an exhibit in this cause, and although he was a pendente lite purchaser, yet he was at the time also a party in this cause.

It does not appear that any notice was given at the sale of the Dinwiddie land, of the lien of the judgment of *Myrick's* executors, and as far as appears it may be that those present at the sale supposed that the sheriff sold all William D. *Epes's* life estate in the land. It is true this could not injure the interest of

Myrick's executors so far as to cause them any loss, but how far such a sale and conveyance would operate to bring that land within one of the points decided in *McClung v. Beirne*, 10 Leigh 394, is submitted to the decision of the Court. It is the fifth point in that cause to which reference is made.

It seems to the counsel, that there can be no question that at least one-half of *Epes's* interest in that land was legally sold and conveyed by the sheriff, and that *Myrick's* executors had no lien on or claim to more than half, at the time of the sale. And it seems difficult to understand how the Court could come to the conclusion that *Myrick's* executors were entitled to more than half the sales of the Dinwiddie land, if to any part, except by losing sight of the fact that there was no lien on that land but the judgment, when the insolvent oath was taken.

The sale made by the sheriff of Dinwiddie could not legally have been of any right, title or interest which had vested in *Myrick's* executors under the judgment of September 1827, or the forthcoming bond. Their interest had not been sold because the sheriff was not called on to sell it, nor was he authorized to sell it, nor did he offer or attempt to sell it. It seems then difficult to comprehend on what ground *Myrick's* executors could claim or be entitled to one cent of the amount of that sale, 800 dollars, net amount 753 dollars 55 cents.

The Court decided that *Myrick's* executors had waived their right to the said sum of 753 dollars 75 cents, the proceeds of the sale of the Dinwiddie land aforesaid. If they had no right to any part of that sum, they could waive nothing. But let us look at the case under the supposition that the executors were entitled to some part or the whole of that sum of 753 dollars 75 cents.

207 *It will not surely be contended that any right to said money was waived in this cause. The question in relation to that land was expressly submitted to the Court for decision by the bill, the purchaser was a party and his title deed was an exhibit, and all the exhibits necessary to shew the nature of the interest sold were filed in the cause. If any right then was waived by *Myrick* or his executors it must have been done in the case of *Epes & Scott v. Epes & C.* That suit was brought in August 1828. It will be seen on examination that the parties in the two cases are the same, except J. D. Royall sheriff of Nottoway, and E. Watkins sheriff of Dinwiddie. All the parties interested in that money being parties in both causes, knew or ought to have known that *Myrick* had submitted the question about the Dinwiddie land to the decision of the Court. The two cases were depending at the same time and were in the same Court. *Myrick* was made a party in the case of *Scott and Epes*, merely because he was a party in one of the trust deeds. No claim is set up or intimated against his rights by virtue of the

lien of the first judgment in 1827 and the forthcoming bond. Was it then a fatal error in Myrick that he did not in Scott and Epes's case volunteer to state again what he had already done in the suit first brought? If he erred in this it was certainly not done with any bad intention. In his answer in that cause he expressly refers to his two executions, one on the forthcoming bond and one on the judgment obtained at April term 1828. He did not suppose nor did his counsel suppose that any part of the land sales under the insolvent assignment was applicable to the payment of his judgment in 1827, or the forthcoming bond taken under it. If he was mistaken as to this matter why was he more to blame than Archer Jones the purchaser and also a creditor under the trust deeds, and D. G. Williams and Francis Epes, all parties in both causes who remained wholly *silent. Myrick did not obtain a decree for a dollar in Scott's case, and what he did and did not do cannot be construed into an attempt or desire to obtain an undue advantage. No injury was done to any party by the course he pursued.

But if Myrick was entitled to the 753 dollars 75 cents or any part of it towards the payment of his forthcoming bond, did not the Court commit a grave error in not taking hold of the amount and decreeing it accordingly in this case? True it had been decreed to particular parties in the case of Scott and Epes, but those parties were all before the Court in this cause. Surely then if they had received moneys to which they were not entitled, and by a decree in a cause brought after this, if that money ought to have been appropriated towards Myrick's forthcoming bond, it was clearly the duty of the Court in this cause which first assumed the control of that fund as far as it could, to have decreed those parties to do justice, to pay back the sums thus received by them and to which they were not entitled according to the expressed opinion of the Court. It was in the full power of the Court in this cause to have reached that money and to have had it appropriated in pursuance of its opinion. No part of it was lost, and all might have been still decreed as the Court thought it was equitably and legally applicable. It does not seem that any right obtained under that decree in Scott and Epes's case could be a bar in a Court of equity to reclaiming the fund thus said to have been waived or abandoned.

It is finally submitted that there is no good ground for deciding in this case that Myrick waived or abandoned his lien on the Dinwiddie land by not urging a claim to the fund of 753 dollars 75 cents, or to one-half of it more strenuously in Scott & Epes v. Epes. That money is not lost and can even now be reached by a future decree in this cause, if indeed any part of it
209 *ought to be applied towards the judgment in question. The counsel has not been able to find any authority tending

to sanction the doctrine of waiver or abandonment such as was relied on by the Court. This is not a case where a party was present at the sale and stood by among persons ignorant of his claim, and suffered them innocently and without notice to purchase or in any manner to be injured by his silence. The whole matter was transacted among those who were perfectly informed of all the circumstances attending the matter. No loss was or can be sustained, for if some have to refund it will be only refunding what they are not and never were entitled to.

BALDWIN, J., delivered the opinion of the Court.

The statute concerning executions, 1 Rev. Code 1819, p. 530, § 16, prescribed in regard to forthcoming bonds, that in the event of the failure to deliver the property according to the condition of the bond, the sheriff should return it to the office from whence the execution issued, to be there safely kept and to have the force of a judgment; and thereupon it should be lawful for the clerk of the Court, where such bond should be lodged, upon motion &c., to award execution &c. And by the amendatory act of 1822, Supp. Rev. Code, p. 270, § 1, the authority of the clerk to award execution upon the bond was transferred from him to the Court. By the true construction of the act of 1819, the forfeited forthcoming bond was to have the force of a judgment, so as to give a lien upon the lands of the obligors, not from the time of the forfeiture, but from the time of the return of the bond to the clerk's office; from which time last mentioned there was a capacity to sue out execution, and whether the same should be awarded by the clerk or the Court was immaterial. This construction is warranted by the terms of the statute, and is
210 consonant to its spirit. *The quasi judgment was, like other judgments, to be deposited in the clerk's office, where it could be seen and inspected by all persons interested in the subject; whereas if it took its force as a judgment lien from the time of the forfeiture, it might be held up to the great prejudice of creditors and purchasers for many years, and that by the act of the plaintiff himself, for by the 17th section of the same statute it was made the duty of the sheriff to deliver the bond to the plaintiff if required, and there was no period of limitation to the award of execution.

In the present case, the execution of Myrick, the testator of the appellants who are first above mentioned, against William D. Epes, upon which the forthcoming bond was taken, issued on the 2d of October 1827, upon a judgment of the Superior court of Nottoway, for 1160 dollars 1 cent, with interest thereon from the 12th of May 1827, and 7 dollars 51 cents costs, and was returnable on the first Monday in December next following. It was levied and the forthcoming bond taken on the 25th of October in the same year; and the bond forfeited

on the first Thursday in December 1827, and execution thereupon awarded by the Court on the 28th of April 1828. The forthcoming bond must be regarded as returned on the 28th of April 1828, when the motion for award of execution was made upon it, there being no evidence that it was returned at an earlier day. But prior to the 28th of April 1828, the said William D. Epes, by several deeds of trust conveyed his real estate to secure some of his creditors, which deeds of trust were admitted to record in the county of Nottoway on the 26th of April 1828; one of which deeds however embraces a tract of land situate in the county of Dinwiddie, in which county the same was not recorded. And on the 28th of April 1828, the said William D. Epes, in the Superior court of Nottoway county, confessed various judgments, and
 211 *being in custody thereupon by the surrender of his special bail on that day in open Court, took the oath of an insolvent debtor, and by his schedule surrendered and transferred to the sheriff all his estate in the property real and personal embraced in the deeds of trust aforesaid.

The said deeds of trust therefore, except in regard to the Dinwiddie land, had priority over the lien of the forthcoming bond, and with the same exception over the assignment of the insolvent for the benefit of his schedule creditors; and the latter must be preferred in regard to the Dinwiddie land over the lien of the forthcoming bond, inasmuch as the judgments confessed in open Court, and the proceeding thereupon and therein had relation to the first moment of the first day of the term; whereas the return of the forthcoming bond must be treated as an act done in the office and not in the Court, and as having no relation at all, and therefore before it was effectual the estate of the insolvent had been assigned by operation of law for the benefit of the schedule creditors.

But although the lien of Myrick by force of his forthcoming bond had thus proved unavailing, as well in regard to the schedule creditors as the incumbrancers, yet that of his original judgment was in equity still subsisting; and being prior in point of time, paramount to both. The forthcoming bond, it is true, after its forfeiture operated while it continued in force as a discharge of the original judgment; but its purpose was to secure the payment of the debt, and having proved abortive in that respect from the insolvency of the obligors, the Court of law would have quashed it on the motion of the creditor, in order to remit him in all respects to the benefit of his original judgment. And a Court of equity looking to the substance of things, and disregarding mere matters of form, will not
 212 when it has jurisdiction of the subject require the party *to go through the formality of quashing the bond at law, but treat the security as a nullity, and proceed to give such relief as he was entitled to under his original judgment.

Myrick therefore, by force of his original

judgment, had at the institution of this suit a lien upon all the lands of his debtor, William D. Epes, at the time of the recovery thereof, to the extent of the debt, interest and costs thereby recovered, and also for the costs and expenses occasioned by the taking of the forthcoming bond, which was part of the execution, and proved unavailing without any fault of the creditor. This lien, by the rules of equity, was to be enforced in the first place as amongst alienees and incumbrancers, against the land last aliened or incumbered by the debtor, and if that should be insufficient, then against the other lands successively in the inverse order in point of time of the alienations and incumbrances.

This suit was instituted by Myrick on the 21st of June 1828, and his bill filed at the August rules next following. Between those two periods the Dinwiddie land was sold by the sheriff of that county for the benefit of the schedule creditors. The bill sets forth the judgment, execution, forfeited forthcoming bond and award of execution above mentioned. It also sets forth the several deeds of trust executed by the debtor, the judgments confessed by him, his discharge as an insolvent, and his schedule. It asserts the priority of the plaintiff's judgment lien, and that it is not affected by the deeds of trust, or the assignment of the debtor on taking the oath of insolvency. It represents that although the plaintiff's lien upon the Dinwiddie land is prior to that of the schedule creditors, yet he is not disposed to interfere with that land if he can be decreed his money to be raised from the other tracts, as they would produce much more than sufficient for the purpose; and as to this matter submits it to the Court to decide as equity shall dictate.

213 *The bill further represents that the plaintiff obtained another judgment against William D. Epes in the same Court, on the 30th of April 1828, for 262 dollars 62 cents, with interest thereon from the 14th of February 1828, and 7 dollars 15 cents costs; upon which and the forthcoming bond aforesaid, writs of fieri facias issued, directed to the sheriff of Dinwiddie county, and came to his hands, and thereby created a lien upon the Dinwiddie slaves previously embraced in the schedule aforesaid, at least for any balance remaining, after satisfying the schedule creditors, although said writs were never levied upon said slaves, in consequence of their escape from the county of Dinwiddie to the county of Nottoway.

The bill makes defendants the schedule creditors and those secured by the deeds of trust, amongst which defendants are Archer Jones, Francis Epes, in his own right and as administrator of Thomas R. Epes deceased, and Samuel Scott, administrator of John F. Epes deceased, prays satisfaction of the debts due the plaintiff, a sale of the lands and the Dinwiddie slaves, and that if the latter should be applied to the satisfaction of the schedule creditors, then that the plaintiff's smaller judgment should

participate in the proceeds of the sale which had been made of the Dinwiddie land, on the ground that it had been obtained at the April term 1828, and relating back to the first day of the term, operated as a lien upon that land pro rata with the judgments of the schedule creditors.

Shortly after the commencement of this suit by Myrick, some of the defendants therein, to wit, Francis Epes in his own right and as administrator of Thomas R. Epes deceased, and Samuel Scott, administrator of John F. Epes deceased, brought their suit in the same Court, in which the bill was filed on the 27th of August 1828. The bill charges that the said Francis Epes,

214 Thomas R. Epes, and John F. Epes became *bound as sureties for William

D. Epes in the bond for 1808 dollars, upon which Cooper, one of the schedule creditors, recovered his judgment; that the judgment to the extent of 1930 dollars 7 cents had been made by execution out of the property of Francis Epes; and that for the small balance still due Cooper was pursuing Samuel Scott as administrator of John F. Epes. It sets forth the several deeds of trust above mentioned by which William D. Epes conveyed his lands and other property to secure some of his creditors, and represents the failure to record any of them in the county of Dinwiddie prior to the debtor's oath of insolvency, and his assignment for the schedule creditors; and that by this failure they became void as to the Dinwiddie property, which passed to the sheriff for the benefit of the schedule creditors. It states the sale by the sheriff of Dinwiddie for the benefit of the schedule creditors of the land and some of the other property in that county; the escape of some of the slaves to the county of Nottoway, and their liability to be sold there, under the schedule assignment, by the sheriff of that county. It seeks the application to the debts due the schedule creditors of the proceeds of the sale which had been made by the sheriff of Dinwiddie, and of the sale which should be made by the sheriff of Nottoway of the Dinwiddie slaves that had escaped from the latter to the former county, and the subrogation of the plaintiffs to the interest of said Cooper as one of the schedule creditors in said proceeds: And it makes the proper defendants, and amongst them the said Myrick; but it takes no notice of his suit, nor of his paramount lien upon all the lands of the debtor, and does not mention the judgments which he had recovered.

To that bill, Myrick, with other defendants, filed a joint answer, in which they deny the equity to subrogation asserted by the plaintiffs, and allege that the plaintiff

215 Francis Epes had already received more than *the amount paid on Cooper's judgment from sales of part of

the property conveyed by the trust deeds, one of which provided for his indemnity as security for the debt to Cooper, and embraced the Dinwiddie property; and that its failure as to that property proceeded from

his own laches: Myrick stated separately the recovery of his two judgments, and reasserted his claim to a lien upon the Dinwiddie slaves by force of his unlevied writs of fieri facias; but took no notice of his own pending suit, nor of his lien therein asserted, whether paramount or pro rata, upon the Dinwiddie land, or the proceeds of the sheriff's sale thereof.

Pending Myrick's suit, sales were made by a trustee of the property embraced in the trust deeds, in regard to which they had been duly recorded, and some of it very shortly after the suit was instituted, and before the filing of the bill. In regard to these trust sales, as well those already made as to those contemplated, the bill is silent.

The other suit brought by Francis Epes &c. was finally heard on the 11th of April 1834, when the Court, by its decree, disposed of the trust sales and the schedule sales according to the supposed rights of the parties, substituting the plaintiffs as sureties to the place of Cooper as one of the schedule creditors, and adjusting the equities arising amongst some of the parties; and the design and effect of the decree was to give distributively as well to the plaintiffs by substitution to the interest of Cooper, as to some of the other schedule creditors, the whole proceeds of the schedule sales made by the sheriffs, including that of the Dinwiddie land.

It appears that in the Dinwiddie land and the other lands conveyed by the deeds of trust, the grantor William D. Epes had but a life estate, except the tract of 800 acres in Nottoway conveyed by the deed for the benefit of David G. Williams,

216 in which he had an estate *in fee. That deed was made on the 14th of February 1828, and the others on the 25th of April next following. It also appears that the proceeds of the trust sales of the lands conveyed for the benefit of Archer Jones and Francis Epes respectively were paid over to them, and that the proceeds of the sale of the 800 acres under the deed of the 14th of February were paid over to Williams; and that the proceeds so paid to said Jones and Epes were rather more than sufficient to pay off the balance of the larger judgment of Myrick, after deducting from it a sum equal to the proceeds of the Dinwiddie land.

Myrick's suit was not finally heard until the 14th of October 1845, when the decree appealed from was rendered, by which the Court declining, for reasons stated, to direct a sale of the Dinwiddie land, held that the plaintiff had waived his right to the proceeds of the sheriff's sale of the Dinwiddie land, and had no right to recover of that amount from the defendants who had received the proceeds of the lands sold for their benefit under the deeds of trust: that the defendants Archer Jones and Francis Epes were liable on account of such proceeds before the defendant Williams could be called upon on account of those received by him: and directed payment by said Jones and Epes respectively to the plaintiff

of sums together equal to the balance of his larger judgment, after deducting therefrom the amount of the proceeds of the Dinwiddie land.

And so the question arises, whether the appellants who are the executors of Myrick ought to recover in this suit the amount of the proceeds of the Dinwiddie land, against those defendants who as schedule creditors received the benefit thereof, under the decree of 1834, rendered in the suit brought by Epes and others; and if not, then the further question, whether the executors of Myrick can recover the amount so deducted from his judgment against any of the other defendants.

217 *There is no evidence, nor is there any pretence from any quarter, that the Dinwiddie land did not produce at the sheriff's sale thereof under the schedule the full value of the life estate of William D. Epes therein; nor does it appear that it was sold subject to Myrick's paramount judgment lien, or that the purchaser or the sheriff had any knowledge of the existence of that lien. It would therefore have been competent for the Court while the proceeds of the sale were in the hands of the sheriff or otherwise within its control, to have directed the same to be applied towards the discharge of Myrick's judgment. And that relief would have been required by principles of equity, instead of subjecting the purchaser to the loss of the land; and would have fallen within the scope of the plaintiff's bill, though not designated therein, the object of it being to obtain satisfaction of his demand out of the lands of the debtor, and whether by means of sales thereof to be directed by the Court, or of sales already made by competent authority, was immaterial.

It was too late however at the hearing of the present suit in 1845, to subject the proceeds of the sheriff's sale of the Dinwiddie land, which proceeds were recovered by the schedule creditors by the decree rendered in 1834 in the suit brought by Epes &c. That decree is an insuperable bar to the pretension now made by the executors of Myrick, who was a party in that suit, to a recovery against the schedule creditors of the money paid to them under the authority and by the direction of the said decree of 1834. It was a decree not only upon the same matter, the apparent paramount lien and title of the schedule creditors in regard to the Dinwiddie land, which carried with it the negation of a paramount lien or title in all other persons; but it was a recovery of the identical subject, the proceeds of the sale of that land made by the sheriff. Nor was it the less decisive and conclusive that the money was not in the hands of

218 *Myrick, but in the hands of the sheriff who held it subject to the control and decision of the Court: nor that Myrick in his answer did not deny the lien or title asserted in the bill, and asserted no lien or title in himself, nor that the present suit was then pending and the first brought, for it is not the institution of a suit, but the judgment or decree therein, which concludes

the rights of the parties. The pendency of the present suit, however, serves to shew, if that were material, that Myrick was not ignorant of his own paramount lien upon the Dinwiddie land, but chose not to insist upon it, preferring and desiring, as would seem from his own bill, to obtain satisfaction of his larger judgment out of his debtor's other lands.

It follows from what has been said, that the Circuit court did not err in failing to decree in the present suit to the plaintiffs therein, payment by the schedule creditors of the proceeds of the sale of the Dinwiddie land which they had recovered by the former decree of 1834, rendered in the suit brought by Epes &c.

Nor did the Circuit court err in refusing to decree against the creditors who had received the proceeds of the sales made under the deeds of trust, so much of the plaintiff's demand as was equal to the proceeds of the sheriff's sale of the Dinwiddie land.

Although Myrick had a paramount judgment lien upon all the lands of his debtor, yet his proper resort was primary as to the Dinwiddie land, secondary as to the Nottoway lands conveyed for the security of Jones & Epes, and ultimate as to the Nottoway land conveyed for the security of Williams; and of these funds he could not subject the second until he had exhausted the first, nor the third until he had exhausted the second. And if by his surrender, waiver, acquiescence or neglect, he lost the power of proceeding in this order, he thereby incurred the consequences himself,

and could not throw the burthen upon
219 others by whom it *ought not to have been borne. The facts already stated serve to shew that, with a full knowledge of the priority of his lien, he suffered the proceeds of the Dinwiddie land to remain in the hands of the sheriff for nearly four years without an effort to secure the application thereof to his judgment, and by his wilful waiver or gross neglect, submitted to the conflicting pretension of the schedule creditors, and so allowed the fund to be appropriated to their benefit, by an unreversed and irreversible decree in their behalf. And if notwithstanding this, he might still have pursued the perishable life estate in the hands of the purchaser at the sheriff's sale, he has not made out a case proper for such relief by evidence, nor by pleading, his bill not having even mentioned the name of the purchaser, who did not stand in the position of a purchaser pendente lite, the sale having been made before process served and bill filed.

The Court is therefore of opinion, that there is no error in the decree of the Circuit court.

Decree affirmed.

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*Hutcherson &c. v. Pigg.

October Term, 1851, Richmond.

(Absent CABELL, P.)

1. Administration Bonds—Property Covered by—Rents and Profits of Realty.*—The official bond of an

*Administration Bonds—Property Covered by—Rents

executrix only binding the obligors for the due administration of the personal estate, the sureties are to no extent responsible for the rents and profits of the real estate.

2. **Same—Action on—Parties.**†—All the sureties in the official bond of an executrix should be parties to a suit by legatees for distribution, or a sufficient reason should be shewn for failing to make them parties, before a decree is made against one of them.

John Pigg died in 1816, having first duly made his will, which was admitted to record in the County court of Pittsylvania. He left a widow and six children, all of whom were infants. Mrs. Pigg qualified as executrix of the will, with James Adams, Samuel Calland, Nathan Hutcherson, James Hart and Clement Pigg, as her securities. After the qualification of Mrs. Pigg as executrix of John Pigg, she intermarried with Nathan Hutcherson, and he seems to have conducted the administration.

The children seem to have lived with Hutcherson and his wife, on the land belonging to the estate, and no division of the property was made until 1829.

In 1828 Hezekiah Pigg, one of the children of John Pigg deceased, instituted a suit in the County court of Pittsylvania, which was afterwards removed to the Superior court, against Hutcherson and wife and the children of John Pigg, asking for a settlement of Hutcherson's account and a division of the estate. The estate was divided, and the commissioner to whom the executorial accounts were referred
221 made a *report, in which he allowed Hutcherson a credit for the support of the children.

Hezekiah Pigg, the plaintiff, excepted to the account of the administratrix, and also to the statement of his account; and the Court sustained some of his exceptions, and among others, the exception to the allowance for his support; and recommitted the report.

In the second account, the commissioner stated the administration account, in which he charged the executor with the rent of the land, and ascertained the balance thereon, and distributed that balance between the widow and the children. Each child's part was 220 dollars 47 cents. He then stated an account between Hutcherson and Hezekiah Pigg, and ascertained the

and Profits.—For the proposition that sureties on the bond of an administrator for the faithful administration of the personal estate, are not responsible for the administration as to the realty, see the principal case cited in *foot-note* to *Murphy v. Carter*, 23 Gratt. 477. See monographic *note* on "Official Bonds" appended to *Sangster v. Com.*, 17 Gratt. 124; monographic *note* on "Executors and Administrators."

†**Same—Action on—Parties.**—In a chancery suit against a committee of a lunatic, where relief is sought against the sureties in his official bond, all the sureties in the bond are necessary parties. *Hedrick v. Hopkins*, 8 W. Va. 171, citing *Hutcherson v. Pigg*, 8 Gratt. 220. See monographic *notes* referred to above.

amount due to Pigg to be 211 dollars 88 cents; but he did not state an account with any of the other children; and the Court confined its decree to the balance found due Hezekiah Pigg. This decree was in November 1842.

In 1844 John W. Pigg instituted a suit in chancery in the Superior court of Pittsylvania against Hutcherson and Clement Pigg, in which he stated that Hutcherson had administered his father's estate; that Clement Pigg was the only surviving security (though he does not say the others were insolvent). He stated the proceedings in the former suit, and that the commissioner had reported due him the sum of 220 dollars 47 cents, which he was willing to consider as the true sum due him; that no decree had been made in his favour for that sum, and he asked for a decree for it against Hutcherson and Clement Pigg as his surety.

Hutcherson answered the bill, saying that the plaintiff had been fully paid. The bill was taken for confessed as to Clement Pigg.

Hutcherson took testimony to prove that for a part of the time John W. Pigg lived with him, viz: thirteen years, his support was worth 30 dollars a year. He
222 *also proved that he paid for John W. Pigg the sum of 75 dollars, and in the suit of Hezekiah Pigg against Hutcherson and als., the first report shewed items not excepted to of 26 dollars 43 cents, paid for John W. Pigg.

The cause came on to be heard in October 1845, when the Court made a joint decree against Hutcherson and Clement Pigg, for the whole sum of 220 dollars 47 cents, with interest thereon from the 9th of May 1829.

From this decree the defendants applied to this Court for an appeal, which was allowed.

Grattan, for the appellants, insisted,

1st. That the representatives of the other sureties of Mrs. Hutcherson as executrix of John Pigg, should have been parties. And for this he cited *Spotswood v. Dandridge*, 4 Munf. 289; *Taliaferro v. Thornton*, 6 Call 21; *Story's Equ. Jur.* § 161, 162, 169; *Primrose v. Bromley*, 1 Atk. R. 89; *Calvert on Parties* 235, 17 Law Libr.

2d. That it was error to make a joint decree against the executor and the surety, before there had been a decree against the executor and a return of nulla bona, or other evidence of his insolvency. *Roberts v. Colvin*, 3 Gratt. 358.

Stanard and Bouldin, for the appellee, insisted,

1st. That it was too late for Clement Pigg to object in this Court that the representatives of the other sureties had not been made parties, after he had allowed the case to proceed in the Court below upon the bill taken for confessed as to him. They referred to *Chappell v. Robertson*, 2 Rob. R. 590; and *Kee's executors v. Kee's creditors*, 2 Gratt. 116.

2d. That the case cited by the counsel for

the appellant on the second point, 223 shews that the decree may be *against the executor and the surety at the same time; and although it was most proper that the decree should be first against the executor and then against the surety, that was a mere matter of form which the Court will correct without reversing the decree.

DANIEL, J., delivered the opinion of the Court.

The Court is of opinion, that as by the executorial bond given by Mrs. Pigg and her sureties, the obligors bound themselves only for the due administration, by the executrix, of the goods, chattels and credits of the testator, the sureties are, to no extent, responsible for the rents or profits of the real estate; and as it appears that the balance reported by the commissioner in favour of the appellee, and for which the decree was rendered, is composed in part of items for rent of the real estate received by the appellant Hutcherson in right of his wife the executrix, it was erroneous in the Circuit court to render a joint decree for said balance against the appellants.

The Court is also further of opinion, that as no reason is shewn or alleged for failing to make the representatives of the other sureties to the executorial bond parties to the suit, it was error to render any decree in the cause against the appellant Clement Pigg in the absence of said representatives. Decree reversed with costs to the appellants. Cause remanded with leave to the appellee to make the proper parties, and for a resettlement of the accounts and further proceedings in order to a final decree.

Decree reversed.

224 *Ott's Ex'x v. King & als.

October Term, 1851, Richmond.

(Absent CABELL, P.)

Equitable Liens—Practice in Equity*—Case at Bar.—A debtor contracts to give a lien on two adjoining tenements, to secure the debt, and the creditor is in possession of one of the tenements under an agreement by which the rent of the tenement is to be taken in satisfaction of the interest on the debt. Afterwards the debtor becoming embarrassed in his circumstances conveys all his property in trust to pay his debts. **Held:** The creditor is entitled to enforce his equitable lien not only against the debtor but his creditors.

In January 1811 George Ott leased from Miles King a lot on Main street in Norfolk, for a term of twelve years, to commence

***Equitable Mortgages.**—In *Atkinson v. Miller*, 84 W. Va. 118, 11 S. E. Rep. 1007, it is held: "An executory agreement in writing, stipulating for the execution in future of a mortgage or deed of trust, is of common occurrence, and is valid, and will be specifically enforced in equity, or what is the same thing, treated as an equitable mortgage. *Ott v. King*, 8 Gratt. 224; *Alexander v. Newton*, 2 Gratt. 266; 1 Jones, Mortg. § 163."

from the 31st of March 1811. Ott covenanted to build on this lot a good brick house, and to pay an annual rent of 220 dollars. It was further agreed that either Ott or King might at any time, not less than twenty or more than sixty days before the expiration of the term, give the other party notice the lease would not be renewed, and in that case the buildings erected by Ott were to be valued, and the amount of the valuation to be paid by King to Ott before the expiration of the term, and then on such payment the premises to be surrendered by Ott. Ott entered on the premises and erected a large double brick tenement, &c., and continued in possession throughout the term, which ended on the 31st of March 1823. On the 1st day of February 1823, Ott gave King a written notice that he would not renew the lease, and appointed a valuer of the buildings. King on his part appointed a valuer, and the two valued the buildings at 8159 dollars 225 *73 cents. By the agreement of lease,

King was to pay Ott the sum ascertained by the valuers, and on the payment Ott was bound to surrender the property at the end of the term. It seems that King was unable to comply with his obligation to pay the value of the buildings. He proposed to Ott to execute two bonds of 2500 dollars each, dated April 1st, 1823, each bearing interest from date, and payable one in four the other in five years; the residue of 3159 dollars 73 cents, payable as King conveniently could after the 1st April 1823. King at various times paid the 3159 dollars 73 cents. He executed his two bonds for 2500 dollars each, according to his proposition, and Ott released possession of one of the houses, and King agreed to execute a deed of trust on the two. Ott retained the possession of one of the houses until his death as a security for the two notes of 2500 dollars each, and it still is in possession of his executrix and devisee. By an agreement between Ott and King the rent of the retained tenement was set off against the interest accruing on the bonds; so that only the principal remained due.

In 1831 Ott died, and devised his real and personal estate to Jane Ott his wife, and appointed her his sole executrix.

Miles King had become much embarrassed in 1835, and executed various assignments on separate portions of his real estate, in which deeds his interest in the land and appurtenances occupied by Mrs. Ott was not conveyed. But by a deed bearing date the 8th day of July 1835, he appointed Newton C. King his trustee for the purpose of receiving all his estate, real and personal, not before conveyed, for the benefit of all his creditors, and added, "I hereby convey the same to him in trust for the purpose aforesaid, he first paying me ten dollars which I hereby acknowledge to have received."

In July 1840 Mrs. Ott as executrix of George Ott, filed her bill in the Circuit court of the city of Norfolk *against Miles King and his wife and N. C. 226

King, in which she set out the foregoing facts and asked that the said two bonds might be decreed to be paid; and in default of payment that a sale of the premises in her possession might be decreed for satisfaction thereof.

Miles King answered the bill admitting the lease and the agreement by which he was to execute the two bonds, but alleging that they had been nearly paid off; and concurring in the prayer that for the balance due on them they might be held to be a lien on the premises in the possession of the plaintiff. N. C. King answered, averring his ignorance of the matters stated in the bill except that he had been appointed by Miles King by his deed of the 8th of July 1835, the trustee and receiver of all his estate not before conveyed, for the benefit of his creditors; and he supposed that by this deed the premises mentioned in the bill passed to him, and whatever rights the creditors had under that deed he submitted to the protection of the Court.

In the progress of the cause an account was directed and reported by a commissioner of the Court, but when the cause came on to be finally heard in June 1845, the Court being of opinion that the plaintiff was not entitled to the relief prayed for, without acting on the report, dismissed the bill with costs. Whereupon the plaintiff applied to this Court for an appeal, which was allowed.

The Attorney General and Cabell, for the appellant.

1. The agreement between Ott and King should be executed as between them. That agreement is not only fair and certain, but if it had not been reduced to writing, it would have been enforced, because Ott is in possession. 2 Story's Equ. Jur. § 751.

2. If the agreement will not be enforced then Ott held adversely to King. He held the property as a pledge to secure another contract; and in that state of
227 *facts King's deed passed nothing. Hopkins v. Ward, 6 Munf. 38.

3. Independent of the written agreement Ott had a vendor's lien on the houses. He built them, and they were valued and sold to King at the valuation. And Ott held possession of one of them to secure the payment.

4. The deed of King is a nullity, and cannot affect Ott's title to specific execution of the contract. The deed contains no words of conveyance sufficient to pass real estate or any interest in it. The deed too, names no property and no creditor. It is all the property for all the creditors. Harvie v. Wickam, 6 Leigh 236; Galt v. Carter, 6 Munf. 245. In the case of Wilkins v. Gordon, 11 Leigh 547, the deed was sustained: but there although the debts were only described as being about so much, the property was properly described.

It has been frequently held in England that a deed made without the assent of the cestuis que trust is revocable at the pleasure of the grantor, and void as to creditors.

Walwyn v. Coutts, 5 Cond. Eng. Ch. R. 7; Garrard v. Lauderdale, Id. 1; Acton v. Woodgate, 8 Id. 97; Page v. Broom, 3 Id. 543. We have a decision of our own seemingly in conflict with these cases. Skipwith v. Cunningham, 8 Leigh 271. This case is however shaken by the later case of Spencer v. Ford, 1 Rob. 648.

The case has been depending for years, yet no attempt has been made by creditors to set up the trust as against the property claimed by Ott. There is no authority in the deed to the trustee to sell; and the cestuis que trust can only set up their claims by filing a bill to enforce them: And this they have not done.

5. King did not by his deed to his son Newton King, either convey or intend to convey any property but such as he had a right to dispose of. And as he had no right to dispose of this property until Ott's
228 claim was satisfied, *it is only the remainder after paying that debt that passed by the deed. Lacon v. Mertens, 3 Atk. R. 1; 2 Story's Equ. Jur. § 759; 3 Woodson's Lect. 281.

There was no counsel for the appellee.

MONCURE, J., delivered the opinion of the Court.

The Court is of opinion that the appellee Miles King, having agreed by contract in writing signed by him, to give a deed of trust on the lot of land and buildings in the bill mentioned, to secure the payment of his two bonds to George Ott, the testator of the appellant, for two thousand five hundred dollars each, dated the first day of April 1823, payable four and five years after date, with interest from the date; and the said George Ott in his lifetime, and the appellant as his sole devisee, legatee and executrix, since his death, having retained possession of a part of the said property, to wit, the western tenement, since the said contract was entered into, under an agreement with the said Miles King that an annual rent of three hundred dollars should be allowed therefor and set off against the annual interest on the said two bonds; the said contract constituted an equitable lien on the said property for the amount of the said two bonds, which lien a Court of equity ought to enforce not only against Miles King and his heirs, but against Newton C. King and the creditors, if any, claiming under the general assignment exhibited with the bill; whether the said assignment be invalid or not, a question which the Court deems it unnecessary, in this case, to decide. And the Court is further of opinion, that the Circuit court, instead of dismissing the plaintiff's bill, should have proceeded to ascertain the balance due upon the said bonds, and then have decreed that unless the said balance so ascertained with interest and costs of suit
229 should be paid by the defendants or *some of them within a reasonable time thereafter, the said property or so much as might be necessary, commencing with the western tenement aforesaid,

should be sold for the purpose of paying the same. Therefore it is considered that the said decree of the Circuit court be reversed and annulled, and that the appellant recover against the appellee Miles King her costs by her expended in the prosecution of her appeal aforesaid here. And the cause is remanded to the said Circuit court to be proceeded in according to the foregoing opinion.

Decree reversed.

Ross's Adm'r v. Reid & Wife.

October Term, 1861, Richmond.

(Absent CABELL, P., and MONCURE, J.*)

Appeals—Perfecting—Laches†—Case at Bar.—A party having obtained an injunction to a judgment at law upon the usual condition of a release of errors, omits to execute the release. Pending the injunction suit, he obtains a *supersedeas* to the judgment at law, but does not perfect the appeal by giving the security. There are repeated applications by him for a renewal of the *supersedeas*, which are granted, but he does not perfect the appeal. The injunction is proceeded in and decided against him; and he afterwards, more than ten years from the date of the judgment, asks that he may have a writ of error to the judgment at law, without giving security, except for costs, which is granted. His *laches* in perfecting his appeal being wilful, deliberate and repeated, and the application for the appeal, having been, under the circumstances, improper, the Court of appeals will, upon motion by the appellee, dismiss the appeal.

230 *This was a motion by Reid and wife, inhabitants of the kingdom of Scotland, to dismiss a writ of error to a judgment of the Circuit court of Spottsylvania, recovered by them against Ross. All the facts of the case are stated by Judge Baldwin in his opinion.

Morson, for the motion.

There can be no doubt that if Ross had executed a release of errors at law when he obtained his injunction, as he was required to do, that release would have been a good bar to his writ of error to the judgment at law against him; and might have been pleaded in bar. *Hite v. Wilson*, 2 Hen. & Munf. 268. So if not given, if inadvertently omitted to be required when the injunction was granted, and the party attempted to take advantage of it in the chancery suit, the Court would prevent him. *Ashby v. Kiger*, Gilm. 153. Indeed a Court of equity will consider that a party has abandoned his remedy at law by proceeding in equity. *Fairfax v. Muse*, 4 Munf. 124. If then this was an appeal in equity there would clearly be no difficulty in having it dismissed.

The remedy in the present case is by summary motion in the nature of a writ of *audita querela*. That writ is now obsolete,

and a motion is substituted for it. The nature of the writ is stated in 3 Chitty's Black. 405-6, and the notes. The remedy by this writ applies wherever anything has occurred since the judgment entitling the defendant to relief. It is in the nature of a bill in equity, a writ of a most remedial nature, and intended for the relief of parties who have a good defence, but have no opportunity to make it in the ordinary forms of law.

Here then is a case in which we have a good defence, because as we have seen in equity the appeal would be a nullity. And the party has had no opportunity to make defence to this writ of error, because 231 it was not *proceeded on until the injunction suit was ended. If pending that suit notice had been given to the defendants, Reid and wife, Ross would have been compelled to abandon his application for a writ of error.

The gross negligence of the appellant in the prosecution of this writ of error will well justify its dismissal. Without stating the several steps of this proceeding to obtain the writ, it is enough to say that the present and only writ now pending has been obtained more than ten years after the judgment, and is therefore barred by the statute of limitations. In the case of an action at law, or bill in equity, to which the statute of limitations applies, a party cannot rely upon a former action or suit which has gone off, to remove the bar of the statute. *Braxton v. Woods*, 4 Gratt. 25. And why not in this case, as the writ of error now pending is another and distinct writ from that formerly allowed, which was a writ of *supersedeas*.

Patton, in opposition to the motion.

This motion proceeds upon the concession that there has been no release of errors by the appellant. And I suppose we must presume upon this motion that the judgment appealed from is erroneous.

It seems to be supposed that Reid and wife might have enjoined the prosecution of this appeal; and therefore that this Court will now grant relief upon the equitable grounds. And it is argued in the next place that the appeal is not rightfully pending here now. I shall consider the last proposition first.

The application for the writ of error in this case was made out of Court, and the record was not left with the clerk, because it was not recollected that the law required it. The application was then made to the Court; and such applications are made here every day without notice. The writ of error was then awarded by the Court, and was not given for more than five 232 *years. But this Court has decided upon mature consideration, that if that order now stood, Ross being dead, his administrator could now prosecute that appeal, though no bond had ever been given.

It is supposed the appellant is barred of his right to prosecute this appeal from what has occurred in this case: And that is that

*JUDGE MONCURE had been counsel in the cause.

†The principal case is cited in *Bank v. Hupp*, 10 Gratt. 36.

Mr. Ross being unable to give the appeal bond required of him, applied for leave to prosecute the appeal without giving security, except for costs. That is all he asked, and all that was granted to him. But it is said by the counsel for this motion that the writ of supersedeas was on his motion set aside, and that a new writ was awarded. Ross had a legal right to have the judgment against him reviewed by this Court. The basis of his suit here is the petition for an appeal; and when that was allowed his appeal was pending. The writ is mere process to give notice to the other party. If the writ is the commencement of the proceeding in the case of an appeal, no appeal is pending until the appeal bond is given: And that is expressly denied by the case of *Williamson v. Gayle*, 4 Gratt. 180. But it is said the supersedeas was set aside. What is the difference between a supersedeas and a writ of error? The first is a writ of error, and gives notice to the other party of the pendency of the appeal. But it is something more, and suspends proceedings on the judgment in the Court below upon condition of giving security. It was this part of the process that Ross asked to have set aside; and not that which constituted the writ of error.

The great complaint here is that Ross obtained an injunction to the judgment at law. In fact there was no injunction. That was granted only on the condition precedent of a release of errors at law. That release was as necessary as an injunction bond; and not having been executed, there has been no injunction.

Whether that release had or had not
233 been executed, *could be known by

Reid and wife by a simple enquiry in the clerk's office; and I reckon there has been some studious sleeping on their part in the hope that the five years would elapse so as to prevent an appeal from the judgment. They answered the bill objecting to the jurisdiction of the Chancery court, and stating grounds of defence which were conclusive unless disproved: And Ross had said in his bill that he had no proof. If therefore there was delay in the termination of that suit it was their own laches: And if they delayed to sue out execution on their judgment it is to be attributed, not to the injunction which had no existence, but to the decision of this Court in the case of *Ross v. Milne*, 12 Leigh 204; a case founded on the same paper as is this suit; and which shewed that there was error in this judgment for which it would necessarily be reversed upon appeal.

Reid and wife have now all the rights they ever had: Or if they have lost any by not proceeding earlier, they have only themselves to blame. They had all their rights unimpaired by any proceeding either in this or the injunction case. And having slept on their rights they come here to complain that Ross asked for aid which was offered to him on terms which he could not or did not choose to comply with; and now they seek to deprive him of his legal

rights upon the principles of the writ of *audita querela*. This is a writ of extensive application; but I question if any case can be found in which it has been employed to support a judgment illegal at law.

BALDWIN, J. The ground of this motion is the alleged misconduct and laches of the plaintiff in error, as disclosed by the record of the appellate proceedings in this Court, and the record of the injunction suit prosecuted by him in the Court below, to be relieved against the judgment now sought to be reversed.

234 *It appears that the judgment was recovered by Reid and wife, the defendants in error, against Ross the plaintiff in error, on the 13th of September 1838, in an action of debt brought by the former against the latter. Ross filed his bill in equity for a discovery and relief against the judgment, and on the 20th of September 1838 obtained an injunction order restraining all proceedings upon the judgment until the further order of the Court; which injunction was granted upon the usual condition of giving bond and security to pay and satisfy the judgment, if the injunction should be dissolved, and of filing a release of all errors in the judgment and proceedings at law. The bond and security was given the 29th of the same month, but no release of errors was ever filed. The injunction suit however, proceeded in like manner as if the release of errors required had been filed, and was heard on the 27th of May 1848, when a decree was rendered by which the injunction was dissolved and the bill dismissed. The fair presumption is, that during the whole period of its pendency the defendants therein were ignorant that the condition of the injunction order had not been fully complied with, inasmuch as they made no effort to sue out process of execution upon their judgment, nor to exact the filing of a release of errors.

It may be that the failure of Ross to give the release of errors was in the first instance from inadvertence; but pending the injunction cause, to wit, on the 27th of June 1842, he applied to and obtained from a Judge of this Court a vacation order awarding a writ of supersedeas to the judgment at law upon the usual terms. At that time he could not have been ignorant that he had not given a release of errors, for he must have known that if he had the attempt to reverse the judgment in the appellate Court was utterly hopeless.

After obtaining from the Judge the order for a writ of supersedeas, it was in-
235 cumbent upon Ross to return *it with the record upon which it was obtained, to the office of the appellate Court; and our statute law prescribed that if the party praying such writ of supersedeas should not deliver the record with the order allowing the same, within thirty days thereafter to the clerk of the Court of appeals, the same should not be received thereafter, unless good cause should be shewn to the contrary; and that after

such dismissal no appeal, writ of error or supersedeas should be allowed. Supp. Rev. Code, p. 155, § 53. Ross however did not return the record with the Judge's order endorsed, within the time required by law, nor attempt to shew cause against the dismissal of the case until the 27th of April 1843, a period of ten months, when on his motion, and for reasons appearing to the Court, the writ of supersedeas awarded by the Judge in vacation was directed to issue on bond and security being given. This order of the Court was made *ex parte*, no notice being required by the act of assembly or the rules of the Court; and it is known that such orders are usually made without evidence, and upon the mere suggestion of some excuse for the delay.

I cannot doubt that if it had been made known to the Judge in vacation, when the petition for the writ of supersedeas was presented, that Ross was then prosecuting an injunction bill to be relieved against the judgment, that he would not have awarded the writ, whether upon the supposition that the condition of the injunction order requiring a release of errors had, or had not been performed: if the former he would have seen that the appellate proceeding was idle; if the latter, that an abuse was attempted which would have induced him to require performance of the condition before acting upon the subject. And if the same fact had been made known to this Court when the petitioner applied for leave to perfect his appellate proceeding, his motion would doubtless have been
236 overruled and his case dismissed, *or he would at least have been laid under the condition of dismissing his bill of injunction.

Under this order of the Court, of the 27th of April 1843, it seems that a writ of supersedeas issued, but what became of it does not appear. It is certain that the condition of giving bond and security was never complied with. If it had been, then the endorsement of the fact by the clerk of the Court below upon the writ would have authorized its service upon the adverse parties, and such service would have led them to the enquiry whether a release of errors had been given, and upon ascertaining that it had not, to the proper course of proceeding in order to exact it.

Ross however on the 29th of February 1848, while the injunction suit was still pending, and more than five years after the order of the 27th of April 1843, obtained on his *ex parte* motion an order of this Court, suggesting that the writ of supersedeas had not been returned executed, and awarding a new writ. But the new writ of supersedeas was not sued out until the 14th of August 1848, after the decree had been rendered dissolving his injunction and dismissing his bill. And upon the 17th of October following, upon his petition, without notice, stating his inability to give bond and security in double the amount of the judgment, he obtained an order of this Court, founded upon the act of 1825, Supp.

Rev. Code, p. 127, setting aside the order allowing him the writ of supersedeas, and awarding a writ of error, upon giving bond and security for the costs thereof only. Although by the literal terms of this last order, it would seem that the appellate cause was dismissed and a new one instituted, the inevitable result of which would be to bar the latter by the operation of the statute of limitations; yet I think a fair and reasonable construction of the order is that it was intended, in conformity with the prayer of the petition, to discharge the su-
237 persedeas of the appellate *proceeding, and allow it as a mere writ of error to be continued and renewed.

It thus appears that Ross did not perfect his appellate proceeding, so as to enable him to ask to be heard thereupon in this Court, until since the order of the 17th of October 1848, (made more than ten years after the date of the judgment,) allowing him to renew his writ of error on giving security for costs only: And the question is whether, under the circumstances of the case, he ought to be now heard, for the purpose of reversing the judgment for some error of law therein, though he has exhausted in another forum the remedy he prosecuted there upon the principles of equity. And if he ought not to be heard then it follows that the writ of error must be discharged, and the parties dismissed from this Court.

It is true that by the construction which has been given to our statute law, (as it stood prior to the new Code, and which was thereby adopted,) a writ of error or supersedeas was not barred by the statute of limitations, though bond and security was not given within five years from the date of the judgment, if the order allowing the writ, or even the application therefor, was made within that time. Still, however, the appellate proceeding, though considered as pending, was not made effectual for the purpose of staying execution of the judgment, or of being brought to a hearing by the plaintiff in error, until the bond and security was given. And it cannot be doubted that it is the duty of the party to perfect the same within a reasonable time, and if he should fail to do so when required by the Court, that his appellate proceeding should be dismissed. And it is equally clear that when the party has been guilty of great laches, the Court may refuse him its aid, or its leave, to perfect his appellate proceeding and discontinue the same. *Anderson v. Livel*, 6 Leigh 77; *Williamson v. Gayle*, 4 Gratt. 180.

238 *Whether if this were a case of mere laches, that would appear to have been sufficient to call for the dismissal of the writ of error, I deem it unnecessary to consider. This it seems to me is not a case of mere laches, on the part of the plaintiff in error, but of laches wilful, deliberate and repeated; and moreover of misconduct in the instituting and prosecuting of a wrongful appellate proceeding, for the purpose of securing an undue advantage aris-

ing solely out of his own failure of duty, a duty which if it had been performed would have excluded him inevitably from the appellate forum.

In the first place, it was the duty of Ross, if his omission to perform one of the conditions upon which he obtained the injunction to the judgment was inadvertent, to have supplied the defect, so soon as he discovered it, by executing and depositing with the proper officer a release of all errors at law: And if he did not choose to do this, to have dismissed his injunction bill, or to have disclosed the omission to the Court or the adverse party, which would have led to the exaction of the release of errors. Instead of taking this obvious course, he still pursues his remedy in equity, and availing himself at the same time of his knowledge that the errors at law if any had not been formally released, he obtains the vacation order of June 1842, for a writ of supersedeas, nearly three years after the date of the judgment; and thus secures himself in the appellate forum from the bar by further lapse of time of the statute of limitations. It was not his interest, however, for the reason already suggested, to perform the condition of that order, nor of the order of this Court of April 1843, founded upon his not having returned the record within the time prescribed by law. But it was his interest shortly before the expiration of five years from the order last mentioned, to guard against the imputation of laches, by procuring the order of February 1848, suggesting that the writ

239 of supersedeas theretofore *issued had not been returned executed; and after the decree in the Circuit court of May 1848, to sue out his writ of supersedeas of August 1848, to prevent the execution of the judgment, provided he could give the required security; and failing in that, to obtain the order of October 1848, dispensing with security except for costs. These several steps, it will be seen, so far from repelling, confirm strongly the imputation of laches; but are more important as serving to shew that being ex parte, and so furnishing no notice to the defendants in error, most of them were, if not designed, at least calculated, to place the appellate proceeding in a condition to be rendered available, if the bill of injunction should fail.

It is true that Reid might by much vigilance have discovered the failure of Ross to give the release of errors, but it is plain that he did not discover it, and that Ross availed himself of his adversary's ignorance to pursue the two incompatible remedies at the same time; which ignorance on the part of Reid, and his consequent belief that his hands were tied by the injunction order, rendered it impracticable for him to enforce his judgment by process of execution.

I need not, I think, step aside to enquire by what analogies this Court may proceed upon motion, or without, to protect its jurisdiction and process from abuse, instead of sending them to the guardianship of a different forum; and in the case before us,

it seems to me, the shortest and most effectual remedy compatible with a due hearing and consideration is the best.

JUDGES ALLEN and DANIEL concurred in the opinion of Baldwin, J.

The following is the order entered in the cause:

This Court having maturely considered the motion of the surviving defendant 240 James Reid, by counsel, and *the evidence submitted in its support; and having also maturely considered the cause shewn against the said motion, and the evidence relied on in support of that cause by John S. Caldwell, as committee administrator of the plaintiff, James Ross, who is now deceased, and whose said administrator appeared by counsel to shew cause as aforesaid; and upon such consideration, as well as upon consideration of the arguments of counsel who were fully heard upon both sides, this Court being of opinion that the said Caldwell, as committee administrator as aforesaid, has not shewn good cause against the said motion, but that the said James Reid, surviving defendant as aforesaid, has shewn good cause in its support; thereupon doth grant the said motion of the said surviving defendant, James Reid, and doth order that the writ of error heretofore allowed in this case to the said James Ross, who is now deceased, be abated and dismissed, and that the said Caldwell, as committee administrator as aforesaid, be barred and precluded forever from suing out any writ of sci. fa., or other process to revive the same, or from, in any way whatsoever, farther prosecuting the said writ of error: And it is farther considered and adjudged by this Court, that the said Caldwell, as committee administrator as aforesaid, out of any assets of the said James Ross deceased, in the said administrator's hands to be administered, do pay unto the said James Reid, surviving defendant as aforesaid, his costs, by him about his motion in this behalf expended.

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*Bryan v. Stump &c.

October Term, 1851, Richmond.

[56 Am. Dec. 189.]

(Absent CABELL, P.)

1. Joint Owners of Land—Deeds of Partition—Validity of*—Case at Bar.—A brother and sister, both of whom are married, own a tract of land jointly. In 1802 the brother and wife and the sister and

*Coparceners—Deeds of Partition.—Deeds of partition between parceners are not absolutely necessary. They mark and establish the dividing line between them, and will, from the time of establishing the lien, be seized in severalty. *Jennings v. Shacklett*, 30 Gratt. 776, citing *Coles v. Wooding*, 3 P. & H. 189; *Lomax Dig.* 134; 2 Min. Inst. (2d Ed.) 707; *Jones v. Carter*, 4 H. & M. 184; *Bryan v. Stump*, 8 Gratt. 241; *Parrill v. McKinley*, 9 Gratt. 1. See also, citing the principal case, *Brooks v. Hubble*, 2 Va. Dec. 382, 27 S. E. Rep. 585.

her husband unite in a deed of partition of the land, and from thence to the present time the land is held in severalty by the parties respectively and those claiming under them. The partition is valid and binding on the parties, though no certificate of the privy examination of the wives is annexed to the deed.

2. Deeds of Trust—Release under Power of Attorney—Validity of*—Case at Bar.—A trustee in a deed, the trusts of which have been satisfied, executes a power of attorney to a third person with authority to release the deed. The attorney executes a deed which commences in the name of the trustee by the attorney; but it is signed in the name of the attorney for the trustee; and it releases the land not to the grantor in the trust deed, but to a purchaser under him. **HOLD:** The deed of trust is duly and regularly released.

3. Femes Covert—Privy Examination—Validity—Case at Bar.—**QUÆRE:** If the certificate of the privy examination of a *feme covert*, made under the act of 1792, which purports in the body of the certificate to be under the sale of the justices, but in fact no seals or scrolls are affixed to their names, is valid so as to bar the *feme*.

4. Deeds of Trust—Cloud on Title—Duty of Trustee—Case at Bar.—Whether or not such certificate be valid, it is at least so doubtful as to cast a cloud upon the title; and the husband being dead, and the interest of the *feme* in the land having been the fee, and her title not being barred by lapse of time, a sale of the land under a deed of trust should not be made until the cloud is removed, though neither the *feme* during her life nor her heirs since has set up any claim to the land.

In September 1843 Thomas Bryan filed his bill in the Circuit court of Hampshire county, to enjoin the sale of a tract of land under a deed of trust executed by himself to Isaac Baker, to secure a sum of money which he owed to Jacob Stump for
242 the purchase money *of the land.

The grounds of the injunction as they appear upon the pleadings and proofs are as follows:

Sometime previous to September 1802 Michael Cresap was the owner of a tract of two hundred and fifty acres of land in the county of Hampshire, which on his death descended to his two children Thomas Cresap and Abigail who married James Cresap. By deed of partition bearing date the 23d of September 1802, made between Thomas Cresap and Mary his wife and James Cresap and Abigail his wife, this tract of land was divided between them by metes and bounds; but there was no privy

***Deeds of Trust—Release under Power of Attorney—Validity of.**—The principal case is distinguished in *Stinchcomb v. Marsh*, 15 Gratt. 210.

†**Same—Sale under—Cloud on Title—Duty of Trustee.**—On this subject, see the principal case cited in *Bank of Washington v. Hupp*, 10 Gratt. 58; *foot-note* to *Faulkner v. Davis*, 18 Gratt. 651; *foot-note* to *Shurtz v. Johnson*, 28 Gratt. 657; *Muller v. Stone*, 84 Va. 837, 6 S. E. Rep. 223; *Morriss v. Ins. Co.*, 90 Va. 374, 18 S. E. Rep. 843; *Spencer v. Lee*, 19 W. Va. 195; *Lively v. Winton*, 30 W. Va. 561, 4 S. E. Rep. 456; *Dunlap v. Hedges*, 35 W. Va. 206, 13 S. E. Rep. 659. See generally, monographic note on "Deeds of Trust."

examination of either of the *femes covert*. The parties however took possession of the part of the land assigned to them, and held it without molestation. On the 27th of April 1814, James Cresap and Abigail his wife conveyed to James M. Cresap with special warranty against themselves and all claiming under them, the land assigned and conveyed to them by the deed of September 1802. It appears that James Cresap and his wife lived in the state of Maryland, and a commission issued to three persons by name who were described as justices of the peace for the county of Alleghany, in the state of Maryland, authorizing any two of them to take the privy examination of Abigail Cresap, and certify it under their seals to the County court of Hampshire. The certificate of the two who acted under this commission, stated the fact of the privy examination properly; and it purported to be under their hands and seals; but no seals or scrolls were affixed to their names; and they did not, nor were they required by the commission to certify that they were justices.

On the death of James M. Cresap this land descended to his son Luther M. Cresap, and he and his mother Mary Cresap, united in a deed bearing date on the 29th of November 1834, by which they conveyed it to James Prather, in trust to secure a debt of 1100 dollars which they owed to John
243 J. Jacob. They afterwards *in 1835 sold the land to Jacob Stump, and conveyed it to him by deed bearing date the 4th of April 1843: Having previously, as early as 1835, paid off the debt to Jacob by the assignment to him of one of Stump's bonds.

In May 1842 an agreement was entered into between Stump and Thomas Bryan, by which Stump agreed to sell to Bryan this land for 7000 dollars; of which 3000 dollars was to be paid on the 1st of the next April, and the balance in two equal annual payments; and upon the receipt of the first payment Stump was to convey the land clear of all incumbrances; and Bryan was to execute his bonds for the deferred payments, and a deed of trust upon the land to secure them. Bryan paid a part of the first payment, and executed his bond for 1750 dollars payable on the 1st of July 1843, and the other two bonds as provided for in the agreement. And on the 6th of April 1843 Stump and wife by a deed which traced the title from the deed of September 1802, conveyed the land to Bryan; and they covenanted that they had an indefeasible estate in fee simple in the premises, and good right to convey, and they conveyed with general warranty. And on the same day Bryan conveyed the land to Isaac Baker in trust to secure the balance of the purchase money, with power to sell upon the failure to pay any one of the bonds.

In July 1843 James Prather, then residing in Illinois, the trustee in the deed to secure the debt to Jacob, executed a power of attorney to William Donaldson of Hampshire, by which, after reciting the conveyance to

himself, and the several subsequent conveyances, he authorized Donaldson to execute for him and in his name, a deed of release to the person legally entitled to receive the same. And accordingly Donaldson, the 19th of July 1843, executed a deed which commenced in the name of James Prather, by William Donaldson his attorney in fact; but was signed William
244 Donaldson, *attorney in fact for James Prather; and the seal was attached to his name. He released and conveyed the land to the trustee Baker.

Bryan having failed to pay the bond for 1750 dollars, which fell due the 1st of July 1843, the trustee advertised the land for sale; and Bryan applied for and obtained an injunction, relying upon the want of the certificate of the privy examination of the *femes covert* who executed the deed of partition in 1802; the insufficiency of the certificate accompanying the deed of 1814; and that the deed of trust to Prather was still outstanding, the conveyance by Donaldson not being as he contended, valid to release it.

The defendants answered the bill. It appeared from the proofs that James Cresap lived until about 1836, and he was survived by his wife Abigail, who lived until 1843: And that they and those claiming under them, had held quiet and undisputed possession of the land from 1802 down to the hearing of the cause. It further appeared that their children were the heirs of both of them, and that they derived from their father an estate of more than three times the value of the land sold and conveyed by Stump to Bryan.

In April 1844 the Court dissolved the injunction; and the plaintiff applied for and obtained an appeal to this Court.

Robinson, for the appellant, relied,

1st. On the defect in the certificate of the privy examination of Mrs. Abigail Cresap, attached to the deed of 27th April 1814, which he insisted should have been under the seals of the justices. For which he referred to the act. Old Rev. Code, edi. of 1814, p. 221; *Tod v. Baylor*, 4 Leigh 498; *Hairston v. Randolph*, 12 Leigh 445.

2d. He insisted that the warranty of James Cresap was not such a security
245 as a Court of equity would *compel a purchaser to take as a security for a clearly defective title. For which he referred to *Keytons v. Brawford*, 5 Leigh 39.

3d. That at least the case came within the principle of the class of cases which reprobates a sale of lands under a trust deed whilst there is a cloud upon the title. And he referred to *Miller v. Argyle*, 5 Leigh 460.

4th. That the time which had elapsed since the conveyance in 1814, was not a bar to an action by the heirs of Abigail Cresap to recover the land, either on the ground of laches or of the statute of limitations. That the purchasers were entitled to possession under the conveyance from James Cresap until his death in 1836; and only

seven years had passed after his death before this bill was filed. And he referred to *Hairston v. Randolph*, 12 Leigh 445.

Patton, for the appellee.

Bryan accepted the conveyance from Stump with full knowledge of all the defects in the title, as a compliance with Stump's covenant. And he was so well satisfied with the title that he conveyed to the trustee with general warranty, and then comes to complain of these irregularities without an intimation of Stump's insolvency, or of an apprehension that he will be disturbed in his possession of the land. The irregularity of which he complains is moreover merely technical, and the provision of the statute requiring the justices to certify under their seals may well be considered as merely directory. *Bank of the U. S. v. Dandridge*, 12 Wheat. R. 6.

But if this formal defect exists, will a Court of equity enjoin the payment of the purchase money under the circumstances of this case. Clearly it will not be done in England where there is a deed with general warranty, unless, possibly, the grantor be insolvent. Here the grantor is not insolvent, no suit has been brought or is
246 *threatened; and the vendee has taken the conveyance with a full knowledge of the defects in the title. If a Court of equity should interfere in such a case, it would aid in the perpetration of a fraud by the vendee in taking the possession and the title, and then upon the pretence of these defects, of which he was before informed, refusing to pay the purchase money. 2 Lomax Dig. 282, and the cases there cited.

MONCURE, J., delivered the opinion of the Court.

The Court is of opinion, that the partition made between Thomas Cresap and Mary his wife, and James Cresap and Abigail his wife, on the 23d day of September 1802, as appears by their indenture of that date, followed as it has been ever since, by the possession in severalty of the said parties, and those claiming under them, is a valid and binding partition, although no certificate of the privy examination and acknowledgment of the said Mary and Abigail is annexed to the said indenture.

The Court is also of opinion, that the deed of trust of the 29th of November 1834, was duly and regularly released by the deed of the 19th of July 1843.

The Court is also of opinion, that the certificate of the privy examination and acknowledgment of the said Abigail annexed to the indenture of the 27th day of April 1814, substantially and sufficiently conforms to the requisitions of the statute of 1792, in regard to conveyances by husband and wife, except that the said statute requires the certificate of the justices to be returned under their hands and seals, and no seals or scrolls appear to be affixed to the names of the justices in this case, though they state in their certificate that

it is given under their hands and seals. The Court, without deciding whether the apparent omission of seals or scrolls as aforesaid rendered the title of the appellee

247 Stump to the land sold and conveyed by him to the appellant *defective, is yet of opinion that, as the said Abigail survived her husband, who did not die until 1836, and therefore when the injunction awarded in this case was dissolved she was not barred by the statute of limitations from asserting any claim to the said land, such omission of seals or scrolls raised a cloud over the title which, according to the case of *Miller v. Argyle*, 5 Leigh 460, and other cases therein referred to, ought to be removed before any sale is made under the deed of trust to secure the purchase money; and that the said injunction should have been retained until the said cloud was removed by a release of any claim of the heirs of said Abigail to said land, or by the decision of a Court of competent jurisdiction adversely to such claim in a suit to which the said heirs were parties, or by the lapse of fifteen years from the death of her said husband, which would bar the right of entry of her heirs, or by some other effective means. Therefore it is decreed and ordered, that the order of the Circuit court dissolving the said injunction be reversed and annulled with costs to the appellant against the appellee Stump; and that the cause be remanded to the said Circuit court to be further proceeded in according to the foregoing opinion.

248 *Brooke v. Washington.

October Term, 1851, Richmond.

[56 Am. Dec. 142.]

(Absent CABELL, P.)

Partnership—Land Purchased for Partnership Purposes—Liability of Dormant Partners.—A partnership for the manufacture of iron is composed of four persons, the names of two of whom do not appear; and they live at a distance. The acting partners buy land in their own name for the purpose of obtaining from it wood to be used in the manufacture of iron, and so far as it is paid for it is paid for out of the partnership effects. The land is partnership property, and the partnership having failed, the two dormant partners are liable to the vendor for the balance of the purchase money.

This was a suit instituted in 1843 in the Circuit court of Jefferson county by Thomas B. Washington against Thomas H. Perdue, William Nichols, Charles Brooke and Leon-

ard Jewell, as partners under the style of Perdue, Nichols & Co., to recover from them the purchase money of a tract of land which the plaintiff alleged he had sold to the partnership. The question in controversy was, whether the land had been sold to the first two named partners as individuals or had been sold to the partnership. The facts and the proceedings in the case are stated by the Judge in delivering the opinion of the Court. The decree in the Court below was in favour of the plaintiff; and Brooke obtained an appeal to this Court.

Patton, for the appellant, contended,

1st. That Brooke was not a secret partner, and yet that Washington had contracted with Perdue and Nichols as individuals, and not with the firm; and therefore whatever use was made of the property 249 purchased, *the partnership was not bound by the contract. Gow on Part. 183-4; Collyer on Part. 266; *Emily v. Lye*, 15 East's R. 7; *Jacques v. Marquand*, 6 Cow. R. 497; *Ex parte Hunter*, 1 Atk. R. 223.

2d. That the partnership was only for the manufacture of iron; and that the purchase of land was therefore not within the scope of the partnership: And the several partners can only be bound by the contract by their consent to it. If indeed all the partners had consented to this purchase, it still would not be partnership property; but it would be held as real estate, in which they were tenants in common. *Wheatley v. Calhoun*, 12 Leigh 264.

appropriated to those purposes, and paid for with partnership funds, becomes partnership property. Nor does it matter in what manner, or by what agency it is brought, or in whose name it held, it may be conveyed to all the partners, or one or more of them in trust for the partnership, or to a stranger under a similar trust; nor is it necessary (in this state and probably in most of the states of the Union) that the trust should be expressed (though in order to save all question about it, it would be better to be so), yet if it be wholly omitted from the conveyance, equity will always supply this want and treat the ownership as a distinct trust, if the trust exist and can be proved, and the land be, in fact and substance, partnership property; and a party holding the legal title to the land, however it may have come to him, will be held as a trustee for the partnership, if it be certain that the land was in fact their joint property as partners. (*Parsons on Partnership*, 364-5; *Brooke v. Washington*, 8 Gratt. 245; *Pierce's Adm'r v. Trigg's Heirs*, 10 Leigh 406; *Edgar v. Donnally*, 2 Munf. 387; *Wheatley v. Calhoun*, 12 Leigh 264; *Davis v. Christian*, 15 Gratt. 11.)" See also, *M'Cully v. M'Cully*, 78 Va. 162; *Cunningham v. Ward*, 30 W. Va. 579, 5 S. E. Rep. 650; 2 Min. Inst. (4th Ed.) 222, all citing the principal case.

It may be proved by *parol* that the money used to purchase the land belonged to the partnership. *M'Cully v. M'Cully*, 78 Va. 162; 2 Min. Inst. (4th Ed.) 222, both citing principal case.

Issue Out of Chancery—When Proper.—On this subject, see principal case cited in *foot-note* to *Magill v. Manson*, 20 Gratt. 527; *Steptoe v. Pollard*, 30 Gratt. 702; *Mason v. Bridge Co.*, 17 W. Va. 423. See generally, monographic *note* on "Issue Out of Chancery" appended to *Lavell v. Gold*, 25 Gratt. 474.

***Dormant Partners—Powers and Liabilities.**—As to who are dormant partners, their powers and liabilities, see a somewhat extended *note* appended to the principal case as reported in 56 Am. Dec. 142, 147.

Purchase of Realty with Partnership Funds—Conveyance to One Partner—Effect.—In *Hancock v. Talley*, 1 Va. Dec. 442, it is said: "As a general rule, real estate purchased for partnership purposes and

3d. That even if Brooke and Jewell had been secret partners, and the contract had been made with Perdue and Nichols as partners, and for the use of the partnership; they had no authority to bind the other partners in a purchase of land, if they intended to do it. By the statute of frauds no man is chargeable on any contract concerning the sale of lands, but on some memorandum in writing signed by himself or his agent lawfully authorized. *Pitts v. Waugh*, 4 Mass. R. 424; *Tucker's* opinion in *Wheatley v. Calhoun*, 12 Leigh 273.

Cooke, for the appellee, insisted,

1st. That Brooke was a secret partner; but that the question was immaterial, as he was bound whether a secret or known partner. *Williams v. Donaghe's ex'or*, 1 Rand. 300.

2d. That the land was essential to enable the partners to carry on their business, as is proved by the fact that in eighteen months they cut off it five thousand cords of wood. And that whatever doubts may have existed as to the light in which real property is to be considered when bought and used by a partnership for partnership purposes, it is now well settled that it is 250 to be *considered as forming a part of the partnership funds. *Phillips v. Phillips*, 7 Cond. Eng. Ch. R. 208; *Broom v. Broom*, 9 Id. 118; *Randall v. Randall*, 10 Id. 52; *Pierce's adm'r v. Trigg's heirs*, 10 Leigh 406.

3d. That the statute of frauds did not apply, as there had been part performance, the purchasers having taken possession of the land, and taken off it a large quantity of wood, thereby materially diminishing its value. *Whitchurch v. Bevis*, 2 Bro. Ch. R. 559; 1 Fonb. Equ., Book 1, ch. 3, § 8, note e.

MONCURE, J., delivered the opinion of the Court.

The suit in which the decree from which the appeal in this case was taken, was rendered, was a suit brought to recover of dormant partners a debt for which the ostensible partners had given their bonds, but which the latter had become unable to pay by reason of their insolvency. The following appear to be the facts of the case so far as it is material to state them. In 1841 Perdue, Nichols, Brooke and Jewell entered into partnership for carrying on the iron making business in the county of Jefferson; and accordingly carried it on for about two years. Perdue and Nichols resided in the county of Jefferson, and were the ostensible partners; Brooke and Jewell were non-residents of the state, and their names did not appear in the style of the firm, which was "Perdue, Nichols & Company." It does not appear to have been known to the appellee, nor generally, that Brooke and Jewell were partners; and it was proved that several suits were brought by different attorneys against Perdue and Nichols alone as constituting the firm of "Perdue, Nichols & Company," though it does not appear that there was any designed

concealment of the fact that Brooke and Jewell were members of the firm. In May 1841 the appellee Washington sold and conveyed to Perdue and Nichols 843 acres of land in Jefferson for 6200 dollars; 251 of *which 1100 dollars was paid at the time; and for the balance they gave their bonds payable in five annual instalments, and gave a deed of trust on the land to secure the payment of the same. The cash payment was made by the check of "Perdue, Nichols & Co.," and entries were made on their books, bearing the same date with the deeds and bonds, to wit, the 1st of May 1841, crediting Washington in account with the firm, for 6200 dollars, the purchase money of the land, and debiting him in the same account with 1100 dollars the cash payment. During the operations of the partnership for some eighteen months after the purchase, about five thousand cords of wood were cut from the land and used in the said operations. Portions of the land were also rented out and the rents were received by the firm and entered on their books. Brooke had access to the books and looked into them, though it did not appear that he ever examined any account but his own. In December 1842, Perdue and Nichols in their individual names and by the partnership name of Perdue, Nichols & Co., executed a deed of trust to secure the debts of the firm which are enumerated. Three parcels of land besides other property were embraced in the deed, but the land bought of Washington was not included, and the debt due to him was not mentioned in the deed. In March 1843 Washington filed his bill charging that a large portion of the value of the land consisted in the timber and trees standing on it, that the object of the purchasers in buying it was to cut off the timber for fuel to supply their iron works; that they had cut down and carried off the timber and trees on the land until it was of very little value; that he had no other security for the purchase money than the land itself under the deed of trust; that the partnership had become insolvent and made a general assignment of their effects for the benefit of their creditors; and his only mode of redress to recover 252 the balance due him *was to charge the same on the individual partners; and that Brooke was a partner at the time of the sale, though he was then ignorant of the fact; the name of Brooke being withheld from the public: and seeking to charge said Brooke as a member of the firm for the balance of said debt. Afterwards an amended bill was filed charging that Jewell also was a secret partner of the firm; and seeking to make him liable. Of all the defendants Brooke alone filed an answer. He placed his defence upon the ground that the purchase was not made on account or upon the credit of the firm, or by his authority, and was not within the scope of the partnership; and in the absence of any knowledge on the subject at the time it was made, "presumes it was made by Perdue and Nichols with the view

of bringing it into the firm as a part of their share of the capital;" and he also objected to the jurisdiction of the Court.

The Circuit court being of opinion that Brooke and Jewell were secret members of the firm; that that fact was unknown to the appellee at the time of the sale; that the land was purchased for partnership purposes; that the chief value thereof consisted in its timber required as fuel for the iron works; and therefore that such purchase was a transaction in the ordinary course of business in conducting the iron works, rendered a decree against all the parties for the balance due to Washington after crediting the proceeds of the sale of the land. From that decree the appeal in this case was taken.

The case of *Weaver v. Tapscott*, 9 Leigh 424, seems to rule this case, and to shew that there is no error in the decree of the Circuit court. In that case Weaver and Trimble were partners in the boating business upon James river, between Rockbridge and Richmond. Trimble went to Buckingham and hired hands to be employed in the business, which were actually so employed during a portion of the time that
253 *the partnership continued; and for the hire he executed his bond with Tapscott as surety. Trimble the principal obligor having become embarrassed, and left the state, Tapscott the surety was compelled to pay the money, and filed his bill to recover it of the other partner, Weaver, who had not signed the bonds. He obtained a decree; and this Court consisting of five Judges unanimously affirmed it. Many expressions used by the Judges in that case are very apposite to this. Parker, Judge, says, "A dormant partner to whom a vendor gives no credit, and whose responsibility constituted no part of the consideration moving him to sell, is liable to the whole extent of engagement in matters which, according to the usual course of dealing, have reference to the business transacted by the firm. *Robinson v. Wilkinson*, 3 Price's Exch. R. 538; *Saville v. Robertson*, 4 T. R. 720. There can be no doubt that the hiring of hands to be employed in the boating business had immediate reference to the nature of the dealings between Trimble and Weaver. The trade in which they were engaged could not be carried on without hands any more than without boats." "If Tapscott was ignorant of Weaver's being a partner, it brings this case within the influence of those upon secret partnership. *Gow*. 176. If he knew it, but dealt with Trimble alone, without intending to release the partnership, it must be governed by the cases of *Bond v. Gibson*, 1 Camp. R. 185, and *Gouthwaite v. Duckworth*, 12 East's R. 421. It is only, I think, in cases where a separate credit is clearly given to one of the partners, to the exclusion of the rest, that the latter are absolved." "When one deals with a partner in matters relating to the partnership business, it ought to be inferred that he deals on the credit of the partnership, un-

less the circumstances prove that though apprised of the partnership he meant to give individual credit. It would be hard to hold him bound to prove that he knew
254 *of the partnership and dealt on its credit." "The presumption is in the affirmative; and to discharge the firm it ought to appear clearly that he gave credit to the individual alone and intended to absolve the other partners." Cabell, Judge, says, "It is perfectly clear that Weaver was equally liable with Trimble even if Tapscott at the time of the contract was ignorant of the fact that Weaver was a partner. And if the fact of the partnership was known to Tapscott, Weaver is a fortiori liable; unless indeed it can be shewn that Tapscott, with this knowledge contracted on the individual credit of Trimble, in exclusion of that of Weaver. Nothing of the kind is attempted to be proved, and it cannot be presumed without proof. Weaver therefore was clearly liable on the hiring; and the cases of *Sale v. Dishman*, 3 Leigh 548; and *McCullough v. Somerville*, 8 Leigh 415, shew that this obligation was not extinguished by the execution of a bond by his partner." Tucker, P., referring to the arrangement alleged, that Weaver should find the hands and Trimble the boats, says that even if it was made between the parties, yet the public had nothing to do with that arrangement, and as Weaver was to get half the profits he was responsible for the hires, since that interest in the profits ipso facto constituted him a partner." Again he says, "It is possible, says Chief Baron Macdonald, in *Barton v. Hauson*, 2 Camp. R. 97, that separate credit may be given to one of two partners individually, but the presumption of law is otherwise, and that presumption must be rebutted by very clear evidence. And this is reasonable; for why should the partner desire to bind himself and absolve the concern? or why should the dealer with him prefer to bind him individually, when, if bound as a partner, he is personally not less bound, and there is the additional security of his partner." In this case it is absurd to suppose that Tapscott took Trimble's individual responsibility, if he knew of Weaver's
255 *connexion with him; and if he did not know of it, then the execution of a sealed instrument could not have been with a view to indicate his individual responsibility in contradistinction to that of the concern."

These copious extracts are made from the opinions of the Judges in *Weaver v. Tapscott*, because, *nomine mutato*, they are as applicable to this case as they were to that, and because they leave little or nothing more to be said in this case. It seems to be difficult to find a distinction between that case and this, unless it be in the fact that in that case the bonds were given for negro hire, and in this they were given for the purchase money of land; and that is a distinction without a difference, at least in principle. Land is not ordinarily a subject of partnership operation, and therefore

stronger evidence is required to shew an intent to convert real estate into partnership stock. But it is capable of being so converted; and an intention to make such conversion being shewn by sufficient evidence, it becomes as completely a part of the social effects as if it were personal estate. In the case of *Wheatley v. Calhoun*, 12 Leigh 264, this Court said, that "whatever doubts may have heretofore existed as to the light in which real property is to be considered, when bought and used by a commercial partnership for the purposes of the concern, it is now well settled that it is to be looked upon as forming a part of the partnership funds. Such is at present the received doctrine in England, and so this Court has decided." In that case *Wheatley* and *Calhoun* had purchased a mill and tract of land jointly, and for sometime conducted a partnership milling business. The question was whether there was sufficient evidence of an intention to convert the mill and land into partnership stock, or, whether they merely intended to carry on the milling business in partnership. *Tucker, P.*, in delivering the opinion of the Court said: "There may indeed be partnerships in

the business of milling or mining
256 *or farming; but unless the intent of the joint owners to throw their real estate into the fund as partnership stock is distinctly manifested, or unless the real property is bought out of the social funds, for partnership purposes, it must still retain its character of realty." "In this case I see nothing from whence to infer that there was any design on the part of these joint purchasers to convert their real estate into partnership stock." In the case now under consideration the evidence is conclusive that the land was bought for partnership purposes, paid for in part and intended by the purchasers to be paid for entirely, out of partnership funds, and applied to partnership purposes. The purchase was within the scope of the partnership, for the operations of the furnace could not be carried on without fuel; and the best mode of obtaining it was to purchase land in the neighborhood, well covered with wood, as was the land of Washington. All the partners are therefore bound for the purchase money, on the authority of the cases before cited. The case of *Pitts v. Waugh*, 4 Mass. R. 424, was a very different case from this. It was a case of speculation in lands, and the question was, whether, not being a subject of trade and commerce, the mercantile law in regard to dormant partners was applicable thereto; and the Court thought not. That case was decided in 1808, since which time the partnership law in regard to real estate has undergone great changes. *Collyer on Partnership*, § 135 and notes. But in this case the land was not purchased for speculation, but for the purpose of carrying on a business which was an ordinary and legitimate subject of commercial partnership. There is nothing in the objection of the statute of frauds. The purchase being within the scope of the

partnership the partners who made it were agents for the partnership which became bound by a valid contract made by their agents. It would also be bound on the doctrine of part performance.

257 *The jurisdiction of a Court of equity in this case is fully sustained by the cases of *Sale v. Dishman*, 3 Leigh 548; *Weaver v. Tapscott*, 9 Leigh 424; *Williams v. Donaghe's ex'or*, 1 Rand. 300; *Galt v. Calland*, 7 Leigh 594; *Parker v. Cousins*, 2 Gratt. 372.

The Court is therefore of opinion to affirm the decree.

Decree affirmed.

Isler & Wife v. Grove & Wife.

October Term, 1851, Richmond.

(Absent *CABELL, P.*)

Issue Out of Chancery—When Proper—Case at Bar.—

Where the subject matter in controversy is of the nature of estimated and unliquidated damages, and the accuracy and credit of the witnesses is impeached, an issue should be directed.

* Benjamin Beeler of Jefferson county died in 1827, leaving a widow and several children; three of whom were by his last wife. Mrs. Beeler lived on the land on which her husband had lived, without any assignment of dower until 1833, when she married Abraham Isler. During her widowhood her three children lived with her; and on her marriage Isler qualified as their guardian; and at that time the daughter Mary W. Beeler was about fifteen years old. In 1835 the land was divided, and Isler held the share of his ward Mary W. Beeler until she arrived at the age of twenty-one years; and soon after that period she was married to George G. Grove. Isler settled his guardianship accounts in 1836 and 1839; the last time after Mary W. Beeler had come of age; and according to these accounts
258 *he was in advance to his ward 109 dollars 24 cents.

In 1839 George G. Grove and his wife filed their bill in the Circuit court of Jefferson county, against Isler and wife, in which they charged that the accounts had been improperly settled; and asked for a settlement of the account of Mrs. Isler whilst she acted as guardian de facto of the female plaintiff; and of the account of Isler after his qualification.

The defendants demurred to the bill for multifariousness, and also answered; but the Court overruled the demurrer, and directed the accounts as asked for in the bill. Under this decree the commissioner reported that the plaintiffs had not required him to take an account of Mrs. Isler's actings before her marriage, and it therefore had not been taken. He reported an account of Isler's actings as guardian, based upon the accounts previously settled,

*See monographic note on "Issue Out of Chancery" appended to *Lavell v. Gold*, 26 Gratt. 478.

lessening a credit to the guardian for the board for a period of six months, when she was absent from his house; and adding several charges for wood cut and rails removed from the land of his ward; and by these alteration in the account bringing Isler in debt to his ward on the 1st of January 1839, 174 dollars 12 cents.

To this report Isler filed eight exceptions, all of them having reference to the charge for the wood and rails alleged to have been taken from the land of the female plaintiff. The commissioner returned with his report the depositions taken upon this subject; and they shewed that there were numerous witnesses whose testimony was conflicting and contradictory; and one of the most important witnesses for the plaintiffs was impeached.

The cause came on to be heard in October 1844, when the Court reduced the price at which the rails were charged to 2 dollars 50 cents a hundred, making due from Isler 152 dollars 87 cents, and overruling all the other exceptions, gave the plaintiffs a decree for that sum, with interest from the 1st of January 1839 until paid and their costs. From this decree Isler and wife applied to this Court for an appeal, which was allowed.

Cooke, for the appellants.
Watkins, for the appellees.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that as the accuracy and credit of the testimony relied upon to sustain the items of the master commissioner's report, which were excepted to in the eight exceptions filed by the appellants to said report, were impeached, an issue should have been directed, as a jury with the witnesses before them would have been better enabled to test their accuracy and weigh their credit than a commissioner or the Court. The case too from the character of the claim was peculiarly proper for an issue; for although it was competent for the appellees to make the alleged profits received and made by the guardian from the use and sale of the timber taken from the ward's estate a matter of account; yet the extent of the charge on this account, if any was proper, depends upon estimate, and is in the nature of unliquidated damages, and therefore should have been submitted to a jury. The Court is therefore of opinion, that the decree is erroneous, and the same is reversed with costs. And the cause is remanded, with instructions to direct an issue to ascertain and try whether any timber not accounted for by the appellant in his accounts rendered, was taken by him from the lands of the ward, and sold or converted to his own use; and what sum would be a proper charge against the guardian for such timber so taken and sold or converted to his own use.

Decree reversed.

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*Carrington & als. v. Didier,
Norvell & Co.*

October Term, 1851, Richmond.

(Absent CABELL, P.)

1. Foreign Attachment—Against Debtor's Heirs Residing Abroad.†—Creditor of a deceased debtor may proceed by foreign attachment against the heirs residing abroad to subject land or its proceeds, in the state, descended to them from the debtor.
2. Absent Defendants—Marshaling Assets.—So he may proceed against them as absent defendants in equity to marshal the assets, and thus subject the land descended to them.
3. Heirs Residing Out of State—Suit to Have Land Descended to Them Sold—Subjection of Proceeds by Creditors to Payment of Debt—Case at Bar.—Heirs residing out of the state, having instituted a suit for a sale of land descended to them, and the same having been sold, and the proceeds being in the hands of a commissioner directed by the Court to collect them; a creditor of the ancestor seeking to subject these proceeds to the payment of his debt, should apply by petition to the Court to be made a party in the cause, and to have the fund applied by proceedings in that cause to the payment of his debt. Or if he proceeds by foreign attachment the commissioner should be a party, and be restrained by the endorsement on the process, from disposing of the proceeds. Or if the creditor proceeds against the heirs to marshal the assets, there should be an injunction to restrain the commissioner from paying away the money in his hands. And the commissioner though a party as administrator of the debtor, to the creditor's suit, but having in fact no knowledge of the object of it, paying over the money to the heirs under the order of the Court whose commissioner he was, will not be affected by the *lis pendens* of the creditor's suit so as to be held liable to pay it over again to the creditor.

This was a suit in chancery brought in July 1841 in the Circuit court of Halifax, by Didier, Norvell & Co. against Henry Carrington administrator of John A. Morton deceased, and the four children of John A. Morton. The facts are fully stated in the opinion of the Court. There was a joint decree against Henry Carrington and the other defendants. And they thereupon applied to this Court for an appeal, which was allowed.

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*S. Taylor, for the appellants.
Stanard and Bouldin, for the appellees.

ALLEN, J., delivered the opinion of the Court.

It appears that the appellees on the 30th July 1841, sued out of the Circuit court a subpoena in chancery against the appellant Henry Carrington, as administrator, and the other appellants as children and heirs of John A. Morton deceased, which was returned executed August 7th, 1841, on

*For monographic note on Marshaling Assets, see end of case.

†The principal case is cited in Osborn v. Glasscock, 20 W. Va. 761, 20 S. E. Rep. 706.

Henry Carrington, and the rest no inhabitants. On the 21st August 1841, they filed their bill, in which they charge that they are creditors of the intestate; that the administrator alleged there were not assets in his hands sufficient to pay them; that the personal estate had been exhausted in the payment of bond debts binding the heirs; that the real estate of which the intestate had died seized in the county of Halifax, had been sold under a decree of the County court of said county for the purpose of dividing the proceeds amongst the heirs; that said Carrington had been appointed by the said Court collector of the proceeds of sale, and had collected and then held part thereof, and the residue would be due at a future day. They seek to marshal the assets and to be substituted to the rights of the bond creditors, and satisfied out of the real assets; and pray that Carrington as administrator and as such collector, be made defendant; that as administrator he render an account, and as collector be restrained from paying away or disposing of the funds in his hands or which may come into his hands; and ask that the proceeds arising from the sale be applied to the payment of their debt, and for general relief. Two of the children and heirs were proceeded against as non-residents, by publication; a guardian ad litem was appointed to defend the other two children and heirs as infants, who in December 1842 put in an answer for them.

262 *At November rules 1841, the bill was taken for confessed as to Carrington, and as to him the cause set for hearing. At April rules 1843 it was set for hearing as to the non-resident defendants, and came on for hearing at April term 1843, upon the order of publication, the answer of the infants by the guardian ad litem, and the bill taken for confessed as to Henry Carrington; and an interlocutory order for an account was rendered. At the April term 1844 the cause was heard upon exceptions to the report and recommitted. Henry Carrington answered in April 1845; and on the 13th April 1846, the decree appealed from was rendered. In his answer Carrington avers that all the assets which came to his hands as administrator, have been paid out to the creditors; an averment which is sustained by the report of the master commissioner, which shews he is in advance to the estate. He further avers that the money arising from the sale of the land descended to the heirs, and which came to his hands as collector, had been paid out by him to the parties respectively entitled to receive it, in virtue of two orders of the County court made in the suit in which he was appointed collector; that he acted in obedience to the orders of the Court whose commissioner he was. And he alleges that he had no recollection that the subpoena in this cause had been ever served on him; and that he had no knowledge of the existence of the suit at the time he paid out the money. The record of the County court which he files as an exhibit

with his answer, shews that a friendly suit for the sale of the land and distribution of the proceeds was brought in November 1839, and a decree appointing commissioners to sell was rendered during the same term. In January 1841, H. Carrington was appointed collector. At August term 1841, the report of sale was confirmed, and the collector ordered to pay over the amount of the first instalment, after deducting cer-
263 tain allowances to the widow *and children in the proportions fixed by the decree; and at March term 1842 he was ordered to pay over the second instalment; and the report of the commissioner shews that the money was all paid out by him between the 1st February and the 1st November 1842.

In September 1841, after the institution of this suit, the appellees obtained a judgment against the administrator for their debt, subject to a credit of 108 dollars 91 cents, paid on the 27th September 1841. By the commissioner's report it appears that assets to the value of 700 dollars had been applied by the administrator in the payment of debts binding the heirs.

From the foregoing statement of the facts it is evident that the appellees had a right to be substituted to the shoes of the creditors whose debts bound the heirs, and that the assets should have been marshalled for their benefit. The land had been sold by a decree of the Court at the time they instituted their suit; and it was competent for them to follow the proceeds. Their bill sets out that their debtor was late of the city of New York, the original subpoena is returned no inhabitant as to all the defendants except the administrator; and two of the children and heirs being adults, were proceeded against as non-residents; and from the return on the subpoena and the other circumstances, it is fair to presume the infant children and heirs were also non-residents. The heirs were debtors to the value of the assets descended, and if non-residents, it would have been competent to have proceeded against them by way of foreign attachment, and by a restraining order, or an endorsement on the subpoena, which stands in place of such order, to have attached the proceeds arising from the sale of land. The appellees did not adopt this course. The heirs were not treated as debtors; but the proceeding was to subject the land descended, or the proceeds arising from the sale thereof, as the estate of their deceased debtor within

264 the jurisdiction of the *Court. The heirs were made defendants not as debtors, but as absent defendants having an interest in the subject which the creditor was seeking directly to charge under the equitable jurisdiction of the Court to marshal the assets of a decedent. They were warranted in this course by the case of *Tennent v. Patton*, 6 Leigh 196, where in a case to marshal the assets, one of the heirs being a non-resident was proceeded against as an absent defendant. But their bill cannot be treated as tantamount to a foreign

attachment with a restraining order. Regularly they should have enjoined the resident defendant from paying over the funds in his hands to those entitled thereto, or have obtained some order from the Court restraining the resident defendant from paying away the funds. This was not done. The resident defendant avers he did not know of the existence of the suit at the time the money was paid away, and that he did not remember the subpoena had ever been served upon him. The subpoena was sued out against him in his character of administrator only, and not against him as collector. It gave him no notice of a proceeding against him for the money in his hands as collector. There is no evidence of actual notice to him, and as he could have had no motive in paying to one in preference to the other claimant, it seems manifest that he has acted in good faith in obedience to the orders of the Court from which he derived his authority, and to which he was responsible; and in ignorance of the claim of the appellees. There is nothing to affect his conscience. If he is to be compelled to pay the money over again, it must result from the application of some stern and inflexible rule of equity, which from reasons of public policy fixes a liability upon him, though he was free from all blame. This it is maintained on the part of the appellees is the case here. The money was paid *lite pendente*; and therefore there could be no change of subject by the voluntary act of the party

265 so as to affect *the right of the party suing. The doctrine of *lis pendens* does not depend upon the presumption of notice, but upon reasons of public policy; and where it operates, applies, although there was no possibility of notice of the suit. *Newman v. Chapman*, 2 Rand. 93.

Treating this as a subject which would be affected by the *lis pendens*, how does the appellant Carrington stand? No fraud is imputable to him; he has collected a fund as an officer of Court. He was the mere agent of the Court, having no interest in the subject; the Court made an order for him to pay it away and he obeyed it. Can this be treated as a voluntary act of the party calculated to defeat the rights of a suitor in another case. It is said he should have communicated the pendency of the suit to the County court; but this and similar arguments are based on the assumption that he is presumed to have notice of the suit and the prayer of the bill; and presuming he had notice, he is then to be treated as if he actually had it, and his conscience is to be affected thereby. But notice in fact is denied, is not proved, and is against all the presumptions of the case; nor is notice actual or presumptive at all necessary, if this is a case for the application of the doctrine of *lis pendens*. But where, as in this case, an officer of a Court is made a defendant, who as agent of the Court collects money to be held subject to its control and is liable to attachment instantly

for disobedience to its orders, the duty of obedience is a paramount obligation; and he cannot be held responsible for such obedience by the application of the general doctrine of *lis pendens*. The creditors were the parties in default, and cannot invoke the application of the principle where it will operate so harshly. Their suit was originally irregularly instituted. They should have made themselves, by petition or bill, parties to the proceeding in the County court, in which Court the fund had been realized; and then proper measures would have been taken to secure it. They had full notice of this proceeding, for they refer to it in their bill. Failing in this, they should either have proceeded by foreign attachment and obtained a restraining order, or made the proper endorsement on the subpoena, or if they elected to proceed to charge the subject and treat the heirs as absent defendants, they should have enjoined the defendant from paying over the money, or taken some measures to secure the fund in his hands or to have it paid into Court. Instead of doing so, they seem to have contented themselves with the institution of their suit, relying upon the doctrine of the *lis pendens*, whilst the collector in ignorance of any claim was permitted to go on and pay away the money. The claim to charge him has little foundation in equity, and I think his duty to obey the decrees of the Court, whose agent he was, was a paramount obligation, and relieves him from all liability growing out of the doctrine of *lis pendens*. And therefore that so much of the decree as charges Henry Carrington for the money paid out by him as collector in obedience to the orders of the County court, is erroneous. The decree was also erroneous in not giving the infants a day to shew cause against it after arriving at full age; but as the decree against Carrington and the various defendants is joint, and must be reversed, and such decree entered as the Court below should have done, the leave can still be reserved.

Reversed with costs; and this Court proceeding to render such decree, &c.; bill dismissed as to Henry Carrington without costs. It is further adjudged and ordered that the plaintiffs recover (as in former decree from several defendants, leaving out Carrington) and leave is reserved to the infants to shew cause against this decree within six months after they respectively attain full age.

MARSHALING ASSETS.

I. Definition.

II. Nature of Doctrine.

A. Conditions Precedent.

B. Marshaling in Aid of Subsequent Purchasers and Incumbrancers.

1. Vendor's Lien.

2. Between Mortgagees.

3. As against Bona Fide Purchasers.

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1. Rights of Paramount Creditors.
2. Rights of Third Parties.
3. Liabilities of Paramount Creditors.
 - a. Release.
 - b. Laches, Forbearance, Neglect to Enforce Lien.

III. Method of Enforcing Doctrine.

A. Subrogation.

IV. Application of Doctrine.

A. In Respect of Homestead Lands.

V. Inverse Order of Alienation.

- A. Lands Sold Contemporaneously.
- B. Necessity of Warranty.

VI. Pleading and Practice.

- A. Trust Liens.
- B. Bill by Infant Heirs.
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VII. Marshaling Decedents' Estates.

A. Liability of Heirs and Devisees.

1. Common-Law Rule.
2. Statutory Rule.

B. Liability of Purchasers from Heirs or Devisees.

C. Liability of Legatees.

1. Devastavit.

D. Order of Liability of Assets.

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2. Personal Estate.
 - a. Liability for Payment of Debts.
 - b. Liability for Payment of Legacies.
3. Real Estate Devise for Payment of Debts.
 - a. Contribution by Devisees.
 - b. Effect of Trust to Pay Debts upon Statute of Limitations.
4. Real Estate Descended.
5. Specific Devisees or Bequests Subject to Charge of Debts.
 - a. Contribution under Charge of Debts.
6. General Legacies and Devisees.
7. Real Estate Devise by Will.
 - a. Contribution between Specific Legatees and Devisees.

E. Exoneration of Encumbered Lands.

F. Charge of Debts and Legacies.

1. Charge of Debts.
 - a. Direction for Payment of Debts.
 - b. Devise to Executors.
 - c. Exoneration of Personal Out of Real Estate.
 - d. Personal Liability of Devisee upon Acceptance.
2. Charge of Legacies.
 - a. Intention of Testator.
 - b. Circumstances Tending to Show Intention.
 - c. Effect of Residuary Clause.
 - (1) Blending Real and Personal Estate in Residuary Clause.
 - d. Charge on Lands Devise.
 - (1) Direction for Payment of Legacies.
 - e. Lands Devise to Executor.
 - f. Enforcement of Charge.

G. Rule of Marshaling Applied.

1. In Whose Favor.
 - a. Between Specialty and Simple Contract Creditors.
 - b. In Favor of Legatees.
 - c. In Aid of Devisees.

Cross References to Monographic Notes.

Executors and Administrators.
Subrogation.

I. DEFINITION.

"To marshal assets, in the sense of the courts of equity, is to make such arrangement of the different funds under administration as shall enable all the parties having equities thereon to receive their due proportions, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of these funds." 4 Min. Inst. (8d Ed.) 1361.

II. NATURE OF DOCTRINE.

The rule as to marshaling assets is that if one party has a lien or interest in two funds for his debt, and another party has a lien on or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties; provided always this course does not trench upon the rights or operate to the prejudice of the creditor entitled to the double fund. *Russell v. Randolph*, 26 Gratt. 705; *Vance v. Monroe*, 4 Gratt. 52; *Jones v. Phelan*, 20 Gratt. 220; *Schultz v. Hansbrough*, 33 Gratt. 583; *Hudson v. Dismukes*, 77 Va. 242; *Watkins v. Dupuy*, 87 Va. 87, 12 S. E. Rep. 294; *Stephenson v. Taverners*, 9 Gratt. 308; *Tennent v. Pattons*, 6 Leigh 212; *Ball v. Setzer*, 33 W. Va. 444, 10 S. E. Rep. 798; *McCrum v. Lee*, 38 W. Va. 583, 18 S. E. Rep. 757; *Bank v. Wilson*, 25 W. Va. 242; *Wiley v. Mahood*, 10 W. Va. 307; 1 Bart. Ch. Pr. (2d Ed.) 92; 4 Min. Inst. (8d Ed.) 1361; 3 Min. Inst. (2d Ed.) 584; *Alston v. Munford*, 1 Brock. 206; *Rixey v. Pearre*, 89 Va. 113, 15 S. E. Rep. 498.

And this is true, even though in its consequences harm results to another creditor having a lien on the property later in date. *Ball v. Setzer*, 33 W. Va. 44, 10 S. E. Rep. 798.

"This principle is of frequent application in equity whenever it is required in order to work exact justice, even though the bill were not framed specially to secure that relief. But the bill is also often drawn with that express object, and then it should be in behalf of the plaintiff and all other creditors who shall choose to come in and contribute to the costs of the suit; and where it is to marshal assets and for their due administration, the heirs and devisees of the testator should be made parties (1 Bart. Ch. Pr., sec. 92, p. 293; *Stephenson v. Taverners*, 9 Gratt. 308.)" 4 Min. Inst. (3d Ed.) 1362.

Foundation of Doctrine.—The doctrine of marshaling assets is founded upon the maxim *sic utere tuo ut alienum non laedas*. *Hudson v. Dismukes*, 77 Va. 242; *Rixey v. Pearre*, 89 Va. 113, 15 S. E. Rep. 498.

Doctrine Much Favored.—"This doctrine of marshaling assets is a long-settled, favorite, and highly cherished branch of equitable jurisdiction. It is founded on the best and purest principles, and productive of that evenhanded justice, which, to the greatest practicable extent, enforces the maxim *sum cuique tributo*." *Tennent v. Pattons*, 6 Leigh 196.

Marshaling Securities.—"The same principle is applied in marshaling securities. Thus, if A has a mortgage on two tracts of land for the same debt, and B has a mortgage on but one of the tracts for another debt, B has a right in equity to require A to have recourse in the first instance to the tract that B cannot touch, at least when it will not prejudice A's rights nor improperly impair his remedies." 4 Min. Inst. (3d Ed.) 1362.

Illustration.—Upon a bill by a judgment creditor to subject the lands of his debtors to satisfy a judg-

ment obtained against them as the maker and endorsers of a note, whose liability *inter sese* are successive, it is error to decree a sale of the lands of the last endorser before resorting to the lands of the maker and prior endorser of such note, unless to require the plaintiff to exhaust the estate of those debtors, whose liability is prior to the last endorser, will in the opinion of the court unduly delay the plaintiff in the collection of his debt. *Shenandoah Valley Nat. Bank v. Bates*, 20 W. Va. 211.

A. CONDITIONS PRECEDENT.—To invoke the doctrine of marshaling securities both sources of payment must belong to the common debtor. The equity is not invoked against the doubly secured creditor, but against the common debtor, and cannot be invoked against the common debtor if that course would trench upon the rights, or operate to the prejudice, of the creditor entitled to the double fund. *Blakemore v. Wise*, 95 Va. 373, 28 S. E. Rep. 332; *Russell v. Randolph*, 26 Gratt. 717, 718. See 3 Va. Law Reg. 744; *Rixey v. Pearre*, 89 Va. 113, 15 S. E. Rep. 498.

Social and Individual Assets.—In order for a creditor who has a lien upon one fund to be entitled to substitution to the right of a creditor who has a lien upon that and another fund, it is a necessary condition, among other things, that both funds upon which the prior creditor's claim is secured should be the property of the same debtor, and this condition does not exist where the assets of a partnership constitute one of the funds, and the individual property of a member of the partnership constitutes the other fund, unless that partner has, in equity, become entitled to the partnership assets and become primarily liable for the partnership debts. *Guggenheimer & Co. v. Martin & Co.*, 93 Va. 634, 25 S. E. Rep. 881; *Rixey v. Pearre*, 89 Va. 113, 15 S. E. Rep. 498.

B. MARSHALING IN AID OF SUBSEQUENT PURCHASERS AND INCUMBRANCERS.

1. VENDOR'S LIEN.—Upon this principle of marshaling assets, where payments have been made by an executor, to the vendor of land purchased by the ancestor, and not conveyed to him, the lien of the vendor will be marshaled. *Alston v. Munford*, 1 Brock. 266, Fed. Cas. No. 297.

Where one of two joint purchasers of real property, who have given their notes for the payment of the purchase money, becomes insolvent, and the other pays more than his moiety of the purchase money, such latter party has a lien on the property to reimburse him for all that he has paid above one moiety of the purchase money, in preference to the creditors of the insolvent debtor claiming under a deed of trust from him, unless they appear to be purchasers without notice. *Tompkins v. Mitchell*, 2 Rand. 428.

Principal Debtor Insolvent.—Where a vendor's lien is retained to secure the payment of several bonds given for the purchase money of lands, and a judgment is obtained at law by the assignee of one of those bonds against the principal on the bond and his surety, the surety cannot come into a court of equity and compel such assignee to exhaust his vendor's lien before enforcing the collection of his judgment by execution against the surety, although it is shown that the principal debtor is insolvent. *Armstrong v. Poole*, 30 W. Va. 666, 5 S. E. Rep. 257.

2. BETWEEN MORTGAGEES.—If A has two mortgages, and B has one of the same subjects mortgaged to him, B will be aided by equity, in throwing

A upon that subject which B cannot touch. *Tennent v. Pattons*, 6 Leigh 196.

3. AS AGAINST BONA FIDE PURCHASERS.—The equity of a judgment creditor to marshal the assets, as a means of obtaining payment out of a fund that is not subject to the lien of a judgment, will not be enforced against a *bona fide* purchaser, unless the equity springs out of some contract between the purchaser and vendor. *McClaskey v. O'Brien*, 16 W. Va. 791; *Withers v. Carter*, 4 Gratt. 407; *Schultz v. Hansbrough*, 33 Gratt. 582.

But where the purchaser buys subject to an existing incumbrance, or undertakes to pay it off in satisfaction of the purchase money due his vendor, the case is very different. He then becomes the principal debtor and as between himself and the vendor at least, he is primarily bound to discharge the incumbrance, and the vendor having a right as against him to require the obligation to be performed, the subsequent incumbrancer is entitled to stand in the vendor's shoes and have his equities administered for his relief. *Schultz v. Hansbrough*, 33 Gratt. 582.

C. RULE QUALIFIED.

1. RIGHTS OF PARAMOUNT CREDITORS.—The rule that when a creditor has a lien on two funds, and another creditor has a subsequent lien on one of the funds only, equity will require the former to resort, in the first instance, to the fund upon which the subsequent creditor has no lien, for the satisfaction of his debt is subject to the qualification that such course must appear to be necessary for the payment and satisfaction of both debts, and must not operate to prejudice the rights of the first creditor to the double fund. Neither must there be any unreasonable doubt of the sufficiency of the one fund to satisfy the debt of the first creditor. *Hudkins v. Ward*, 30 W. Va. 204, 3 S. E. Rep. 600; *Schultz v. Hansbrough*, 33 Gratt. 582; *Rixey v. Pearre*, 89 Va. 113, 15 S. E. Rep. 498; *Miller v. Holland*, 84 Va. 652, 5 S. E. Rep. 701.

Paramount Creditor Delayed.—Where a creditor can resort to two funds for payment, while another creditor can resort to but one of them, the first creditor cannot be delayed in enforcing his debt, but may resort to the fund most easily accessible, and the other creditor who has been prevented from resorting to that fund must take his place as to the other. *Hudkins v. Ward*, 30 W. Va. 204, 3 S. E. Rep. 600.

2. RIGHTS OF THIRD PARTIES.—Marshaling will not be enforced to the prejudice of a third party. As subrogation is an equity, it will not be enforced where the effect will be to prejudice or impair the rights of third persons, it being well settled that where both parties have an equal claim to the consideration of a chancellor, the law will be suffered to take its course. *McClaskey v. O'Brien*, 16 W. Va. 792; *Hall v. Hyer* (W. Va.), 37 S. E. Rep. 594; *Lee v. Swepson*, 76 Va. 173; *Rixey v. Pearre*, 89 Va. 113, 15 S. E. Rep. 498; *Miller v. Holland*, 84 Va. 652, 5 S. E. Rep. 701.

Right Indefeasible by Subsequent Parties.—"Though it is broadly stated that marshaling will not be enforced to the prejudice of third parties, yet that statement is too broad, for it seems that, when once the right of a creditor having a lien on one property to compel another creditor having a lien on two properties to subject, in the first instance, the property on which the junior creditor has no lien, exists, it is good against a third subsequent lienor, though not against one antedating the one who asks the

marshaling, because he had this right when the third party's right began." Note by BRANNON, J. Woods v. Douglas, 46 W. Va. 657, 33 S. E. Rep. 771; 2 Beach. Mod. Eq. Jur., sec. 785, say this is the general rule.

3. LIABILITIES OF PARAMOUNT CREDITOR.

a. Release.—If a prior judgment lienor releases the property subject to a second deed of trust, the proceeds of which are amply sufficient to satisfy his judgment lien, he cannot enforce payment of such judgment lien out of the property subject to a first deed of trust until such latter trust is fully satisfied. First Nat. Bank of Huntington v. Simms (W. Va.), 38 S. E. Rep. 525.

Thus where a defendant sold a mill and took a mortgage on the mill and also on the purchaser's land which latter mortgage was more than enough to pay his debt, and afterwards the purchaser gives a deed of trust on the mill, whereupon the defendant comes in the nighttime and ships the mill beyond the jurisdiction of the court, selling it for a small amount, it was held that, since the defendant deprived the trust creditors of the right to have the securities marshaled, a court of equity properly rendered judgment against such defendant for the difference between the amount for which the mill sold and what it would have brought if undisturbed. McCrum v. Lee, 38 W. Va. 583, 18 S. E. Rep. 757.

b. Laches, Forbearance, Neglect to Enforce Lien.—It seems that mere laches, forbearance, or neglect, on the part of the senior creditor, to enforce his lien against one of the two funds on which his debt is charged, without any fraudulent combination with the debtor to defeat his creditors, will not operate *pro tanto* as a release of the doubly charged fund from the lien of the paramount incumbrance. Sandidge v. Graves, 1 P. & H. 101.

III. METHOD OF ENFORCING DOCTRINE.

A. SUBROGATION.—A creditor who has two funds open to him, while another has but one, cannot take the latter fund without placing that one exclusively within his reach at the disposal of the creditor whom he has deprived of the means of payment. If he refuses or neglects to fulfill this duty, equity will decree subrogation. Hudkins v. Ward, 30 W. Va. 204, 8 S. E. Rep. 600; Alston v. Munford, 1 Brock. 266, Fed. Cas. No. 267; Rixey v. Pearre, 89 Va. 113, 15 S. E. Rep. 498.

A mortgagee of lands and slaves, cannot be compelled to resort to a sale of the slaves before he shall disturb the possession of *bona fide* purchasers of the lands from the mortgagor; but the decree against such purchasers ought to permit them, after satisfying the claim of the mortgage, to seek indemnity out of the mortgaged slaves, or the estate of the mortgagor, or any other person liable to such demand, so far as the mortgagee might be able to charge such party, or otherwise. Mayo v. Tomkies, 6 Munf. 520.

"It being the object of a court of equity, that every claimant upon the assets of a deceased person, shall be satisfied, as far as such assets can, by any arrangement, consistent with the nature of the respective claims, be applied in satisfaction thereof, it has long been settled, that where one claimant has two funds to resort to, and another only one, the first shall resort to that fund on which the second has no lien; or the second shall be *pro tanto* substituted to this last fund." Tennent v. Pattons, 6 Leigh 212.

IV. APPLICATION OF DOCTRINE.

A. IN RESPECT OF HOMESTEAD LANDS.—Where homestead has been set apart, and there is not sufficient property unexempt to pay the debts, all creditors must share ratably in such property, and then those creditors as to whom homestead is waived are entitled to satisfaction out of the homestead for the balance of their debts unpaid. Scott v. Cheatham, 78 Va. 82; Strange v. Strange, 76 Va. 240; Russell v. Randolph, 26 Gratt. 716, disapproved.

Decedent's entire estate may be subjected to a homestead waived debt, but the portion not embraced in the homestead deed shall be first subjected. Strange v. Strange, 76 Va. 240. See Scott v. Cheatham, 78 Va. 82.

V. INVERSE ORDER OF ALIENATION.

Generally where land subject to an encumbrance is sold successively in parcels, each of them will be liable in the inverse order of alienation. McClaskey v. O'Brien, 16 W. Va. 791; Conrad v. Harrison, 3 Leigh 582; McClung v. Beirne, 10 Leigh 394; The Lynchburg Perpetual B. & L. Co. v. Fellers, 96 Va. 837, 31 S. E. Rep. 505; Miller v. Holland, 84 Va. 652, 5 S. E. Rep. 701.

In the case of Beverley v. Brooke, 2 Leigh 425, it was decided that where a judgment is obtained against a debtor, who afterwards alienates his lands to divers alienees by divers conveyances, all the lands in the hands of the several alienees are alike liable to the judgment creditor, and must contribute *pro rata*. This case, however, was doubted, in Conrad v. Harrison, 3 Leigh 582, and expressly overruled in McClung v. Beirne, 10 Leigh 394, 408; and the above rule laid down.

See monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 440.

A. LANDS SOLD CONTEMPORANEOUSLY.—But where the different parcels of land are sold contemporaneously, they must contribute *pro rata* to the satisfaction of the judgment. Harman v. Oberdorfer, 33 Gratt. 497.

B. NECESSITY OF WARRANTY.—Where a grant of part of the land covered by an encumbrance contains a covenant of warranty, there can be no doubt that the burden is to be borne exclusively by the residue of the land in the hands of the grantor. This results not from the technical operation of the covenant, but from the evidence which it affords of the intent; and the effect will be the same, if it appears unmistakably from any part of the deed or from a collateral writing, that the vendee is to have an unencumbered title. And perhaps where there is not a covenant of general warranty, the same rule should prevail, unless there is evidence of an opposite design. McClaskey v. O'Brien, 16 W. Va. 791.

Grant with Warranty to Volunteer.—It seems that a paramount judgment will not be marshaled as against a grant with warranty to a volunteer, in order to leave the real estate of the grantor free for the discharge of a judgment which has been entered subsequently to the grant. McClaskey v. O'Brien, 16 W. Va. 791, 841.

VI. PLEADING AND PRACTICE.

A. TRUST LIENS.—It is error for the circuit court not to determine, by marshaling the same out of which of the proceeds of several properties various judgments and trust liens should be paid according to their priority. First Nat. Bank of Huntington v. Simms (W. Va.), 38 S. E. Rep. 525.

B. BILL BY INFANT HEIRS.—Upon a bill against infant heirs, to marshal assets, it is error to decree a sale of the lands descended, without giving the infant heirs a day after their attainment to full age, to show cause against it. *Tennent v. Pattons*, 6 Leigh 196.

C. PARTIES.—A bill to marshal assets and for their administration, should be on behalf of the plaintiff and all other creditors, and the heirs and devisees of the testator should be parties. But if the proper parties are not made, the bill should not be dismissed, but the plaintiff should have leave to amend and make the proper parties, unless a decree for an account had been made in some other creditor's suit having the same object. *Stephenson v. Taverners*, 9 Gratt. 308.

VII. MARSHALING DECEDENTS' ESTATES.

A. LIABILITY OF HEIRS AND DEVISEES.

1. COMMON-LAW RULE.—At common law, land could be charged with a decedent's debts (other than debts of record and debts of specialty binding the heirs expressly, for which an action lay at law) only in a court of chancery, either in consequence of a will or some other trust so providing, or by means of a bill to marshal assets, that is, to arrange them in such order as to make them go as far as possible towards the payment of all debts. Lands, therefore, at common law, except as to debts of record and of specialty binding the heirs, were always equitable assets. 3 Min. Inst. (2d Ed.) 583; *Frasier v. Littleton*, Jan. No. 1902, Va. Law Reg. 620.

2. STATUTORY RULE.—Statutes, however, have done away with the distinction between debts chargeable on decedent's lands at common law and simple contract debts, and have made real as well as personal estate subject to the just debts of the intestate. But the object of these statutes was not to disarrange the order of liability of the assets of the decedent's estate, which by a long line of adjudication has become firmly settled, as we shall see later. *Frasier v. Littleton*, Jan. No. 1902, Va. Law Reg. 620; *Laidley v. Kline*, 8 W. Va. 318; *McCandlish v. Keen*, 13 Gratt. 615; *Pierce v. Graham*, 25 Va. 235.

But Va. Code 1887, sec. 2065, making real estate of decedent's assets for the payment of debts, does not give a devisee of encumbered land the right of contribution from devisees of unencumbered land. *Frasier v. Littleton*, Jan. No. 1902 of Va. Law Reg. 620.

Debts Subsequently Discovered.—Executors, who in ignorance of debts against the decedent, have paid over the proceeds of the personal property to the devisees, are entitled to have the devisees subjected in the first place to pay the amount to the creditor. *Lewis v. Overby*, 31 Gratt. 601.

B. LIABILITY OF PURCHASERS FROM HEIRS OR DEVISEES.—Where real estate in the hands of heirs is sought to be subjected to the judgment of the decedent ancestor's debts, and that portion of it assigned to one of the heirs before the commencement of the suit has been aliened to a *bona fide* purchaser, whether absolutely or in trust to pay his debts, and that heir has become insolvent, the rest of the real estate in the hands of those heirs who have not aliened it, is liable not only for the proportionate share which each heir would at first have borne, but for the whole debts of the decedent, to be contributed by each one in proportion to the value and extent of the land descended to him. *Ryan v. McLeod*, 33 Gratt. 367; *Lewis v. Overby*, 31 Gratt. 601, and *note*.

C. LIABILITY OF LEGATEES.—A legatee is entitled to nothing until the debts of the testator are paid; he has no claim except upon the bounty of the testator; if he receives payment before the debts are paid, he takes subject to the condition of making restitution, if it becomes necessary to satisfy creditors; and no dealing of the executor with him or advancement made to him, can in any manner affect or modify the liability of the testator's estate to the payment of his debts. *Leake v. Leake*, 75 Va. 794. See *Dunn v. Amey*, 1 Leigh 465.

"Assets are always bound to the creditor, and he may pursue them in the hands of the legatee even though the testator's effects would have been sufficient to pay both debts and legacies. * * * The legatee takes subject to the liability of being compelled to refund at the suit of a creditor." *Davis v. Newman*, 2 Rob. 668.

Some Legatees Insolvent.—If some of the legatees are insolvent, the others will be required to make good the deficiency, to the extent of what they have received. *Leake v. Leake*, 75 Va. 794; *Hopkirk v. Dennis*, 2 Munf. 536; *Ryan v. McLeod*, 32 Gratt. 367.

1. DEVASTAVIT.

Deficiency Caused by Devastavit.—Although the executor had in hand sufficient assets to pay both debts and legacies, and although a portion of the assets was actually paid to the legatees and another portion set apart for a creditor, which was wasted by the executor, still the creditor had a right to demand restitution from the legatee. *Leake v. Leake*, 75 Va. 794.

Participation by Distributees in Devastavit.—Where the distributees, by participating with the administrator in making distribution of the personalty among themselves, aid the administrator in the commission of a devastavit, they are of course liable. *Watts v. Taylor*, 30 Va. 627.

Voluntary Payments by Executor.—Legatees cannot be compelled to refund to an executor where he, mistaking the value of the assets, voluntarily paid them their legacies, there being no creditors of the decedent, but his estate turning out inadequate for the payment of legacies. *Davis v. Newman*, 2 Rob. 664.

Refunding by Legatees.—Where legatees are called upon to refund at the suit of a creditor, the general principle is that all must be before the court and the burden apportioned among them, if it can be done without material delay or injury to the creditor. *Leake v. Leake*, 75 Va. 794.

D. ORDER OF LIABILITY OF ASSETS.

1. IN GENERAL.—The order in which the different kinds or subjects of property constituting the estate of a deceased testator, and which are liable to the payment of debts, will be applied, seems to be pretty clearly settled by the various adjudications that have been made upon the subject. The first to be so applied, is the personal estate at large not exempted by the terms of the will or necessary implication. Next to it, real estate or an interest therein expressly set apart by the will for the payment of debts. Next, real estate descended to the heir. After it, property, real or personal, expressly charged with the payment of debts, and then subject to such charge, specifically devised or bequeathed. If these prove inadequate, then general pecuniary legacies, and after them specific legacies, both classes ratably; and in the last resort real estate devised by the will. *Cranmer v. McSwords*, 24 W. Va. 594; *Frasier v. Littleton*, Jan. No. 1902 of Va.

Law Reg. 620; *Elliott v. Carter*, 9 Gratt. 541; *Laidley v. Kline*, 8 W. Va. 218; 8 Min. Inst. (2d Ed.) 584.

Where the testator charges his debts on his personalty only, the order of applying his estate to the payment of his debts is: (1) Personalty at large; (2) residuary legacies; (3) general pecuniary legacies; (4) specific legacies; and lastly, real estate devised by will. And where the residuary legacy is bequeathed to the executor, and he takes and consumes it, leaving the testator's debts unpaid, his sureties are liable for the amount thereof before real estate devised by will can be subjected. *Edmunds v. Scott*, 78 Va. 720, citing *Elliott v. Carter*, 9 Gratt. 549.

2. PERSONAL ESTATE.

a. Liability for Payment of Debts.—The well-settled general rule is that the personal estate is the natural and primary fund for the payment of debts, and must first be exhausted before the real estate can be made liable; nor will it be exonerated by a charge on the real estate, even where there is a specific lien for a debt on the real estate, unless there be expressed words, or a plain intent, in the will to make such exoneration. *Swann v. Housman*, 90 Va. 816, 20 S. E. Rep. 830; *New v. Bass*, 92 Va. 383, 23 S. E. Rep. 747; *Elliott v. Carter*, 9 Gratt. 549; *Leake v. Leake*, 75 Va. 792; *Pleasants v. Flood*, 89 Va. 96, 15 S. E. Rep. 504; *McLoud v. Roberts*, 4 H. & M. 448; *Suckley v. Rotchford*, 12 Gratt. 60; *Saddler v. Kennedy*, 26 W. Va. 636.

Generally, the personal assets of an intestate, so far as they have not been administered, should be administered under the direction of the court, and applied to the payment of the debts of the intestate, and in relief of the realty which descended to the legal heir in the suit or proceeding, to subject the realty to the payment of debts of the decedent. *Laidley v. Kline*, 8 W. Va. 218.

"There is no doubt that land descended to the heir is liable for the debts of the ancestor. * * * But before the land descended to the heir can be charged with the debts of the ancestor, the personal property belonging to the estate of the ancestor, must first be applied." *Sommerville v. Sommerville*, 26 W. Va. 484.

Bond Debt of Devisor.—Lands devised (without any specific charge by will or deed) ought not to be charged in equity to satisfy a bond debt of the devisor, until the personal estate is exhausted, including a remainder in slaves, expectant upon an estate for life of the testator's widow. *Foster v. Crenshaw*, 3 Munf. 514.

In equity, whether the lands be charged by the will, or the bond, of the ancestor, creditors must exhaust the personal estate, before they can resort to the lands. *Garnett v. Macon*, 6 Call 303.

General Charge—Personalty Exhausted.—Where a testator charges all of his estate with the payment of debts, if, after the personal estate is exhausted, there remains a debt against the estate, it will be a charge on the real estate. *Hudgin v. Hudgin*, 6 Gratt. 320.

Realty and Personalty Equally Charged.—It seems to be settled that though personal property is applicable to the payment of debts before real property, when neither species is expressly charged by the terms of the will, yet when both are equally and expressly charged they stand on the same footing, and each must be applied in the payment of debts *pro rata* according to their respective values. *Murphy v. Carter*, 23 Gratt. 477; *Elliott v. Carter*, 9 Gratt. 541; *Cockerille v. Dale*, 33 Gratt. 49.

Creditors Delayed for Long Time.—Though as a general rule the personalty dedicated by the will for the payment of debts must be taken before going against the lands devised, still it has been held that where the creditors have been delayed a long time (15 years), and the personal estate dedicated by the will proves insufficient for the payment of the debts, and the efforts to realize from the out-lands directed by the will to be sold for that purpose, have proved abortive, then the lands of devisees not charged by the will may be subjected ratably for the discharge of the debts. *Bell v. McConkey*, 82 Va. 176. See also, *Max Meadows L. & Imp. Co. v. McGavock*, 96 Va. 131, 30 S. E. Rep. 460.

b. Liability for Payment of Legacies.—The personalty is not only the primary, but the only fund liable for the payment of legacies, unless they are charged upon the realty by express direction or by necessary implication. What language will amount to an express charge must always be a matter of construction and interpretation, depending upon the terms employed in each individual case. A charge will be implied if the language of the will indicates that the testator intended the legacies to be paid, knowing that his personal estate would be insufficient for that purpose, or if it appears that in giving the legacies he had the real estate in mind. *Smith v. Mason*, 89 Va. 713, 17 S. E. Rep. 3; *New v. Bass*, 92 Va. 383, 23 S. E. Rep. 747; *Todd v. McFall*, 96 Va. 754, 32 S. E. Rep. 472; *Lee v. Lee*, 88 Va. 805, 14 S. E. Rep. 534; *Crouch v. Davis*, 23 Gratt. 69; *Lewis v. Thornton*, 6 Munf. 87.

Where the testator gives legacies without directing who shall pay the same, or out of what fund they shall be paid, the personal estate being the primary fund for the payment of legacies, the legal presumption is, that he intended they should be paid out of his personal estate only, and if that is not sufficient, the legacies fail. *Read v. Cather*, 18 W. Va. 264.

Where a will provided for the payment of a legacy from the testator's personal property, the legatee is not entitled to payment from lands on which there was a vendor's lien which was paid from the personal estate as a debt of the estate, thereby rendering such property insufficient to pay the legacy. *Todd v. McFall*, 96 Va. 754, 32 S. E. Rep. 472.

Exoneration of Personalty.—Charging the land does not exonerate the personalty; to accomplish that result it must appear that the testator intended not merely to charge the realty, but to discharge the personalty, and this intention may be shown where there are express words or a plain intent in the will to make such exoneration. *New v. Bass*, 92 Va. 383, 23 S. E. Rep. 747; *Elliott v. Carter*, 9 Gratt. 549; *Swann v. Housman*, 90 Va. 816, 20 S. E. Rep. 830.

3. REAL ESTATE DEVISED FOR PAYMENT OF DEBTS.—See *ante*, this section, 1. *In General*.

a. Contribution by Devisees.—The legatees have no right to call upon the devisees to contribute to the payment of their legacies unless the real estate devised be expressly charged. *Allen v. Patton*, 83 Va. 255, 2 S. E. Rep. 143; *Elliott v. Carter*, 9 Gratt. 550. See also, *Gaw v. Huffman*, 12 Gratt. 623.

b. Effect of Trust to Pay Debts upon Statutes of Limitations.—A devise of real estate for the payment of debts will not affect the operation of the statute of limitations upon such debts, whether they are due at the testator's death or not, unless the contrary intention on his part plainly appears. *Johnston v. Wilson*, 29 Gratt. 379. The court in this case further said: "In some of the earlier cases it was held

that a devise for the payment of debts had the effect of reviving debts already barred by limitation; but this doctrine has been long since exploded, and it is now held that such a devise does not take a debt out of the operation of the statute. *Burcke v. Jones*, 2 Ves. & Beam. 275; 7 John. Ch. R. 208; *Tazewell v. Whittle*, 18 Gratt. 329; *Baylor v. Dejarnette*, 13 Gratt. 152; 1 Rob. Pr. 346."

Where a testator devised a large real and personal estate to his wife and children; charged the portion of one of his sons with the payment of 1,500 pounds sterling towards his debts; directed sundry tracts of lands to be sold, and the monies arising therefrom, as well as from loan office certificates, or otherwise (after payment of his just debts), to be equally divided among his six sons. On a bill brought by one of the creditors of the testator, the statute of limitations being pleaded, and the complainant not having shown that he came within any of the exceptions of the act, it was held that the statute ought not to operate to prevent a recovery of so much of the specific fund as remained undisposed of, but that it would be a bar to a recovery out of the general fund. *Lewis v. Bacon*, 8 H. & M. 89.

Trust of Personalty Inoperative.—But a provision in a will that the money arising from the sale of the testator's personal property, after payment of his just debts, shall be applied to certain purposes, does not create a trust for the payment of the debts, nor take any debt out of the operation of the act of limitations. *Brown v. Griffiths*, 6 Munf. 450.

Debts Barred at Testator's Death.—In *Tazewell v. Whittle*, 18 Gratt. 347, it was said that in *Lewis v. Bacon*, 8 H. & M. 89, it was held that a debt barred at the time of the testator's death was, to some extent, revived by a trust for the payment of debts out of the real estate, but that case was decided in 1808 before the decision in *Burcke v. Jones*, 2 Ves. & Beam. 275, and ought not to be considered as settling the law.

A trust created by will for the payment of debts by a general direction that all the testator's debts shall be paid, extends only to such as he was bound in conscience to pay. Hence, an undertaking which is merely *nudum pactum* is not comprehended, and may be barred by the act of limitations. *Chandler v. Hill*, 2 H. & M. 124.

4. REAL ESTATE DESCENDED.—See *ante*, this section, 1. *In General*.

Quære, whether, and under what circumstances, a court of equity can decree a sale of land descended or devised (without any specific lien, or any charge, either general or special, by a conveyance or will of the ancestor or devisor), to satisfy a bond, or a simple contract creditor, claiming on the principal of marshaling assets. Especially can such decree be made, in any such case, where the rents and profits of the land are sufficient to keep down the interest accruing on the debt. *Mason v. Peter*, 1 Munf. 487.

Rights of Simple Contract Creditors.—A simple contract creditor shall receive out of the *real* assets descended to the heirs at law as much as has been paid to bond creditors out of the personal assets. *Haydon v. Goode*, 4 H. & M. 460.

Rents and Profits.—But upon a bill by creditors of a decedent against his administrators, and heirs to marshal assets, the court may decree a sale of the lands descended to the heirs, but it is not bound, and ought not to decree such sale, if the rents and profits of the lands will satisfy the debts within a

reasonable time, especially if the heirs be infants. *Tennent v. Pattons*, 6 Leigh 196; *Mason v. Peter*, 1 Munf. 487.

Parties to Suit to Subject Lands Descended.—In a suit to subject lands, descended to the heir, to the payment of the debts of the ancestor, the personal representative of the ancestor is a necessary party. *Sommerville v. Sommerville*, 26 W. Va. 484.

5. SPECIFIC DEVISES OR BEQUESTS SUBJECT TO CHARGE OF DEBTS.—See *ante*, this section, 1. *In General*.

a. Contribution under Charge of Debts.—It seems to be settled that though personal property is applicable to the payment of debts before real property, when neither species is expressly charged by the terms of the will; yet when both are equally and expressly charged they stand on the same footing, and each must contribute its ratable share to the common burden. *Murphy v. Carter*, 23 Gratt. 477; *Elliott v. Carter*, 9 Gratt. 541; *Cockerille v. Dale*, 23 Gratt. 45.

6. GENERAL LEGACIES AND DEVISES.—See *ante*, this section, 1. *In General*.

7. REAL ESTATE DEVISED BY WILL.—See *ante*, this section, 1. *In General*.

a. Contribution between Specific Legatees and Devisees.—It was said by LEE, J., in *Elliott v. Carter*, 9 Gratt. 550, that "In the case of *Long v. Short*, 1 P. Wms. 403, it would seem to have been held that specific legatees and devisees of real property not charged with payment of debts, were bound to contribute ratably for payment of debts due by specialty. But the authority of this case has been greatly doubted; 2 Jarman 547 n. b; and it would appear to be greatly shaken, if not entirely overthrown by the cases just cited, and especially the case of *Mirehouse v. Scaife*, 2 Mylne & Craig 695, in which the distinction endeavored to be maintained between specific and residuary devisees is utterly repudiated, and the principle applicable to both held to be identical."

Apportionment of Burden.—The court should subject each devisee for his proportion of the debt, according to the value of the land devised to him or her, and direct a sale of his or her land not sold in the first instance for the payment of his or her proportion of the debt. If the land still held by one of them does not discharge his or her proportion of the debt, the balance remaining unpaid should be apportioned in like manner among the others, and the land of each sold to pay his or her proportion thereof, and so on until the whole is paid or the whole land sold. *Lewis v. Overby*, 31 Gratt. 601; *Ryan v. McLeod*, 32 Gratt. 367; *Foster v. Crenshaw*, 8 Munf. 514; *Hopkirk v. Dennis*, 2 Munf. 326; *Mason v. Peter*, 1 Munf. 487.

Advancements.—*Advancements* made by the testator in his lifetime are not to be taken into the account in fixing the proportion of the debts which each devisee is to pay. *Gaw v. Huffman*, 12 Gratt. 628.

Specific Legacies Liable before Lands Specifically Devised.—Where the testator charges his debts on his personalty only, and the will contains no directions to the contrary, personal property specifically bequeathed is applicable before lands specifically devised; but specific devisees contribute ratably *inter se*, each being subjected for his proportion of the debt. *Edmunds v. Scott*, 78 Va. 720; *Elliott v. Carter*, 9 Gratt. 541; *Lewis v. Overby*, 31 Gratt. 601.

E. EXONERATION OF ENCUMBERED LANDS.—"Where lands of a decedent descend or are devised subject to a mortgage, or other specific incum-

brance, created by the decedent for an obligation of his own contracting, or assumed by him as his proper debt, his personal estate, since it constitutes the natural fund for the payment of all his debts, and has been increased by the consideration for which the incumbrance was given, is primarily liable at common law for the discharge of the lien; consequently, as a general rule, the heir or devisee of such encumbered lands is entitled to have the property exonerated by the discharge of the lien out of the personal estate." 19 Am. & Eng. Enc. Law (2d Ed.) 1817; *Pleasants v. Flood*, 89 Va. 96, 15 S. E. Rep. 504; *Dandridge v. Minge*, 4 Rand. 397; *Elliott v. Carter*, 9 Gratt. 541.

In a suit by creditors to reach the debtor's property conveyed in trust for his wife and children, where the deed is valid and upon good consideration as to the children, one of the creditors, who holds the debtor as a surety on a promissory note, will be required to apply on his claim any available property of the principal, who is a party defendant, in exoneration of the land conveyed, provided it can be done without too great delay or prejudice to the rights of the creditor. *Rixey v. Deitrick*, 85 Va. 42, 6 S. E. Rep. 615.

Incumbrance by Former Owner.—The rule that the personal estate shall be first applied to the payment of mortgages, is founded on the principle that the debt was originally a personal one, and the charge of the real estate merely a collateral security. But where this principle fails, the rule does not take effect. Thus, when the mortgage debt was contracted by one person, and the lands so mortgaged descended to another, his personal estate will not be liable to the payment of the money. *Pleasants v. Flood*, 89 Va. 96, 15 S. E. Rep. 504.

F. CHARGE OF DEBTS AND LEGACIES.

1. **CHARGE OF DEBTS.**—At common law the lands of the testator were only liable for debts of record and of specialty binding the heirs, and they were entitled to the real estate, though charged with debts, until convicted of mismanagement, or misapplication of profits. But as it is so natural to suppose that a man, in a solemn act like a will, intended to be just, that courts have taken very slight words in such an instrument to imply a charge on lands. *Frasier v. Littleton*, Jan. No. 1902, Va. Law Reg. 620; *Trent v. Trent*, Gilmer 174; *Downman v. Rust*, 6 Rand. 587; *Gaw v. Huffman*, 12 Gratt. 628; *Allen v. Patton*, 83 Va. 255, 2 S. E. Rep. 148.

a. Direction for Payment of Debts.—It is established as a general rule, that a direction by a testator that his debts shall be paid, charges them by implication on his real estate, either as against his heir at law or devisee, and this charge is not released by a subsequent selection of particular parts to be sold for that purpose. But, where the testator says, "It is my will and desire that my just debts be paid out of my estate," etc., the debts are not thereby charged upon the testator's real estate. *Allen v. Patton*, 83 Va. 255, 2 S. E. Rep. 148; *Gaw v. Huffman*, 12 Gratt. 628; *Read v. Cather*, 18 W. Va. 264; *Trent v. Trent*, Gilmer 174; *Leavell v. Smith*, July No. 1901, Va. Law Reg. 191; *Clarke v. Buck*, 1 Leigh 487; *Poindexter v. Green*, 6 Leigh 504.

Where it is manifest that a testator intends that his debts shall be paid out of his personal estate, a direction in his will that his debts shall be paid out of the funds applicable thereto is not a charge of his real estate for the payment of his debts. *Frasier v. Littleton*, Jan. No. 1902 of Va. Law Reg. 620.

Where a testator expressly charges the payment of certain specified debts upon the whole of his property, and sets apart a fund for the satisfaction of his general creditor, the latter may require the specified debts to be discharged out of the general estate, so as to obtain payment themselves out of the particular fund. *Trent v. Trent*, Gilmer 174.

Exceptions to Rule.—To this general rule, however, there are exceptions, one of which is where the debts are directed to be paid by the executors. "If the testator directs a particular person to pay, he is presumed, in the absence of all other circumstances, to intend him to pay out of the funds with which he is entrusted, and not out of other funds over which he has no control. If the executor is pointed out as the person to pay, that excludes the presumption that other persons not named are to pay." 2 Story's Eq. Jur. sec. 1247. Quoted in *Allen v. Patton*, 83 Va. 255, 2 S. E. Rep. 148.

b. Devise to Executors.—When the executor is the devisee of real estate, and he is directed to pay the debts, a charge upon it will be generally implied by such a direction. But this will not be the case where the estate is specifically devised to a person who happens to be one of the executors. And even where the executors are also devisees, a mere general introductory direction to the executors will not operate as a charge if it is manifest from the whole will that it was not so intended. *Gaw v. Huffman*, 12 Gratt. 628; *Allen v. Patton*, 83 Va. 255, 2 S. E. Rep. 142. See *post*, title, "Lands Devised to Executors."

c. Exoneration of Personal Out of Real Estate.—The personal estate, being the primary fund for the payment of debts, may yet, by the decedent's will, if he clearly so intends, be exonerated, and the real estate be primarily charged. 3 Min. Inst. (2d Ed.) 584.

Statute (Va. Code 1887, sec. 2065) makes decedent's real property assets for the payment of his debts in the order in which his personal estate is directed to be applied; but it recognizes his right to charge his land, but not his personalty, for such of his debts as he may prefer. *Deering v. Kerfoot*, 89 Va. 491, 16 S. E. Rep. 671.

d. Personal Liability of Devises upon Acceptance.—By accepting the devises the devisees become personally liable in respect to the subject devised to them respectively, each for his share of the debts. *Baylor v. Dejarnette*, 13 Gratt. 152.

2. **CHARGE OF LEGACIES.**—Unless legacies are charged upon the real estate by express direction or by necessary implication, the personalty is not only the primary, but the only fund liable for the payment of legacies. *Smith v. Mason*, 89 Va. 713, 17 S. E. Rep. 3. See *ante*, title, "Liability for Payment of Legacies," and cases cited.

a. Intention of Testator.—Whether legacies are a charge upon real estate devised is a question of intention upon the part of the testator, for real estate is not chargeable with the payment of pecuniary legacies, unless the intention of the testator so to charge it is expressed in the will, or such intention appears by implication. *Read v. Cather*, 18 W. Va. 264; *Thomas v. Rector*, 23 W. Va. 26; *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 27 S. E. Rep. 378; *Hogg v. Browning*, 47 W. Va. 22, 34 S. E. Rep. 754; *Todd v. McFall*, 96 Va. 754, 33 S. E. Rep. 473; *Smith v. Mason*, 89 Va. 713, 17 S. E. Rep. 3; *Wood v. Sampson*, 25 Gratt. 848; *Crouch v. Davis*, 23 Gratt. 62; *Lewis v. Thornton*, 6 Munf. 87.

Parol Testimony to Show Intention.—"According to

the English rule that intention is to be derived exclusively from the provisions of the will; and parol evidence is inadmissible to aid in ascertaining that intention. 1 Rep. Leg. 451 (576, 4th Ed.); Parker v. Fearnley, 2 Sim. & Stu. 592. In Virginia the rule is not so strict, and parol evidence is admissible. Downman v. Rust, 6 Rand. 587; Clarke v. Buck, 1 Leigh 490; Trent v. Trent, Gilmer 174. Read v. Cather, 18 W. Va. 267.

Charges of Debts and Legacies Distinguished.—"A distinction has always been recognized between charging land with debts and with legacies. As to the former, the courts have gone on a slight implication and moral principle; but as to legacies there must be a clear, manifest intention that the devisee or heir shall take subject to the legacies." Lee v. Lee, 88 Va. 805, 14 S. E. Rep. 534.

Annuity.—An annuity is a legacy charged on the whole estate, not specifically devised. Trent v. Trent, Gilmer 188.

b. Circumstances Tending to Show Intention.

Personalty Insufficient to Pay Both Debts and Legacies.—Although legacies do not stand upon as high a ground as debts, yet if the personal fund be inadequate, or if there be expressions in a will, tending to show that the testator had the land in mind, a court will make them a charge on the land, rather than they shall go unpaid. Thus, where a single woman, having but little personal property, and real estate of considerable value, having only one brother, who would have been her heir and distributee, by her will bequeaths pecuniary legacies to two of her friends, as tokens of affection, and makes the brother executor, and residuary legatee, she must be considered as intending that the legacies should be paid out of the land. Downman v. Rust, 6 Rand. 587; Hogg v. Browning, 47 W. Va. 22, 34 S. E. Rep. 754.

Illustrations.—Where a will stated that the testator bequeathed all his "personal property" to his nephews, subject to certain legacies hereinafter specified, and then devised all "real property" to the nephews, followed by a bequest, "payable from my estate," it was held that the land was not chargeable with the payment of this last legacy, where the personal property was insufficient to pay it. Todd v. McFall, 96 Va. 754, 32 S. E. Rep. 472.

Where a testator bequeathed a certain sum of money in the second clause of his will, directing it to be realized out of his personal estate, and in a codicil he designated a particular fund out of which he empowered his executors to pay the legacy; and in the third clause of the will, after directing the legacy to be paid out of the personal estate, provided: "I next devise all my estate, real and personal, or of any description whatever," to the executors for certain stated trusts, it was held that the real estate could not be charged with the payment of the legacy. Smith v. Mason, 89 Va. 713, 17 S. E. Rep. 3. See also, Bird v. Stout, 40 W. Va. 43, 20 S. E. Rep. 852.

Where the testator, owning real and personal estate, makes his will, beginning, "It is my will and desire that all my just debts be paid; after that I wish C to have 1,000 dollars provided my estate will admit of it"; also bequeathing to the same C the greater part of his personal chattels, specifically, but making no mention of his real estate, which descends to his heir at law, and the whole personal estate proves insufficient to pay debts and the 1,000 dollar legacy; it was held that both the testator's debts, and C's legacy are charged by the will on the real estate descended. Clarke v. Buck, 1 Leigh 487.

Where a testator by will gave one of his sons a tract of land, but since the making of the will, the house on the land was destroyed by fire, and by codicil he then bequeathed to that son, "out of any money due and belonging to my estate," a sum to rebuild, it was held that the legacy was not a charge upon any of the testator's lands. Lee v. Lee, 88 Va. 805, 14 S. E. Rep. 534.

c. Effect of Residuary Clause.

(1) Blending Real and Personal Estate in Residuary Clause.—An intention to charge the real estate with the payment of legacies is inferred where pecuniary legacies alone are first given and no part of the real estate is specifically devised, and there is a residuary clause devising and bequeathing the residue of the real and personal estate, thus blending the two kinds of property into a common fund, and thereby plainly manifesting a purpose to make no distinction between them. An intention to charge the real estate is likewise inferred where a testator devises the real estate, after a direction that debts and legacies be first paid, or previously paid; or devises the remainder of his estate, real and personal, after payment of debts and legacies; or the devise is declared to be made after they are paid. Todd v. McFall, 96 Va. 754, 32 S. E. Rep. 472; Crouch v. Davis, 23 Gratt. 94, opinion of STAPLES, J.; Lee v. Lee, 88 Va. 805, 14 S. E. Rep. 534; Smith v. Mason, 89 Va. 713, 17 S. E. Rep. 3; Wood v. Sampson, 25 Gratt. 845; Siron v. Ruleman, 32 Gratt. 215; Downman v. Rust, 6 Rand. 587.

Legacies Payable at All Events.—Where it is manifest from the whole will, that it was the design of the testator, that the legacies should be paid at all events, the implication is, that the residuary devisee or legatee shall only have the remainder after satisfaction of the previous disposition. Thomas v. Rector, 23 W. Va. 26; Bird v. Stout, 40 W. Va. 43, 20 S. E. Rep. 852.

Where a testator by will gives several pecuniary legacies, but does not, in the residuary clause, separate the real and personal estate, but blends them together, and gives his brother and three sisters the residue of both, shows that he had his mind on both as a fund to answer for the legacies, hence the legacies will be charged upon the entire residue including the residuary real estate. Bird v. Stout, 40 W. Va. 43, 20 S. E. Rep. 852; Elliott v. Carter, 9 Gratt. 541, 550.

Where a testator after providing for the payment of several pecuniary legacies, without designating out of what estate they should be paid, but declares that they shall be paid by his executor "out of his estate," and in his will does not make any specific devise of his real estate or any part thereof, but blends the real and personal property together as one fund in the residuary clause, he manifests an intention to charge the land with the payment of the legacies, if the personal property should not be sufficient to pay the same. Thomas v. Rector, 23 W. Va. 26.

Introductory Words.—Even where the testator uses introductory words, which would raise by implication a charge upon the real estate, that implication is rebutted where he disposes of his personal estate in the form of a residue after the gift of legacies. Read v. Cather, 18 W. Va. 264.

Legacy in Codicil.—In Lee v. Lee, 88 Va. 805, 14 S. E. Rep. 534, the court refused to hold a legacy given by a codicil a charge upon real estate disposed of by a clause in the will blending the real and personal property.

d. Charge on Lands Devise.—Whether legacies are a charge on land devised is a question of intent of the testator. *Hogg v. Browning*, 47 W. Va. 22, 34 S. E. Rep. 754. See *ante*, title, "Intention of Testator."

(1) *Direction for Payment of Legacies.*—A direction to the executor, who is also a devisee, to pay legacies has been held, however, not to be conclusive that it was the intention of the testator to charge their payment upon the land devised to him. *Allen v. Patton*, 83 Va. 255, 2 S. E. Rep. 143.

e. Lands Devised to Executor.—Formerly the fact that the devisee is also executor and is directed to pay the legacies as executor was held to be a material element in arriving at an intent to charge the legacies on the real estate; but in *Parker v. Feamley*, 2 Sim. & Stro. 592, it was held, that where a testatrix directed her legacies to be paid by her executor, to whom she afterwards devised all her real estate, and the residue of her personal estate after payment of debts and funeral expenses, that the legacies were not charged on the real estate. *Read v. Cather*, 18 W. Va. 209.

But in *Bird v. Stout*, 40 W. Va. 43, 20 S. E. Rep. 852, and *Downman v. Rust*, 6 Rand. 587, the former rule seems to be adhered to. In *Bird v. Stout*, *supra*, the court said: "And the fact that Wesley M. Bird is executor and a devisee also is important. The case of *Downman v. Rust*, 6 Rand. 587, is exactly in point." See also, opinion of JUDGE CARR, in *Downman v. Rust*, 6 Rand. 587, in which he cites early English cases in support of this proposition.

Thus where a will gives several pecuniary legacies, and then gives a sum of money to three children, and "the residue of my estate, real and personal," to a brother and three sisters, and appoints that brother its executor, such will creates a charge on the land for the legacy of those children. *Bird v. Stout*, 40 W. Va. 43, 20 S. E. Rep. 852.

f. Enforcement of Charge.

Enforcement against Purchaser from Devisee.—Where a will charges with a legacy land devised to a person, and he conveys it to a third person, who retains in his hands, of the purchase money, a sum to pay the legacy, promising his grantor to pay it, such grantor may maintain a bill in equity against his grantee, making the legatees parties, to compel the payment of such fund on the legacy, and to enforce the charge on the land. *Bird v. Stout*, 40 W. Va. 43, 20 S. E. Rep. 852; *Burwell v. Fauber*, 21 Gratt. 446, and *note*.

Following Proceeds of Land Charged.—A testator devised lands to a devisee, charged with an annuity to another, and to pay it the devisee sold a certain tract of land, "White Marsh." In the suit, the devisee convened the annuitant and the purchaser of the land, and with the assent of the annuitant, the court ratified the sale and allowed the devisee to collect one-third of the purchase money for his own use, and secured two-thirds on "White Marsh," the interest thereon to be paid to the devisee to meet the annuity. Subsequently the purchaser of "White Marsh" failed, and the court resold the land. After selling "White Marsh," however, the devisee purchased another tract, "Ditchley" with the proceeds thereof. It was held, upon a bill filed by the annuitant, alleging that "Ditchley" had been paid for with a part of the proceeds of "White Marsh," and was therefore liable for the deficiency of his annuity, that the interest on the deferred payment secured on "White Marsh" was made payable to the annuitant, as an equivalent for the annuity given him by the will, so far at least, as the annuity

affected "White Marsh," or the amount of the proceeds of sale which was paid to the devisee; and even if "Ditchley" was paid for with money so paid to the devisee, no charge thereon would attach in favor of the annuitant. *Tabb v. Tabb*, 83 Va. 48.

Effect of Legatee's Delay in Enforcing Legacy.—In *Lewis v. Thornton*, 6 Munf. 87, a general charge upon the estate of a testator, for the payment of legacies, in aid of a particular fund provided for that purpose, was not enforced against *bona fide* purchasers of the lands, after a great lapse of time, because it might admit of a doubt whether, by the terms of the will, the charge was upon the land itself, or only upon the profits thereof; because the lands might be presumed to be exonerated by requisition of security from the devisees for the payment of the legacies; and above all, because the testator left a personal estate abundantly sufficient for that purpose; which estate was wasted by the executors.

G. RULE OF MARSHALING APPLIED.

1. IN WHOSE FAVOR.

a. Between Specialty and Simple Contract Creditors.—At common law, if a specialty creditor whose debt binds the real as well as the personal assets, is satisfied out of the personalty, the simple contract creditor shall *pro tanto* come in upon the realty; and equity will decree a sale of it, for the satisfaction of his debt. *Tennent v. Pattons*, 6 Leigh 196; *Cralle v. Meem*, 8 Gratt. 496; *Pugh v. Russell*, 27 Gratt. 789.

Previous to the act in the Va. Code of 1849, a judgment against a deceased person had priority over debts by simple contract, and was to be paid out of the personal assets, if these were sufficient for the purpose, and having been paid out of the personal assets, this did not give simple contract creditors a right to have the assets marshaled, and to have their debts paid *pro tanto* out of the real estate. *Pugh v. Russell*, 27 Gratt. 789.

Must Pursue Executor and Securities.—But a simple contract creditor, having obtained a judgment by default against an executor, cannot maintain a suit in equity, for marshaling assets, against devisees of the landed property, until he has fully prosecuted his claim at law against the executor and his securities. *Mason v. Peter*, 1 Munf. 437.

Where a commissioner, settling an administration account before a court of probate, states in his report that two of the credits allowed the executor were for payment of judgments, which were liens on the real estate, this is not evidence against the devisees to prove that the judgments were recovered against the executor upon a bond of the testator binding his heirs, and to entitle a simple contract creditor to marshal the assets. *Pugh v. Russell*, 27 Gratt. 789.

Bill by Simple Contract Creditors.—Upon a bill by simple contract creditors to marshal assets, it is competent for the court in its discretion, to decree a sale of the real estate in the hands of the heirs, some of whom are infants, for the payment of the debts. But it is premature to decree a sale before adjudicating the claims of the creditors, and so ascertaining the amount of indebtedness chargeable upon the lands of the decedent. *Cralle v. Meem*, 8 Gratt. 496.

Creditor of Deceased Debtor.—The creditor of a deceased debtor may proceed in equity against his heirs residing abroad, as absent defendants, to marshal the assets, and thus subject the land or its

proceeds, in the state, descended to them from the debtor. *Carrington v. Didier*, 8 Gratt. 260.

As to Judgment Creditors.—In the application of the principle of marshaling assets, simple contract creditors will be substituted for specialty creditors, but not for judgment creditors; that is, the simple contract creditors cannot charge the lands for so much of the personal fund as has been applied to the payments of debts due by judgments obtained against the ancestor. The reason is, that the writ of *elegit*, by virtue of which the land is charged by judgment against the ancestor, does not issue singly against the land, but against all the chattels (save oxen, and beasts of the plough), and if the chattels be sufficient, the land ought not to be extended. The judgment creditor, therefore, had not the election between two funds (as the specialty creditor has) and the principle on which the assets are marshaled does not apply to the case. *Alston v. Munford*, 1 Brock. 266, 1 Fed. Cas. 578; *Pugh v. Russell*, 27 Gratt. 789; *Rogers v. Denham*, 2 Gratt. 200.

Personalty Exhausted by Taxes.—The payment of taxes due to the state out of the personal assets does not give a simple contract creditor a right to have assets marshaled. *Pugh v. Russell*, 27 Gratt. 789.

b. In Favor of Legatees.

Legacies Charged and Legacies Not Charged.—"The exemption of real estate devised extends as well to the case of a deficiency of personal assets for the payment of legacies as of debts; the legatees having no right to call upon the devisee to contribute to the payment of their legacies, unless the real estate be expressly charged. But in either case the right thus asserted on the part of the devisee to hold the estate devised, as against the legatees, free from liability for debts or legacies, is to be confined to the case of a devisee of real estate not charged with the payment of debts or legacies; for it is equally clear that where the estate devised is so charged, it is applicable before legacies, and the legatees have the right to have the assets marshaled in their favor. The legacies not being charged with the payment of debts while the real estate devised is so charged, the legatees will be regarded as more the objects of the testator's bounty than the devisee; and where the personal estate is not sufficient to pay both the creditors and the legatees, the latter will be entitled to charge the real estate devised so far as the personal estate has been applied in the payment of debts." *Elliott v. Carter*, 9 Gratt. 541. See also, *Pleasants v. Flood*, 89 Va. 96, 15 S. E. Rep. 504.

Specific and Pecuniary Legatees.—The right to marshal assets is afforded equally in favor of specific and pecuniary legatees. *Elliott v. Carter*, 9 Gratt. 541.

c. In Aid of Devisees.—Where lands not chargeable with the payments of debts are sold for that purpose, the devisee thereof may subject lands devised to pay debts to reimbursements. *Cranmer v. McSwords*, 24 W. Va. 594.

"That the devisee of real estate not charged with the payment of debts, is entitled to have the assets marshaled against the claimants of the other funds of the estate in the order stated, including specific legatees, is well settled by the authorities." *Elliott v. Carter*, 9 Gratt. 549.

The principle which lies at the foundation of the right of a legatee or devisee to marshal the assets, is the presumed intention or inclination of the testator in his favor. *Elliott v. Carter*, 9 Gratt. 551.

Lands Devised Separately.—Where land subject to

pay debts of the testator is devised one-fourth to one devisee and three-fourths to another, a judgment against them should be separately against each for his *pro rata* share of the debt with a reservation to the plaintiff to proceed against the interest of either for any deficiency after exhausting the interest of the other. *Pugh v. Russell*, 27 Gratt. 789.

If a testator does not charge the real estate with the payment of debts, but, after making his will, encumbers a portion of his real estate by a specific lien, the devisee of such portion as between him and the devisee of other real estate, takes *cum onere*. *Frasier v. Littleton*, Jan. No. 1902 of Va. Law Reg. 620.

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*Nuckols's Adm'r v. Jones.

October Term, 1851, Richmond.

(Absent CABELL, P.)

1. **Probat—Evidence—Deposition De Bene Esse—Case at Bar.**—In a case of probat the deposition of an aged witness, taken *de bene esse*, allowed to be read, upon proof, either by witnesses or his own affidavit, of his inability to attend the Court.

2. **Same—Same—Witness Unable to Attend Court—Deposition—Admissibility*—Case at Bar.**—In a case of probat, a witness unable to attend the Court, is examined as to the handwriting of a testamentary paper which had been shewn to him by the propounder of the will, but which was not before him at the time he gave his deposition. **Held:** That the testimony is admissible; its weight depending upon the certainty of the proof that the paper propounded for probat is the paper that was shewn to the witness.

3. **Same—Same—Witness to Prove Handwriting—Impeachment of.**†—A witness called to prove the handwriting of a paper offered for probat, may be impeached by proof of what she has said about that paper at another time: But neither her capacity to judge the handwriting or her credit, is to be impeached by what she may have said about some other paper.

***Evidence—Witness Unable to Attend Court—Deposition—Admissibility.**—Upon the authority of *Pollard v. Lively*, 2 Gratt. 216, and *Nuckols v. Jones*, 8 Gratt. 267, it is held in *Taylor v. Smith*, 10 Gratt. 558, that where the deposition of an absent witness is offered to be read in evidence upon the trial of an action at law, the evidence of the witness himself touching his failure or inability to attend the court, and the cause thereof, may properly be heard and considered, and may of itself furnish sufficient ground for admitting the deposition in question.

See monographic note on "Depositions" appended to *Field v. Brown*, 24 Gratt. 74.

†Evidence—Witnesses—Impeachment.—In *State v. Goodwin*, 32 W. Va. 182, 9 S. E. Rep. 87, it is said: "When a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party putting the question. The test of whether a fact inquired of on cross-examination is collateral, is this: Would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea? This limitation, however, only applies to answers on cross-examination. It does not affect answers to the examination in chief. *Whart. Crim. Ev. sec. 484; Forde's Case* (16 Gratt. 547); *Nuckols v. Jones*, 8 Gratt. 267."

4. **New Trial—After-Discovered Evidence—When Allowed*—Case at Bar.**—A new trial will not be granted on the ground of after-discovered evidence, upon the affidavit of a party that he has been informed and believes that certain witnesses will give important testimony, without proof by affidavit of the person or others who have heard them, of what they will state; and especially if their evidence will be not of new facts but merely cumulative, and the cause has been depending for a length of time, and these newly-discovered witnesses live in the county and within a few miles of the party who makes the application.

At the April term 1848 of the Circuit court of Hanover county, John B. Jones offered for probat a paper writing as the will of Ann W. Nuckols, when on the motion of Nathaniel Nuckols he was permitted to enter himself a party to contest the probat of the paper; and the cause was continued. In the same year Nathaniel Nuckols died, and the cause was revived in the
268 name of *Edward W. Morris, as his administrator, and after repeated continuances came on to be tried before a jury in April 1850.

The paper contains but a single clause and is as follows:

"I give to brother John all my hole estate, real and personal. By so doing give all my brother's children one hundred dollars apeace. This is my last will and testament.

"Ann W. Nuckols, 1847."

It appears that Nathaniel Nuckols married Ann W. Jones in 1838, and that there was a marriage agreement between them by which she was authorized to dispose of her property by will, subject to a life estate in her husband. That they lived unhappily together, and frequently separated, and a short time before her death she informed one of the witnesses that Nuckols had threatened to break open her trunk, looking for papers and money. And added let him break it open he will find nothing there.

It appeared further that Ann W. Nuckols died on the 6th of November 1847; that on the day of her death a small box was taken from a press in the room in which she was lying very ill, and then supposed to be dying, by her female servant, and handed to the wife of the propounder of the will, who took it, without any remark being made by either her or the slave. That about a week or probably more, afterwards, in the latter part of November 1847, the wife of the propounder of the will, being in the porch of the house and residence of her husband, who is the brother of the testatrix, called

***New Trials—After-Discovered Evidence—Principles Governing.**—On this subject, the principal case is cited in *Brown v. Speyers*, 20 Gratt. 308. See *foot-note* to the same case, where a large number of authorities are collected and references to other *foot-notes* written on the subject; *Strader v. Goff*, 9 W. Va. 271; *Roderick v. Railroad Co.*, 7 W. Va. 58; *Hale v. Pack*, 10 W. Va. 145; *Hall v. Lyons*, 20 W. Va. 423, 1 S. E. Rep. 592.

to a son of hers then engaged in the garden a few yards distant, and asked him if he did not wish to see the locket of his deceased aunt, meaning Ann W. Nuckols; that he replied he did, and went
269 *into the porch where she opened a small box, where the locket was, and which he had seen worn by his deceased aunt frequently before; that in attempting to remove the locket the hinge was attached to a pad of cotton on which the locket rested, and in taking the locket out the cotton came out with it; and the paper offered for probat was there found folded up and containing a ten cent piece; which box, locket and pad of cotton were produced in Court, and exhibited to the jury and used as evidence. That this paper being taken out and read by the wife of the propounder, she immediately handed it to another son, and directed him to take it to his father who was then at his mill about seven miles off. That the propounder of the will was met on the 22d day of November 1847 in the road riding from towards his mill, when about three quarters of a mile from the mill, in company with the son last referred to; that he remarked to the person who met him that he was glad to see him, he had a paper he wished to shew him, and intended to go to see him with it; and then shewed him the paper propounded for probat, stating it was the will of Mrs. Nuckols. That the paper was examined then and on the next day by the person met by the propounder, which person owned a contiguous farm, and was a magistrate of the county of Louisa, and he proved on the trial that the will was unchanged and was then as it was at that time.

Several exceptions were taken in the progress of the trial by the opponent of the probat of the paper; which and the facts on which they are based, are stated in the opinion of Judge Allen. After the verdict in favour of the will was rendered, the defendant applied to the Court for a new trial, on the ground that the verdict was contrary to evidence, and also on the ground of after discovered evidence; but the Court overruled the motion; and on the motion
270 of the defendant certified *the facts proved. These however are not given except so far as they relate to the production of the paper. The Court admitted the paper to probat; and the administrator of Nathaniel Nuckols applied to this Court for an appeal, which was allowed.

Meredith and Robert G. Scott, for the appellant, insisted,

1st. That the evidence of the witness Glenn's inability to attend the Court was not sufficient. His own testimony was not admissible, and the other evidence did not prove his inability to attend.

2d. That a part of this witness' deposition which related to the paper propounded for probat should have been excluded, because the paper was not before him when he gave his evidence; and there was no proof to identify the paper which had been

shewn to him as the paper which was propounded for probat. If this testimony was illegal, the judgment should be reversed. *Poindexter v. Davis*, 6 Gratt. 481; *Wiley v. Givens*, Id. 277.

3d. That Harding's testimony as to what was said by the witness Elizabeth Glenn, was improperly excluded. 1 Stark. Evi. 134, 164; 2 Stark. Evi. part 4, 222, 223.

4th. That the Court should have granted a new trial on the ground of the after discovered evidence. *Delima v. Glassell*, 4 Hen. & Munf. 369; *Arthur v. Chavis*, 6 Rand. 142; *Calaghan v. Kippers*, 7 Leigh 608.

Lyons, for the appellee.

On the first point made by the counsel for the appellants, referred to *Pollard's heirs v. Lively*, 2 Gratt. 216, in which it was held that the testimony of the witness was competent to prove his inability to attend the trial of the cause.

271 *On the second point he referred to the evidence to prove that the paper propounded for probat was the paper shewn to the witness Glenn. And he insisted that the objection did not go to the admissibility of the evidence, but its weight; and that was a question for the jury. And he insisted further, that the Court would not reverse a judgment for the admission of illegal testimony if the other evidence was ample to sustain the verdict, as it was in this case. *Doe ex dem. Teynham v. Tyler*, 19 Eng. C. L. R. 165.

On the third point he insisted, that as the appellees had examined the witness Elizabeth Glenn as to what she had said, they were not authorized to contradict her by other testimony. *Daniel v. Conrad*, 4 Leigh 401; 1 Stark. Evi. 134; 3 Stark. Evi. 1753; 2 Philip's Evi., Cow. & Hill's edi. 726; 3 Id. 132, 136; *Clement v. Tull-edge*, 19 Eng. C. L. R. 247; *Harris v. Wilson*, 7 Wend. R. 57.

On the fourth point he insisted, that a new trial is never granted on the ground of after discovered evidence upon the mere affidavit of the party asking it. *Delima v. Glassell*, 4 Hen. & Munf. 369; *Arthur v. Chavis*, 6 Rand. 142. The principles on which the new trial is granted on this ground, is, first, that there has been no laches on the part of the party asking it; second, that the evidence is not merely cumulative; and third, the affidavit of the witnesses discovered, shewing that their evidence will be material. *Williams v. Baldwin*, 18 John. R. 489; *Bunn v. Riker*, 4 John. R. 226; *Wheelwright v. Beers*, 2 Hall's N. Y. R. 391; *People of New York v. Superior Court of New York*, 10 Wend. R. 286; *Calaghan v. Kippers*, 7 Leigh 608; *Smith v. Brush*, 8 John. R. 84; *Pike v. Evans*, 15 John. R. 210.

ALLEN, J. At a Circuit court held for the county of Hanover on the 7th April 272 1848, the appellee exhibited *a paper writing purporting to be the last will and testament of Ann W. Nuckols, and

offered the same for probat. There was no subscribing witness to the paper, and the validity of the instrument as the will of the deceased depended mainly on the proof of her hand writing. The deceased at the time of her death was a married woman, but by the terms of a marriage agreement possessed the power of disposing of her separate estate at her death. Her husband who survived her appeared and contested the probat; and having died during the pendency of the controversy, his administrator with the will annexed, appeared and was permitted to enter himself as the opponent of the probat. On motion of the contestant a jury was ordered to be empaneled to ascertain and determine whether the paper writing propounded was the true last will and testament of the deceased.

After some continuances the controversy came on for trial at the April term 1850, and the jury found that the paper propounded was the true last will and testament of the deceased.

Several exceptions were taken to decisions of the Court during the progress of the trial; and after the verdict a motion was made for a new trial upon the ground of after discovered testimony, and also upon the ground that the finding of the jury was contrary to evidence: both motions were overruled and the appellant excepted. The first exception taken during the trial was to a decision of the Court overruling a motion to exclude the deposition of William Glenn taken by the appellee to be read *de bene esse*, because there was no sufficient evidence to shew the inability of the witness to attend. It was proved by the magistrate who took the deposition that the witness was an old man, probably between seventy-five and eighty years of age; that he complained of ill health, stating that his physicians represented he was labouring under rheumatism of the heart, and the

273 witness was of opinion that Glenn was unable to ride on *horse back from his house to the court house; and another witness testifies to the age of Glenn and gives it as his opinion he could not travel to the court house without danger to his health and probably his life. This testimony of itself proves sufficient inability to attend to warrant the reading of the deposition; and its force is not weakened by the evidence on the other side that some two or three years before Glenn was in the habit of riding to the city of Richmond, and that the witness who deposes to this fact when he last saw him did not perceive any change in his general appearance and health. In addition to this evidence is the affidavit of Glenn given immediately before the trial, in which he swears that from sickness and infirmity he was unable to attend the Court. This of itself would have justified the reading of the deposition, as was decided by this Court in *Pollard v. Lively*, 2 Gratt. 216.

The objection to the whole deposition being overruled, the appellant moved the Court to exclude from the jury those parts

of the deposition in which the witness testifies, that a paper writing purporting to be the last will of the deceased, and which had been shewn to him, as the witness stated, by the propounder of the will sometime before the taking of the depositions, was in the hand writing of the deceased; because those parts of the deposition are not legal and competent evidence, and are irrelevant and unconnected with the issue. The proposition presented by the exception, is whether it was competent for the witness to give evidence of the hand writing of a paper shewn to him previously by the appellee as the will of the deceased, without having the paper before him when he gave his deposition, or without distinct proof that the paper shewn to him, was the paper offered for probat. The objections it seems to me, go rather to the weight of the evidence than to the competency of the witness. The paper when

274 exhibited for probat, becomes part of the records of the Court, and *it would not be in the power of the party, in many cases, to procure the original so that a witness at a distance from the office where it was deposited, could inspect it when giving his testimony. In such case he would necessarily be constrained to speak from his recollection of the paper if formerly examined by him. Whether the testimony proved the identity of the paper was a question for the jury. The witness had been cross examined on each occasion when his deposition was taken. But no intimation was given that the paper shewn to and seen by the witness was not the one exhibited for probat. Nor does any exception appear to have been filed to the reading of the depositions or these portions of them before the jury was sworn. Under these circumstances it would have operated as a surprise on the other side to have excluded the deposition from the jury entirely. The weight they would allow to it would depend upon the question whether the paper spoken of by the witness was sufficiently identified by all the testimony in the cause, with the paper offered for probat.

Another witness, Elizabeth Glenn, having testified in her examination in chief that she believed the paper offered for probat and the signature thereto to be in the hand writing of the deceased; and that she had seen the deceased write often, and had frequently seen her hand writing; was asked on her cross examination if she had seen another paper purporting to be in the hand writing of the deceased. She answered that she had, and that it had been shewn to her by Mr. Harding. And being asked if she did not say that the paper so exhibited to her was in the hand writing of the deceased, replied she had not, but thought the signature to it was like the hand writing of the deceased. The appellant after all the evidence had been adduced for the propounder of the will, introduced a witness, Harding, who testified among other things that after the death of the

275 alleged testatrix, having become interested *in her property by a purchase from her husband, but which interest he had released, and having heard of the existence of the paper offered for probat, and that the witnesses, E. Glenn and her father, were relied on to prove the hand writing, called to see them, and understanding from them that they were acquainted with the hand writing of the deceased, and that they had seen the paper offered for probat and believed it to be in her hand writing, for the purpose of testing the accuracy of their knowledge in regard to the hand writing of the deceased, exhibited to them a paper which he had prepared, imitating the writing of the deceased and purporting to be signed by her. And the witness was then asked what was said by E. Glenn and her father in reference to the paper so exhibited to them by the witness; but the propounder of the will objected to any answer being given by the witness to the question; and the objection being sustained by the Court no answer was given by the witness; to which decision the appellant excepted. The answer to the question must have been intended to contradict what the witness E. Glenn had said on her cross examination, and so to impeach her credit; or must have been intended to weaken confidence in the ability and skill of the witnesses in judging of the hand writing of the deceased, by shewing that they were imposed upon by the spurious paper prepared by the witness and exhibited to them. It does not appear that E. Glenn alluded to this paper in her examination in chief. The question before the jury was whether the paper offered for probat was in the hand writing of the deceased; any statements made at another time by the witness touching the matter in issue and contradicting her evidence in chief in regard to the paper, to the hand writing of which she had deposed, would have been proper as tending to impeach the credit of the witness. But what she may have said about any other paper at any other

276 time, having no *relation to the paper offered for probat, was a distinct collateral fact, as to which she could not be examined for the purpose of impeaching her testimony by contradicting her, nor was it competent after such question was put and answered to adduce evidence to contradict the answer. *Harris v. Wilson*, 7 Wend. R. 57; *Charlton v. Unis*, 4 Gratt. 58. Such a course of examination would raise different issues and tend to divert the minds of the jury from the real enquiry before them; for if the statement so made in regard to any collateral paper was contradicted, the other side would be authorized to sustain it; and so the genuineness of every collateral paper would be put in issue.

Still less was it competent to offer such evidence to test the skill and ability of the witness to speak as to the hand writing of the deceased. The circumstances under and the purposes for which it was prepared

shew a design to circumvent and entrap the witness by exhibiting a forged paper, a fact which of itself justified the rejection of the evidence; and as the paper so exhibited to the witness was not produced, the evidence would not have furnished any test of skill. For that would have depended upon the success with which the hand writing of the deceased had been intimated in the paper exhibited to the witness.

After the verdict the appellant moved for a new trial upon the ground of after discovered testimony unknown to him when he went into the trial; and in support of the motion filed his affidavit in which after stating that he had made diligent enquiries for evidence to prove that the paper offered for probat was not in the hand writing of the deceased, before the trial, he had since the trial been informed and believed that the paper had been shewn by the propounder to two females who were acquainted with the hand writing of the deceased and would if examined have testified that they

277 did not believe the paper was in her hand writing; the *persons referred to it appeared resided in the county and within six miles of the appellant. This affidavit did not furnish any ground for setting aside the verdict. He had not seen or conversed with the persons whose testimony is deemed material; his affidavit is based on mere reports derived from others, and there is nothing to shew that the persons referred to would testify in the manner supposed. Even if the affidavits of the supposed witnesses were dispensed with, there should have been the affidavit of some person who had seen and conversed with them: it would lead to endless litigation if verdicts fairly rendered should be set aside upon a mere rumor that other testimony might be procured. The controversy had been pending in Court for two years, the administrator had made himself a party to the contest eighteen months before the trial, and the cause turned upon the proof of hand writing. The parties went into the trial prepared with their evidence on this question, and the testimony supposed to be since discovered is not evidence of any new fact, but merely cumulative evidence bearing upon the question in regard to which the parties had been at issue from the beginning. This is a species of evidence which has not generally been regarded as a good ground for granting a new trial. *Callaghan v. Kippers*, 7 Leigh 608.

A different practice would hold out inducements to a negligent or fraudulent suitor to omit the use of proper diligence in preparing for trial or to withhold a portion of his testimony until he had discovered the strength of his adversary's case, with the expectation of being able to overthrow it by preponderating testimony at a subsequent trial. Upon both grounds, the absence of any direct evidence from the persons referred to, or from any person having communication with them, and the character of the testimony it was reported they would give, the motion was properly overruled.

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*There was an additional reason for refusing to set aside the verdict in this case. A motion for a new trial is addressed to the sound discretion of the Court, to be exercised in view of all the facts developed on the trial. Judge Cabell, in the case of *Callaghan v. Kippers*, 7 Leigh 608, observes that Courts exercise the power of granting new trials upon the ground of after discovered testimony, rarely, and with great caution; and never but under very special circumstances. The party asking its exercise must shew he was ignorant of the existence of the evidence, that he was guiltless of negligence, and that the new evidence if it had been before the jury, ought to have produced a different verdict. In this case the bill of exceptions sets out the facts proved at the trial, which this Court held in the case referred to, was essential in order that the appellate Court might be furnished with the means of ascertaining whether the Court below clearly erred. From this certificate of the facts it appears that five witnesses introduced by the appellee deposed that they believed the paper to be wholly in the hand writing of the deceased. One of these was a magistrate residing in her neighbourhood; another a store keeper near her residence who had often seen her write, and had often received orders from her, which she recognized as genuine; and a third her brother who had gone to school with her for five years, had spent much time with her since she was a woman, and some time since she was married, had corresponded with her and knew her hand writing well. On the other side two witnesses were examined as to this question, one of whom would not at first have taken it to be the hand writing of the deceased, but upon closer inspection and his attention being called to the manner in which some letters were formed and their disconnection, doubted whether it was in her hand writing or not; so that his testimony as to this matter could have

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*no influence. The second witness who did not believe the paper to be in her hand writing, was one of those who at one time had acquired an interest in the property by purchase from the surviving husband, but the contract was afterwards cancelled: A fact which though it might not have affected his credit may have insensibly influenced his judgment. If the two females referred to in the affidavit had concurred with this witness there would have been three witnesses to five upon the question of hand writing; so that the new evidence reported to exist, if it had been before the jury, ought not for any thing disclosed by the record, to have produced a different verdict; for the weight of evidence on the question of hand writing would have inclined in favour of the verdict as found.

On the merits the case is free from difficulty. The paper on its face gives conclusive evidence of testamentary intent. It disposes of the whole estate, and states that it is her last will and testament: And be-

ing proved to the satisfaction of the jury and the Court, to be wholly in the hand writing of the testatrix, and being signed by her, it is a complete statutory disposition of her property. That the jury was justified by the evidence in finding it to be wholly in her hand writing, and could not properly have arrived at any other conclusion if they believed the witnesses, appears from what has already been said in reference to the testimony on the question of hand writing. The objections growing out of the appearance of the paper and the circumstances attending its discovery, might with some give rise to suspicion; whilst others, in view of the character and temperament of this old woman, her fear and distrust of her besotted husband with whom she lived unhappily, and from whom she frequently separated, her repeated declarations of her wish that no part of her property should be enjoyed by him, her

280 complaints *that he had threatened to break open her trunk and her fears that he might do it, would probably conclude that the mode adopted to preserve her will and have it placed in the hands of her brother, was natural and characteristic. All this however is matter of speculation, and can have but little influence when it is satisfactorily shewn that the paper left by her shews upon its face a testamentary intent, is a completed instrument, and is wholly in her hand writing. I think there was no error in any of the decisions of the Court during the progress of the trial, which have been excepted to; that the motion for a new trial upon both the grounds relied on was properly overruled; and that the sentence should be affirmed.

BALDWIN and MONCURE, Js., concurred in Allen's opinion.

DANIEL, J., dissented. He thought that under the circumstances of suspicion which existed in the case, there should have been a new trial to let in the after discovered evidence.

Judgment affirmed.

281 **Ball & als. v. Johnson's Ex'or & als.**

October Term, 1851, Richmond.

(Absent CABELL, P.)

1. Statute of Limitations—When It Begins to Run against Remaindermen.*—The statute of limita-

*Statute of Limitations—When It Begins to Run against Remaindermen.—In *Merritt v. Hughes*, 36 W. Va. 362, 15 S. E. Rep. 58, it is said: "It is a principle everywhere admitted that the possession of a tenant for life is not adverse to the remainderman or reversioner, and therefore the statute does not begin to run against them until the end of the life estate. Hutch. Land Titles, sec. 352; Ang. Lim. §§ 371, 372; *Jackson v. Schoonmaker*, 4 Johns. 390; Co. Litt. 240b; Wood, Lim. 527; Tyler, Eject. 923, 946; *Merritt v. Smith*, 6 Leigh 498; 1 Rob. Pr. (New) 508,

tions does not commence to run against the owners of the remainder in slaves in favour of the purchaser of the life estate, until the death of the life tenant.

2. **Chancery Practice—Presumption as to Parties—Case at Bar.**—In a bill by persons claiming to be legatees or assignees of legatees, against defendants as other legatees and assignees of legatees, under the same will, for distribution of the slaves bequeathed to the legatees jointly, the presumption is, in the absence of all pleading and proof to the contrary, that the persons made parties to the suit as legatees are not fictitious persons, or mere pretenders to the characters assumed in the proceedings.

3. **Same—Want of Proper Parties—Case at Bar.**—In such case, the case being a proper one upon its merits, for distribution of the subject amongst those entitled thereto, the bill should not be dismissed for want of parties, or of proof that the parties were what they professed to be; but the Court should direct the plaintiffs to amend their bill and make the proper parties, and should direct a commissioner to ascertain and report the persons entitled to the several distributive shares.

In March 1844 a bill was filed in the Circuit court of King William county, in which the plaintiffs stated themselves to be Peggy Minor, widow of Richard Minor dec'd, and who before her marriage was Peggy Powers, Richard Gwathmey, sheriff and committee of the estate of James Powers deceased, and Samuel B. Lipscomb, who claimed as purchaser from Delila and Sally Powers, children of William Powers deceased. The bill charged that David Powers, after providing for the payment of his debts, left the remainder of his property to his wife for her life, and at her death to be equally divided among his eight children and the child of his wife by a former husband, who was to

282 share equally with *his own children That the plaintiff Peggy Minor was one of the children, that Gwathmey was the representative of James Powers deceased, who was another of them, and that Lipscomb claimed the interest of William Powers, another child of David, by purchase from Delila and Sally Powers, the children of William; and the deeds from them to him were made exhibits with the bill. That among the negroes left by David Powers to his wife for life, was one named Esther, who had since had some four or five children. That Mrs. Powers sold her life estate in this slave to Christopher Johnson, who, as plaintiffs had heard, had purchased the interest of several of the legatees in said slave. That Johnson died in possession of said slave and her increase, in the life time of Mrs. Powers, who had since died. That there has been

510; 3 Washb. Real Prop. 132, 133; *Ball v. Johnson*, 6 Gratt. 285."

See also, in accord, *Hope v. N. & W. R. Co.*, 79 Va. 288; *Effinger v. Hall*, 81 Va. 100; *Davis v. Tebbs*, 81 Va. 606; *Hannon v. Hounihan*, 86 Va. 439, 12 S. E. Rep. 157; *Central Land Co. v. Laidley*, 32 W. Va. 143, 9 S. E. Rep. 64; *Beattie v. Wilkinson*, 36 Fed. Rep. 649, all citing the principal case.

no division of this slave and her increase, but that they were then in the possession of one or more of Johnson's legatees.

The bill stated that the names of the other legatees of David Powers were Thomas Toler and Sally his wife, who was Sally Powers, Polly Reid, who was the daughter of Mrs. Powers by her first husband, Richard Gwathmey, sheriff and committee administrator of David Powers deceased, and also of Alexander Powers, Betsey Powers, and Catharine Allen who was Catharine Powers, and Fielding Slater, who claimed as purchaser of the interest of Thomas Toler and Sally his wife. And making these and the surviving executor of Christopher Johnson, and his legatees, parties defendants, they asked for a discovery of the names, sexes and ages of the children of Esther, and for a division of the said slaves either by a sale or in kind; for their share of the hires of said slaves since the death of Mrs. Powers; and for general relief.

Sherwin McRae, the surviving executor of Johnson, and the guardian of his two younger children, answered the bill for himself and his wards. He stated

283 that the *slaves left by Christopher Johnson had been distributed among his legatees. That the bequests of the slaves were absolute and unconditional, recognizing no property or title in any other person. That Esther was in the possession of Johnson many years before his death; and that she and her children have been in possession of his legatees ever since; a possession which had been quiet and undisturbed, and adversary to all the world. That this possession had continued more than five years in Christopher Johnson before his death, and he died in 1832; and had continued ever since in those claiming under him. And they therefore relied on the statute of limitations. He further stated that Esther and her children were with other slaves bequeathed by Christopher Johnson to his wife for her life, and then to his three youngest children; and had been divided amongst them according to the will. And he called for proof of the identity of the Esther mentioned in the bill with the slave in the possession of Johnson, and bequeathed by his will; and strict proof of the title of the plaintiffs in all other respects. And it was objected that the administrator or executor of William Powers was not a party to the suit.

It appears from the evidence that David Powers died previous to July 1806, and that a negro girl named Esther was allotted to Mrs. Powers, as a part of her distributable interest in her husband's estate. That some time afterwards, the time is not stated, but it was previous to 1825, Mrs. Powers sold her life estate in this slave to Christopher Johnson, and that since Johnson's purchase of her, all her children, five in number, have been born. Johnson seems also to have purchased out the interest of some of the remaindermen in this

slave. And in 1832 he bequeathed these slaves to his three youngest children. Mrs. Powers died in 1843.

The cause came on to be heard in May 1846, when the Court dismissed the plaintiffs' bill with costs.

284 *At the same term of the Court there was an application for a rehearing of the cause on the ground of after discovered evidence, and the affidavits of several witnesses were filed with the petition, to prove that Johnson had only a partial interest in the slaves. But the Court refused to rehear the cause. And thereupon the plaintiffs, (one of whom, Peggy Minor, had married Achilles Ball,) applied to this Court for an appeal, which was allowed.

Lyons, for the appellants, insisted, that their title to an interest in the slaves was fully made out. And that Mrs. Powers the life tenant, having lived until 1843, until that time the possession of the purchaser from her and those claiming under him, was not adversary but under her title; and therefore that the statute of limitations was no bar. He referred to *Lynch v. Thomas*, 3 Leigh 682; *Merrit v. Smith*, 6 Id. 486.

Daniel, for the appellees, insisted,

1st. That the answer having put in issue the identity of both the plaintiffs and the property claimed, that identity must be proved; and that there was a total absence of proof that the plaintiffs were the persons whom they claimed to be. So there was no proof of the assignment to Lipscomb. And upon the necessity of proof of the assignment, he referred to *Corbin v. Emmerson*, 10 Leigh 663; *Tennant v. Patton*, 6 Leigh 229.

He insisted further, if there had been proof of the title of the assignors and of the assignment, that Lipscomb was not the proper party to sue, but William Powers's administrator. And he insisted that the joinder of an improper party was fatal. For which he cited *Cuff v. Platall*, 3 Cond. Eng. Ch. R. 651; *Makepeace v. Haythorne*, Id. 652; *King of Spain v. Machado*, Id. 643; *Dickenson v. Davis*, 2 Leigh 401.

285 *BALDWIN, J., delivered the opinion of the Court.

It appears to the Court that the slave Esther, in the proceedings mentioned, was the property of David Powers deceased, in his life time, and was by his last will and testament bequeathed to his wife Elizabeth Powers during the term of her natural life, and after her death in remainder jointly to his eight children therein named and the daughter of his said wife by a former husband: That Christopher Johnson, the father of some of the appellees, purchased from the said Elizabeth Powers her life estate in the said slave, and also purchased the undivided interest therein of some of the legatees in remainder, but whose or how many does not certainly appear. That the said Johnson at the time of his purchase from the said Elizabeth Powers, acquired possession of said slave, and held her and her

increase until his death; and that since his death she and her increase have been held by his widow during her life, and since her death by some of his children and legatees, under his will. That the said Elizabeth Powers died a year and some months before the institution of this suit, and thereupon her life estate which she had sold to the said Christopher Johnson was determined; and those claiming under him have thenceforth had no interests in the subject, beyond those acquired by the said Christopher Johnson by purchase from some of the legatees in remainder as aforesaid.

And the Court is of opinion, that the legatees in remainder of the said David Powers, whose interests in the subject were not purchased by the said Christopher Johnson, had no cause of action or suit to recover the same until the determination of the life estate by the death of the said Elizabeth Powers, until which time the possession of the said Christopher Johnson, and of those claiming under him, was not adversary to, but consistent with, and in support of, the title in remainder: And the

persons so entitled are not therefore
286 *barred by the statute of limitations; nor does the lapse of time furnish any presumption against their right to recover their respective interests in the subject.

It also appears that the object of this suit is to obtain distribution amongst those entitled in remainder of the said slave Esther and her increase, and of their hires since the expiration of the life estate. The bill purports to make as the proper parties thereto, some as plaintiffs and the rest as defendants, those interested in the subject, whether as legatees or as representing or deriving title from legatees: And it represents that the said Esther and her increase are in possession of some one or more of the heirs and legatees of the said Christopher Johnson, and it makes them and his surviving executor defendants; and it further represents that the plaintiffs have heard that the said Johnson in his life time purchased the interests of some of the legatees in remainder.

And the Court is of opinion that the parties in this suit, both plaintiffs and defendants, are to be treated as occupying the position of persons claiming a common right in the same subject, derived from the same original source: and the jurisdiction of the Court is invoked for the purpose of causing the proper distribution in severalty to be made amongst them. There is no conflict, so far as yet appears, of pretensions in the cause in regard to the ownership of the several distributive shares; and if there be any difficulty in making the distribution sought, it must arise from mere absence of proof as to the identity of persons made parties as legatees, or as to the representative character of parties in relation to deceased legatees, or as to the fact of assignment to parties claiming to be purchasers from legatees. These are matters in which the appellees have no interests beyond

those acquired by the said Christopher Johnson in his life time. The distributive shares in point of number are fixed,
287 and the persons to take them *respectively designated by the will of the said David Powers. To such of the shares as were purchased by said Christopher, when ascertained, the appellees or some of them will as his representatives be entitled: but their shares cannot be enlarged or diminished by any failure of proof as to other distributive shares not acquired by their testator. The only legitimate consequence of a failure of proof as to some of the distributive shares would be to suspend the action of the Court in the disposition thereof until the defect be supplied; and it is the province of the Court to direct the proper steps to be taken for that purpose. It could furnish no good reason for dismissing the suit, and thereby defeating the rights of parties who appear to be entitled to other distributive shares. The presumption is, in the absence of all pleading or proof to the contrary, that the persons made parties to the suit as legatees, or personal representatives of legatees named in the will, are not fictitious persons or mere pretenders to the characters assumed in the proceedings; and this presumption is applicable to most of the parties in the cause. It is only in reference to parties claiming as entitled to distributive shares by purchase that the proceedings and proofs are defective: these are the plaintiff Lipscomb, the defendant Slater, and the appellees as representatives of Christopher Johnson. Lipscomb claims the share of the legatee William Powers deceased, by purchase from Delila and Sally Powers his children; but the said Delila and Sally, and the personal representatives, if any, of the said William Powers deceased, are not made parties either as plaintiffs or defendants, and there are no averments or proofs tending to shew that the distributive share of the said William Powers became vested in his said children; nor is there any evidence of the execution of the papers purporting to be assignments from them to the said Lipscomb.

The defendant Slater is stated in the
288 bill to claim by *purchase, as the plaintiffs have been informed, the interests of the defendants Thomas Toler and Sally his wife one of the legatees named in the will; but neither Slater nor Toler and wife have answered, and there is no evidence of such purchase. The appellees, or some of them, as representatives of Christopher Johnson, are entitled to such of the distributive shares as he may have acquired by purchase from legatees; but such of his representatives as have answered are silent upon that subject, and no written or other definite evidence in relation to it has as yet been produced.

The case being a proper one upon its merits for distribution of the subject amongst those entitled thereto, and as such distribution must be accomplished through the agency of one or more commissioners, the decree upon the hearing ought of course

to have been interlocutory only, and to have directed the measures requisite for supplying the defects above mentioned in the pleadings and proofs. For this purpose the Court ought to have directed the plaintiffs to amend their bill, and make the proper additional parties, and a commissioner or commissioners to ascertain and report the persons entitled to the several distributive shares, the number, sexes, names and ages of the slaves and their estimated values, the hires of them accruing since the expiration of the life estate, and the persons accountable therefor, with the credits to be allowed for charges incurred since that time in the care and maintenance of any of tender years, or otherwise incapable of labour, and to ascertain and report whether the slaves could be distributed in kind, and if so, to apportion the respective shares of the persons entitled. And upon the coming in of such report, it would have been proper for the Court by its further directions to accomplish a distribution of the slaves in kind, or of the proceeds of a sale of them, if that should be necessary; and finally to dispose of the cause according to the rights of the parties.

289 *The Court is therefore of opinion, that the decree of the Circuit court dismissing the bill of the plaintiffs is erroneous. Reversed with costs, and remanded with instructions to reinstate the cause, and proceed according to the principles above declared.

Decree reversed.

Vance v. McLaughlin's Adm'r.

October Term, 1851, Richmond.

(Absent CABELL, P.)

1. **Foreign Attachment—Wife's Interest as Legatee in Hands of Executor.***—A wife's interest as legatee in her father's estate, in the hands of the executor, may be subjected by the creditor of her husband, by a proceeding by foreign attachment, when the husband resides out of the state.

2. **Same—Same—Service of Process—Death of Husband Pending Proceedings.†**—Though the service of proc-

***Garnishment—Personal Representatives.**—But that a personal representative cannot be garnisheed, see *Whitehead v. Coleman*, 81 Gratt. 784, and *foot-note*.

†**Husband and Wife—Separate Earnings of Wife—Rights of Husband's Creditors.**—Creditors of the husband have a right to seize the earnings of the wife by process against the husband, before they are reduced into possession by the husband; but are liable to be defeated in such proceeding by the death of the husband before they are reduced to possession, as in such case they would survive to the wife. *Bailey v. Gardner*, 81 W. Va. 94, citing the principal case at pages 98, 99, 5 S. E. Rep. 688. See monographic *note* on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

‡**Decrees—Irregularities—When Immaterial.**—Irregularities in a decree which do not injure the appellant are not sufficient grounds for reversing it. This proposition of the principal case is cited and

ess upon the executor creates a lien upon the wife's interest in favour of the creditor, yet if the husband dies pending the proceedings, leaving his wife surviving him, the lien of the creditor is defeated, and the property belongs to the wife.

3. **Decrees—Irregularities—When Immaterial.‡**—Irregularities in a decree which do not injure the appellant are not sufficient grounds for reversing it.

This was a proceeding by foreign attachment in the County court of Hampshire, commenced in April 1830 by William Vance against John Collins as an absent debtor and William McLaughlin executor of Daniel McLaughlin deceased, as a home defendant, in which the plaintiff sought to subject the interest of the defendant Collins in right of his wife, in the estate of her
290 *late father Daniel McLaughlin, to the satisfaction of his debt. The bill was afterwards amended and all the legatees of Daniel McLaughlin were made parties; and an account of the administration of William McLaughlin on the estate of his testator was taken, which ascertained the amount in his hands to which Collins and wife were entitled, to be 106 dollars 85 cents with interest on 88 dollars 2 cents a part thereof, from the 21st of September 1833 until paid.

In 1834, though the death of the executor William McLaughlin was not suggested, the suit was revived against Daniel McLaughlin as administrator de bonis non with the will annexed of Daniel McLaughlin deceased. And in 1837 there was a decree against Collins for the amount of the debt due the plaintiff, viz: 80 dollars 39 cents, with interest on 75 dollars a part thereof, from the 14th of May 1817 until paid; and there was a personal decree against Daniel McLaughlin the administrator for the amount reported to be in the hands of William McLaughlin due to Collins and wife. From this decree McLaughlin applied to the Circuit court of Hampshire for an appeal, which was allowed.

In 1838 the cause came on to be heard in the Circuit court, when the decree of the County court was reversed, and the cause was retained for further proceedings. Whilst the case was pending in the Circuit court the defendant Collins died, leaving his wife surviving him. And without a revival of the cause against the representatives of Collins and William McLaughlin, it came on to be heard in September 1840,

approved in *Dower v. Church*, 21 W. Va. 51; *Elliot v. Trahern*, 35 W. Va. 647, 14 S. E. Rep. 227, and in *Miller v. Rose*, 21 W. Va. 292, it is said: "It is well settled that to entitle a party to obtain and prosecute a writ of error or appeal in this court, he must not only be a party to the controversy, but the record must affirmatively show that he has been prejudiced by the order, judgment or decree from which the writ of error or appeal is taken. *Supervisors v. Gorrell*, 20 Gratt. 484; *Shrewsbury v. Miller*, 10 W. Va. 115; *Richardson v. Donehoo*, 16 W. Va. 685." See also, *Eib v. Pindall*, 5 Leigh 109.

See monographic *note* on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

when the Court dismissed the bill, with costs to the defendant Daniel McLaughlin administrator of William McLaughlin executor of Daniel McLaughlin. And it appearing that the plaintiff had issued execution upon the decree of the County court, and made the money out of the defendant

Daniel McLaughlin before the appeal 291 was allowed, *the Court gave McLaughlin a decree against him for the sum of 125 dollars 27 cents, the amount so made, with interest thereon from the 21st day of April 1837, that being the return day of the execution. From this decree Vance applied to this Court for an appeal, which was allowed.

Cooke, for the appellant.

Patton, for the appellee.

DANIEL, J., delivered the opinion of the Court.

The Court is of opinion, that the rights and interests of the absent defendant Collins in and to the share of his wife in the personal estate of her father in the hands of the executor William McLaughlin, were liable to be proceeded against and charged by the creditors of said Collins, by way of foreign attachment; and consequently that the proceedings in this case were properly commenced.

The Court is however also further of opinion, that the commencement of such proceedings by the creditor of the husband are not in legal contemplation equivalent to the reduction into possession by the latter of the subject sought to be charged, but creates only a lien in favour of the creditor, which is liable to be defeated by the husband's dying pending the proceeding, leaving his wife surviving him. That by the death of Collins during the progress of the suit the whole right to his wife's share in the property or balance in the hands of the executor of her father devolved on her; and that the right of the creditor Vance to have his demand satisfied out of it, terminated with the life of his debtor.

The Court is also further of opinion, that though it was not regular to render a final decree without first reviving the cause against the representative of Collins, or to give a decree for costs in favour of Daniel

McLaughlin as administrator of William McLaughlin executor of *Daniel 292 McLaughlin, yet that these irregularities do not under the circumstances of the case constitute sufficient grounds for the reversal of the decree.

The Court is therefore of opinion, to affirm the decree with costs &c. to the appellee.

Decree affirmed.

Fleming & als. v. Bolling & als.

October Term, 1851, Richmond.

(Absent CABELL, P.)

Final Decrees—Order Suspending—Effect.*—A decree which passes upon the whole subject in issue so

***Final Decrees—Effect of Order Suspending.**—A final decree is not converted into an interlocutory de-

as to be final in its nature, is not converted into an interlocutory decree by the addition thereto of an order suspending the decree as to the amount of an item of the account involved in the cause, until the decision of another suit brought by another party against both the plaintiffs and defendants in the first suit, in which the amount of that item is claimed by the plaintiff.

Thomas M. Fleming of the county of Goochland, died in 1801, leaving a widow and three infant children. By his will he gave his land to his wife for her life, and at her death to his children. He emancipated his slaves, except those he had received by his wife; and these he gave to her. And he appointed several executors, of whom Edward Bolling, the brother of Mrs. Fleming, alone qualified.

Bolling seems to have acted not only as executor, but as agent for Mrs. Fleming for a number of years. The stock on the farm and the household furniture, he 293 left *on the farm for the use of Mrs.

Fleming, according to the directions of the will; and he sold all the slaves emancipated by the will, and applied the proceeds of sale to the payment of debts. Some of these slaves he sold at private sale, and two of them he seems to have purchased back himself, selling them as was insisted in the progress of the cause, at much less than they would have brought at auction.

In 1815 Mrs. Fleming and her children instituted this suit in the late Chancery court at Richmond, against Bolling, as ex-

cree by adding thereto an order suspending the decree as to a part of the account involved in the cause. *Nelson v. Jennings*, 2 P. & H. 381, citing the principal case.

Decrees—When Final—When Interlocutory.—“The distinction between final and interlocutory decrees has been a subject of frequent discussion before this tribunal, and is now well established by the decisions of the court. In *Cocke's Adm'r v. Gilpin*, 1 Rob. R. 20, 46, JUDGE CABELL, adopting the language of JUDGE CARR in *Harvey & Wife v. Branson*, 1 Leigh 108, said: ‘When a decree makes an end of a case, and decides the whole matter in controversy, costs and all, leaving nothing further for the court to do, it is certainly a final decree.’ And in the same case, p. 27-8, JUDGE BALDWIN said: ‘Where the further action of the court in the cause is necessary to give completely the relief contemplated by the court, then the decree is to be regarded not as final but as interlocutory.’ Here we have very briefly and clearly presented the characteristic features of a final and an interlocutory decree; and the definitions thus given have been approved and adopted by this court in the subsequent case of *Fleming & als. v. Bolling & als.*, 8 Gratt. 293. MONCURE, J., delivering the opinion of the court.” *Ambrose v. Keller*, 22 Gratt. 774.

As approving the definitions above laid down, the principal case was also cited in *Ryan v. McLeod*, 22 Gratt. 377, 381; *Jameson v. Jameson*, 86 Va. 54, 9 S. E. Rep. 480; *Series v. Cromer*, 88 Va. 428, 13 S. E. Rep. 859; *State v. Hays*, 90 W. Va. 120, 3 S. E. Rep. 181; *foot-note* to *Rogers v. Strother*, 27 Gratt. 417, where many cases are collected.

Other cases adopting the definitions given above are *Battaille v. Maryland Hospital*, 76 Va. 68; *John-*

ecutor of Thomas M. Fleming, and his official sureties. In their bill, after stating the provisions of the will and the qualification of Bolling, they charge that he received and disposed of the crops grown on the land for a number of years, sold a large number of slaves, and that he had failed to apply the funds which came to his hands to the payment of the debts of the estate, and had not settled his accounts. And they pray for a settlement of the account, that the executor may be compelled to apply the assets in his hands to the payment of the debts of the estate; and that the balance remaining after discharging the debts may be paid over to them; and for general relief.

Bolling and his sureties answered the bill; and the accounts were referred to a commissioner. The report of the commissioner was twice recommitted. In the third report, which was returned in January 1826, the commissioner made alternate statements, presenting the views of the plaintiffs and defendants. On this last report the controverted questions were reduced to three: one was in relation to the price of the slaves sold by the executor at private sale; another was in relation to a debt which the executor claimed to have been due to him from Thomas M. Fleming at his death; and the third was in relation to a credit claimed by the executor for a sum of money paid to James Lyle on account of a debt due to him by Thomas M. Fleming in his lifetime. *It appeared that a certain William R. Fleming had in December 1806, executed to the executor Bolling, his bond for £226. for slaves purchased by him; and that Bolling had assigned this bond to Lyle in part discharge of the debt due from Thomas M. Fleming to Lyle. William R. Fleming became insolvent, so that Lyle failed to recover the amount of the bond from him; and he insisted upon his right to have the amount paid to him either by Bolling the executor, or out of the land of Thomas M.

son v. Anderson, 76 Va. 766; Miller v. Cook, 77 Va. 808; Parker v. Logan Bros. & Co., 82 Va. 376, 4 S. E. Rep. 613; cases collected in *foot-note* to Ryan v. McLeod, 32 Gratt. 367.

See Manion v. Fahy, 11 W. Va. 493, where it is said: "The Virginia decisions on the question of what is a final decree and what an interlocutory decree, are more numerous than satisfactory. See Young v. Skipwith, 2 Wash. 300; McCall v. Peachy, 1 Call 55; Bowyer v. Lewis, 1 H. & M. 553; Templeman v. Steptoe, 1 Munf. 339; Aldridge v. Giles, 3 H. & M. 126; Mackey v. Bell, 2 Munf. 523; Goodwin v. Miller, 2 Munf. 42; Hills v. Fox's Adm'r, 10 Leigh 567; Ellzey v. Lane's Ex'or, 2 H. & M. 592; Allen v. Belches, *Ibid.* 595; Harvey *et ux.* v. Branson, 1 Leigh 108; Thorntons v. Fitzhugh, 4 Leigh 209; Royall's Adm'r v. Johnson, 1 Rand. 421; Alexander's Heirs v. Coleman *et ux.*, 6 Munf. 338; Cocke's Adm'r v. Gilpin, 1 Rob. 20; Vanmeter's Ex'ors v. Vanmeters, 3 Gratt. 148; Ruff v. Starke's Adm'r, *Ibid.* 184; *Fleming et al. v. Bollings et al.*, 8 Gratt. 292; Davis v. Crews, 1 Gratt. 407."

And, in Core v. Strickler, 24 W. Va. 694, it is said:

Fleming, upon which he held a mortgage from Fleming for the security of his debt, which he was then seeking to enforce in the United States court.

By the statement A of the report, which gave the executor credit for this payment to Lyle, there was due to him from his testator's estate on the 31st of December 1808, the sum of 1129 dollars 29 cents; and it appeared by a former report that he was indebted on his account as agent at the same date, the sum of 665 dollars 34 cents.

At the June term 1826 the cause came on to be heard upon the report, when the Court made an entry that "the Court not being advised what decree should be rendered in the premises, time is taken until the next term to consider thereof."

On the 6th of February 1828, James Lyle as administrator de bonis non with the will annexed of James Lyle sen'r, deceased, filed his bill in the late Chancery court at Richmond against Edward Bolling, as executor of Thomas M. Fleming, and the children of Thomas M. Fleming and others, in which he stated the indebtedness of Thomas M. Fleming to his testator, and that the debt was secured by a mortgage on Fleming's land; that in 1804 his testator had instituted a suit in equity in the Circuit court of the United States, against these same parties to have the mortgage foreclosed; and that an

objection had been taken to the jurisdiction of the *Court, upon which the plaintiff was advised that he must be turned out of Court. He further stated the assignment by Bolling, as executor of Fleming, of William R. Fleming's bond, which had not been paid, owing to the insolvency of the obligor, and that he was entitled to have satisfaction for the amount of said bond from Bolling and his sureties, or out of the land. That he had understood that in the suit of Thomas M. Fleming's devisees against Bolling and his sureties, Bolling was claiming a credit for the amount of this bond, and that it had been allowed him by the commissioner. He

"While it must be admitted the definitions given to the term 'final decree' by the decisions of the court of appeals of Virginia are not always the same, still there are many of them which hold, and I think, establish it to be a general rule, not in conflict with any of the decisions, that a decree pronounced upon the hearing, which settles all the matters in controversy between the parties, is final, though much may remain to be done before it can be completely carried into execution, and even though to effectuate such execution the cause is retained and leave is given to the parties to apply for the future aid of the court. Thorntons v. Fitzhugh, 4 Leigh 209; Davenport v. Mason, 2 Wash. 200; Harvey v. Branson, 1 Leigh 108; Vanmeter v. Vanmeters, 3 Gratt. 142; Ruff v. Starke, *Id.* 184; Tennent v. Pattons, 6 Leigh 196; *Fleming v. Bolling*, 8 Gratt. 292; Rogers v. Strother, 27 *Id.* 417; Sand's Suit in Eq., sec. 486; 4 Min. Inst. (3d Ed.) 860." See, in accord, Rawlings v. Rawlings, 75 Va. 87, citing the principal case.

See monographic *note* on "Decrees" appended to Evans v. Spurgin, 11 Gratt. 615.

therefore prayed that the Court would suspend rendering a decision on the credit claimed by Bolling for the amount of this bond, until the matters contained in his bill could be fully heard and decided on the equity, that the Court would decree a foreclosure of the mortgage and the payment of the balance due thereon out of the proceeds of the mortgaged subject; or would decree the said balance of principal money, interest and costs, to be paid by the defendants or such of them as were liable to pay the same; and for general relief.

Before this bill was answered by any of the parties, the case of Flemings against Bolling and others came on to be heard on the 16th of February 1828, when the Court made a decree, whereby the statement A of the commissioner's report was approved, and the other statements were disallowed; and considering that against the balance of 1129 dollars 29 cents found due to the executor by that statement, ought to be set off the balance on the agency account stated in the commissioner's former report, of 665 dollars 34 cents, which would still leave due to the defendant Edward Bolling, a balance of 463 dollars 95 cents, with interest thereon from the 31st of December 1808, it was decreed that the plaintiff Tarlton Fleming, in his own right, and the other plaintiffs, should severally pay to the

296 defendant *Edward Bolling each a third part of the said balance last mentioned, as their respective portions, with interest thereon at the rate of six per cent. per annum, from the 31st of December 1808 until paid; and that they should pay to the defendants their costs. "But this decree, as to the amount due on a bond executed by William R. Fleming to the defendant Edward Bolling, executor of Thomas M. Fleming deceased, dated the 19th of December 1806, which bond was assigned by the defendant Edward Bolling to James Lyle, on the 22d of December 1806, and for the amount of which bond the said Edward Bolling has received a credit in his administration account settled in this cause, say for seven hundred and fifty-three dollars and thirty-three cents, with interest thereon from the 7th day of April 1806, is to be suspended until the cause depending in this Court between Lyle and Fleming's executor and others shall be decided."

After this decree was entered, the defendants to Lyle's suit answered the bill contesting his right to recover the amount of William R. Fleming's bond; and it appeared that allowing them a credit for that bond, the whole of Lyle's debt was discharged.

In the progress of that cause a decree was entered in both causes in 1829, directing the plaintiffs in the first cause to pay into bank the amount decreed against them. There were also orders made in the causes removing them first to the Circuit court for the county of Henrico; and afterwards to the Circuit court of the town of Petersburg.

The case of Lyle v. Bolling, ex'or, and others, came on finally to be heard on the 14th of July 1842, when the Court dismissed

the bill with costs. And in June 1843, the plaintiffs in the first cause applied to the Court for leave to file a bill of review to the decree of February 1828; or if the Court should not consider that decree final, then for a rehearing of that cause. But 297 *the Court rejected both motions; the decree having been pronounced according to the admissions of the plaintiffs' counsel ten years before the motion was submitted. Whereupon the plaintiffs applied to this Court for an appeal, which was allowed.

Stanard and Bouldin, for the appellants.
Grattan and Patton, for the appellees.

MONCURE, J., delivered the opinion of the Court.

The petition for the appeal in this case was preferred in 1844, and complains of errors in a decree of the late Superior court of chancery for the Richmond district, rendered on the 16th of February 1828—sixteen years before the petition was preferred. The question which first presents itself for the decision of the Court is, whether the decree was final or interlocutory. If final, the appeal when applied for was barred by the limitation prescribed by law, and must be dismissed as having been improvidently allowed; if interlocutory, it will then be necessary to decide the other questions arising in the case.

It will be admitted on all hands that the decree would have been final in form and substance, but for the suspending order contained in the latter part of it. The former part of the decree bears every mark of finality upon its face. In the report of the commissioner on which the decree was rendered, alternative statements were made embracing all the subjects of controversy in the case; and the Court approving of one of the statements and disallowing the others, ascertained a balance due from the plaintiffs to the defendant, apportioned it among the plaintiffs, and decreed the payment of the same and the costs of the suit by them to the defendant. At the conclusion of the decree an order of suspension was made in these words: "But this decree

as to the amount due on a bond executed *by William R. Fleming to the defendant Edward Bolling, executor of Thomas M. Fleming deceased, dated the 19th of December 1806, which bond was assigned by the defendant Edward Bolling to James Lyle, on the 22d of December 1806, and for the amount of which bond the said Edward Bolling has received a credit in his administration account settled in this cause, say for seven hundred and fifty-three dollars and thirty-three cents, with interest thereon from the 7th day of April 1806, is to be suspended until the cause depending in this Court between Lyle and Fleming's executor and others shall be decided." Does this order of suspension make the decree interlocutory?

The distinction between final and interlocutory decrees has been often considered by this Court, and there are many cases on

the subject in our reports. In the case of *Thorntons v. Fitzhugh*, 4 Leigh 209, Judge Carr, after referring to some of the previous cases, and repeating expressions which had fallen from some of the Judges in deciding them, says, "These cases seem to me to take the true and clear distinction; where any thing is reserved by the Court for future adjudication, in order to settle the matters in controversy, the decree is interlocutory; but where upon the hearing all these matters are settled by the decree, such decree is final though much may remain to be done before it can be completely carried into execution, and though to effectuate such execution the cause is retained and leave given the parties to apply for the future aid of the Court." In the case of *Cocke v. Gilpin*, 1 Rob. R. 20, Judge Baldwin investigated the subject very fully, and after adverting to the necessity of resorting to some criterion by which the distinction between the two kinds of decree may be preserved, remarks, "For my own part I am aware of no proper criterion but this: Where the further action of the Court in the cause (which he con-

tradistinguishes from the action of the *Court beyond the cause, to which he afterwards adverts), is necessary to give completely the relief contemplated by the Court, there the decree upon which the question arises is to be regarded not as final but as interlocutory."

Let us apply these rules laid down by Judge Carr, and Judge Baldwin (and approved by this Court), to this case; and enquire in the language of the former, "whether any thing was reserved by the Court, in the decree in question, for future adjudication in order to settle the matters in controversy?" or in the language of the latter, "whether the future action of the Court in the cause was necessary to give completely the relief contemplated by the Court?" To ascertain what was contemplated by the Court in making the suspending order before mentioned, it will be necessary to take some notice of the facts and proceedings in the case. Thomas M. Fleming died in 1801, and Edward Bolling qualified as his executor. In 1815 the widow and children, devisees and legatees of Fleming, exhibited their bill against Bolling and his securities, in the late Superior court of chancery for the Richmond district, for the purpose of obtaining a settlement of the executorial account, and a decree for the balance that might be found due thereon. This suit was pending in said Court until the 16th of February 1828, when the decree before mentioned was rendered. During the progress of the suit three different reports were made by the commissioner under different orders of the Court; the last of which reports bears date in January 1826. Among the subjects of controversy before the commissioner and the Court, was the right of the executor to a credit for the amount of William R. Fleming's bond mentioned in the order of suspension aforesaid. That bond had been given for the

purchase of slaves belonging to the testator's estate, and on the 22d of December 1806 was assigned by Bolling as executor to Lyle, on account of a mortgage on 300 the testator's real estate. *Suit was not brought on the bond until 1808; judgment was not obtained until 1810; and after several executions had been sued out on the judgment, one of which had been levied on slaves which were discharged for want of an indemnifying bond, a *fi. fa.* was returned *nulla bona*. On the one hand Lyle contended that this bond was assigned to him with the understanding that Miller would sign it as surety, and that the proceeds, when collected, and not till then, were to be applied to the payment of the mortgage, and insisted that Miller having refused to sign the bond, Bolling was bound to take it back but refused or failed though required to do so; whereupon he brought suit on the bond &c., but having failed to recover the money, credit should not be given therefor. While on the other hand Bolling contended that the bond was assigned by him to Lyle in part payment of the mortgage, that Lyle's only recourse was upon the assignment, and that he had lost that recourse by want of due diligence. To the last report of the commissioner in the case an exception was taken by the plaintiffs for allowing credit to the executor for the said payment to Lyle, "because (in the language of the exception), that payment is not established, and a suit is now actually pending in the Circuit court of the United States at Richmond, to compel the payment of that very amount from the representatives of Thomas M. Fleming, and, if allowed on this account the estate may be compelled to pay the same twice; and plaintiffs refer to the proceedings in said suit." That suit had been instituted in 1804 to foreclose the mortgage, was then pending, and in it a controversy was then going on about the propriety of a credit for the said bond of William R. Fleming. It would seem that the Court suspended the decision of this case for some time, with a view of ascertaining what would be the decision in that suit in regard to the said credit; for in July 1826, the next 301 term after *the said last report was returned, an entry was made that "the Court not being advised what decree should be rendered in the premises, time is taken until the next term to consider thereof." And the next order which was made in the case was the decree of the 16th of February 1828. When that decree was rendered it had been ascertained that the suit in the Federal court would be dismissed for want of jurisdiction: And in the same month in which the said decree was rendered, and a few days before, to wit, on the 6th of February 1828, Lyle exhibited his bill in the said late Superior court of chancery where this case was then pending, making Bolling the executor, and his sureties, and the heirs of Thomas M. Fleming defendants, giving an account of the case in the Federal court and of the assignment

of William R. Fleming's bond, and the proceedings thereon; and praying a foreclosure of the mortgage, a sale of the mortgaged premises, and payment of the balance due on the mortgage debt out of the proceeds of sale, or by such of the defendants as might be liable therefor. He refers to the bill in this case, states that he had been informed that in an account taken in the case Bolling had improperly claimed and been allowed a credit for the amount of said bond, which said Lyle was ready to shew said Bolling was not entitled to, and prays the Court to suspend rendering any decision on the said credit until the matters contained in said bill could be fully heard and decided on in equity.

In this state of things the decree of the 16th of February 1828 was rendered, and the question recurs did the Court which rendered it contemplate any further judicial action in the case to settle the matters in controversy therein? This Court is of opinion that it did not. The case had been pending about thirteen years. It involved the settlement of old transactions, some of

302 which had been subjects of much controversy; and it *was doubtless desirable, both to the Court and the parties, that the case should be ended; provided it could be ended without detriment to any of the parties, arising from the pretensions of Lyle in regard to the credit for the amount of William R. Fleming's bond. The suit in the Federal court being about to be dismissed; and a new suit having just been commenced by Lyle which might last, as it actually did, some thirteen years longer; the Court seems to have determined to decide this case, and turn the parties over to the suit just brought by Lyle for any further adjustment of their rights and liabilities in regard to the said bond which the result of that suit might render proper. The right of the executor to a credit for the amount of said bond was a question legitimately raised and regularly controverted in the case: being maintained by the executor on the one side, and denied by the legatees on the other. The proper parties were all before the Court. Lyle was neither a necessary nor a proper party to the case. The case was therefore in a situation to be decided, (if it was not the duty of the Court to decide it, if desired by the parties,) without waiting for the decision of Lyle's suit. In deciding it, the Court was of opinion that the executor was entitled to credit for the amount of said bond, and therefore allowed it; the effect of which allowance was to give the executor a decree against the legatees for 463 dollars 95 cents, with interest from the 31st of December 1808. The amount of the credit was 753 dollars 33 cents, with interest from the 7th of April 1806; and if it had been disallowed, the decree would have been the other way for the difference between the two sums, and interest. While however the Court deemed it proper to decide the case, yet, as Lyle was not a party to it, and therefore not bound by the decree, it deemed it also

proper to protect the legatees against the possible consequences of a different decision in Lyle's suit, of the question in 303 *regard to the propriety of the credit for the amount of William R. Fleming's bond. Therefore the suspending order was added to the decree; the object of which seems to have been, not to reserve the question for future decision by the Court in this case, but to prevent the enforcement of the decree until Lyle's suit was decided; and to subject the parties to such directions as might seem proper to the Court in that suit, when it should be decided.

That the Court did not intend to reserve the question in regard to the propriety of said credit for future decision in the case, seems to be manifest from the terms of the decree. By it the Court expressly approved the account of the commissioner containing the credit, disallowed the accounts from which the credit was excluded, ascertained the balance due to the executor, and decreed the payment of the same with costs. This was a plain action of the judicial mind upon this question, between these parties; and seems to be wholly inconsistent with an intention in the same decree to suspend judicial action on the same question. If however the Court intended to say, that while it judicially acted upon the question in this case, and between these parties, it did so without prejudice to any judicial action which might appear to the Court in Lyle's suit to be proper; then the decree is consistent and reasonable in itself. If the Court intended to suspend judicial action on the question, why was any decree made in the case? Or, if there was any advantage in deciding on all the questions in controversy except that in regard to William R. Fleming's bond; why was not the report confirmed as to all other matters, and left open as to that? Or, if the Court intended to decree on the whole matter but reserve to itself the power of reforming the decree on motion, if the decision of Lyle's suit should render such reformation proper; why was not such reservation expressly made in the decree? Whether such

304 *a reservation would have made the decree interlocutory, is a question which need not be considered, as no such reservation is contained in the decree. The object which the Court seems to have had in view could better be attained by rendering a final decree in the case without prejudice to any order that might be proper to be made in Lyle's suit in regard to the single matter of William R. Fleming's bond. By that course old and troublesome transactions would be settled by a decree, which, as the law then was, could not be disturbed after the lapse of three years; while, at the same time, the plaintiffs would be secured against all possible danger by the suspension of the decree until Lyle's suit should be decided. That danger was a remote one to say the most of it. If Lyle should fail in his suit, as the Court when it rendered the decree must have expected he would, and as turned out to be

the case, then there would be an end of the suspension, and the decree in this case might be enforced. If Lyle should succeed, his first recourse would be against Bolling and his sureties, who in that case would undoubtedly be bound in the first place for the amount of William R. Fleming's bond; and, upon payment by them, they would be entitled to enforce the said decree. The only contingency upon which it would be necessary to resort to the plaintiffs in this case, was the success of Lyle in the suit, and the inability of Bolling and his sureties to pay the amount of the recovery. In that double contingency the mortgage would be enforced for the payment of the amount, and the heirs of the mortgagor (the plaintiffs in this case) would be protected by a perpetual injunction of the decree in Bolling's favour, and by a decree over against Bolling and his sureties, to such extent as might be proper. All the parties concerned being before the Court in Lyle's suit, the principles of equity would enable and require it to do justice among them by

305 laying the burden at once on *the right shoulders, or giving one defendant a decree over against another, or by the exercise of its restraining powers, as might seem to be just and proper.

But it is said that the period of suspension was indefinite, and that the Court could not have intended to leave it to the clerk to determine when the suspension was ended, but must have intended to decide that question itself. The period of suspension being capable of being rendered certain, is in effect as definite as if it had been for a given time. And in the event which occurred, to wit: the decision of Lyle's suit against him, it was only necessary to exhibit an official copy of the decision to enable the clerk to issue execution on the decree. That was in point of fact the very course pursued; and the execution was quashed, only because more than a year had elapsed after the decree was rendered, before execution was sued out. On a scire facias afterwards issued, the execution was awarded by the Court. Had Lyle's suit been decided differently, and any occasion had arisen for preventing the execution of the decree in this case, such order would have been made by the Court in that case as would have relieved the clerk from all embarrassment in regard to the propriety of suing out the execution. And even if it had been necessary to refer to the Court the decision of the question, whether the period of suspension was ended, or whether an execution might be issued on the decree, it is not perceived that such necessity would render the decree less final; matter relating only to the execution of the decree.

Again it is said that the decree was treated as interlocutory by the Court and counsel; orders having been afterwards made in the case. The only orders afterwards made in the case were in relation to the transfer of it, at different times, to Courts which succeeded to the late Superior court of chancery of the Richmond dis-

306 trict, *and in 1840 to the Circuit court of Petersburg; and in relation to the payment of the amount of the decree into bank. On the other hand the Court treated the decree as final on the ground assigned for overruling the motion for leave to file a bill of review, and in awarding execution upon the scire facias. But if the decree was in fact final, its character could not be changed by the manner in which it was afterwards treated by the Court.

And again it is said that to treat the decree, under the circumstances of this case, as final, would operate a surprise upon the appellants, and subject them, at the same time, to great and irremediable injury. If this be so, the necessity of so treating the decree must be matter of extreme regret to the Court. But might it not on the other hand be said that to treat the decree as interlocutory, would subject the appellees to at least as great and irremediable injury. The law limiting the right of appeal was intended to remedy a great evil; and to put an end to litigation. The period of limitation, when the decree in this case was rendered, was three years; but has been since extended to five years. More than five times the former, and three times the latter period elapsed after the rendition of the decree, before the appeal was applied for. Had the decree been interlocutory in keeping open a single matter, yet being certainly intended to be final as to all other matters, the appellants could at once have appealed from it; and no good reason appears for their not having done so. Were this Court now to set aside a decree made twenty-five years ago, and require a resettlement of transactions which commenced fifty years ago, which could not be settled without great difficulty when they were comparatively fresh, and the parties and their witnesses alive, and which, now that the parties and witnesses may all be dead and the vouchers lost, could not be expected to be correctly settled at all, great and irremediable injury might be done to the appellees. But it is the duty of

307 *the Court to decide the question of law whether the decree is interlocutory or final, without being influenced by the consequences of the decision, except so far as they may throw light on the question to be decided. And the Court being of opinion that the decree is final, the appeal must therefore be dismissed.

DANIEL, J., dissented.

Appeal dismissed.

Moore v. Moore's Ex'or & als.

October Term, 1851, Richmond.

(Absent CABELL, P.)

Wills—Attestation—Presence of Testator.*—*QUÆRE*: Whether an attestation of a will out of the room

*Wills—Attestation—Presence of Testator.—The principal case was cited in *Sturdivant v. Birchett*, 10 Gratt. 88, 97, 98; *Green v. Crain*, 12 Gratt. 250;

in which the testator is lying, and out of his sight, but in a case in which the testator was able, and might have placed himself in a position to see the witnesses when they signed the paper, is a valid attestation? A Court of four Judges equally divided upon the question.

This was a bill filed in the Circuit Court of King and Queen county, by James E. Moore, to set aside the will of his father Richard Moore deceased, which had been admitted to probat in the County court of that county, in October 1834. An issue devisavit vel non was directed; and upon the trial the jury found a special verdict.

The only question in the cause was as to the attestation of the testamentary
308 paper. It was attested by *three witnesses; and the special verdict finds that the will was written on the day on which it bears date, the 23d of July 1834, at the request and dictation of Richard Moore; and after it was written was read to him, and then read by him carefully; and was then signed by him in the presence of all the attesting witnesses, who were by him requested to sign it as witnesses. That the will was then taken by the witnesses into the passage, and there signed by them in the presence of each other; after which they carried it back and handed it open, with their names subscribed to it, to the testator, who held it a minute or more and looked at it, and then gave it to one of them to be folded up for preservation.

The testator lying in his ordinary position in his bed could not have seen the attesting witnesses sign their names; but he might have seen them if he had got out of bed, or by changing his position in the bed so as to lean over the foot of it; and his state of health and strength was such at the time that he might have got out of bed, or have so changed his position in bed if he had desired to do so: But the testator did not get out of bed nor change his position in the bed so as to lean out at the foot of it.

Upon this special verdict the Court below made a decree establishing the will; whereupon James E. Moore applied to one of the Judges of this Court for an appeal, which was allowed.

R. T. Daniel, for the appellant.

This case turns upon the true meaning of the words "in the presence," in the act of 1823 concerning wills. That act uses the words as to the witnesses to a will "subscribing in his presence," the presence of the testator. The special verdict shews that the will was not signed in the presence of the testator, nor in the room where the testator lay.

309 *The principle established by the cases is, that where the witnesses attest the will out of the room in which the testator is, he must be in such a position as that he has the capacity without changing

Young v. Barner, 27 Gratt. 105. See what is said on this subject in *foot-note* to Sturdivant v. Birchett, 10 Gratt. 67.

The principal case was distinguished in Nock v. Nock, 10 Gratt. 184.

that position, to see the witnesses when they subscribe the paper. The cases on this subject are reviewed in Neal v. Neal, 1 Leigh 6. Although in that case the Judges differed upon the question whether an attestation in the room was in all cases good; they were all of opinion that where an attestation is made out of the room it must be made so that the testator has a capacity to see the witnesses attest without changing his position.

It will be urged that the testator looked at the paper after it was attested. It does not appear that a word was said at that time: And what passed then might have been a publication; but cannot be made a subscription by the witnesses in the presence of the testator. Doe v. Manifold, 1 Maule & Selw. 294.

Griswold, for the appellee.

The counsel for the appellant has taken no distinction between the paper as a will of realty and a will of personalty. The will was admitted to probat in 1834, before our statute requiring attesting witnesses to wills of personalty. Sess. Acts of 1834-5, ch. 6, p. 47; Redford v. Peggy, 6 Rand. 316.

It must be conceded that the statute in relation to wills of real estate, is broad enough in its terms to exclude all wills where the witnesses did not subscribe in the actual presence of the testator: But the Courts have established a constructive presence. The authorities on the subject are cited in Neal v. Neal, 1 Leigh 6. All these authorities concur in declaring that it was the object of the statute to prevent imposition upon the testator. And viewing this as the object of the law, the Courts have gone far to uphold fair wills by giving a liberal construction to the words "in the presence of"

310 *the testator. In the case before us all the objects of the statute have been attained: The witnesses relied upon by the testator have subscribed the paper; and the paper is the very paper which he executed as his will, and requested the witnesses to attest. If therefore this paper is declared not to be the will of the testator, that decision must be based upon some merely technical grounds, to which the declared purposes, objects and wishes of the testator are to fall a sacrifice.

All that the case of Neal v. Neal decided was, that a paper attested in the same room with the testator was prima facie attested in his presence; and if attested out of the room in which the testator was, it was prima facie out of his presence. This was no new law, and yet there are many cases in which it has been held that a will attested out of the room in which the testator was, was valid, upon the principle of a constructive presence. The true principle as held in the English cases, and in Neal v. Neal, is, that if the testator could by his own volition, and without a material change in his position, place the witnesses within range of his vision whilst they were attesting the paper, they were in the contemplation of the statute, in his presence. In this case the testator was able

to change his position at his pleasure without assistance; and by a slight change in his position he might have seen the witnesses whilst they were attesting the will.

These cases of wills stand each upon its own circumstances; and when the circumstances afford the security against imposition intended by the statute, they are to be held sufficient to sustain the will. In the case of *Neal v. Neal*, the Court distinguished between the cases where the testator can change his position himself, and those in which he is unable to do it: And this will explain the seeming conflicts in the opinions of the Judges in that case. When he cannot

311 move himself without help, then he must be able in his then position *to see the witnesses whilst they are attesting the paper: When he can move himself without help, then it is not necessary that he shall be able to see them in the precise position which he then occupies. The Court is referred to 4 Kent's Com. 516; *Davy v. Smith*, 3 Salk. R. 395.

But if the attestation of the witnesses out of the room in which the testator was, was not a subscribing in his presence, the delivery of the will subscribed by the witnesses, open to the testator, and his examination of it in their presence, was equivalent to a signing in his presence. An acknowledgment by a testator that a paper is his will is an acknowledgment that the signature is his. And although the witnesses are required to prove every fact necessary to constitute the paper a will, and signing by a testator is necessary, yet proof by them that the testator acknowledged the paper to be his will, is sufficient proof that he signed it. *Burwell v. Corbin*, 1 Rand. 131. On this point the Court is referred to *Burwell v. Corbin*, 1 Rand. 131; *Dudleys v. Dudleys*, 3 Leigh 436; *Pollock v. Glassell*, 2 Gratt. 439; *Rosser v. Franklin*, 6 Gratt. 1.

R. T. Daniel, in reply.

As to the proposition that this is a good will of personalty, that depends upon the dates.

The counsel on the other side says, in relation to all these cases upon the attestation of wills, that there was an inability of the testator to change his position.—*Griswold*. No. I said that was the distinction taken by the Judges in *Neal v. Neal*.—*Daniel*. In all the cases the whole question was whether the attestation was or was not in the room where the testator was. And when the attestation takes place out of the room, all the cases hold, it must be within the range of the testator's vision. The controversy in *Neal v. Neal* was

312 as to an attestation in the testator's room. *Brooke* *and *Carr, J's*, held that where it was in the same room and there was no suspicion of fraud, it was enough. But where the attestation was out of the room, the question was not whether the testator had power to move himself, but whether the attestation was within the range of his vision. And so is *Winchilsea v. Wauchope*, 3 Cond. Eng. Ch. R. 474.

In *Neal v. Neal* the question was upon the

sufficiency of an attestation in the same room with the testator, when he was so placed that he could not see the witnesses sign, and was not able to turn himself. There was no suspicion of fraud in that case. There was no doubt that the paper contained the true will of the testator; yet a majority of the Court held that it was not attested in the presence of the testator.

Judge Carr, after considering the question really involved in the case, proceeds to refer to another class of cases where the attestation was out of the room; and he says many decided cases held that the attestation in these cases must be within the vision of the testator: And he refers to *Doe v. Manifold*, 1 Maule & Sel. 294. In our case it is admitted that the testator did not see, and could not see, the attestation by the witnesses where he was lying.

But it is said that the presentation of the will by the witnesses after they had signed it, to the testator, and his examination of it, is equivalent to a signing in his presence. The paper was not a will when it was taken from the room, and a thousand acknowledgments by the testator without the attesting witnesses, would not make it his will. It was then no will when it left the room or when it returned, but the mere fact that the testator looked at it when it was presented to him, has had the talismanic effect of making it a will, though not a word passed between the witnesses and the testator on the occasion: They did not say that they had attested it:

313 He did not say the attestation was theirs; *but a mere look is to convert the paper into a will, duly attested in his presence.

DANIEL, J. The writing, the probat of which is contested, is dated the 23d of July 1834, and was ordered to be recorded by the County court of King and Queen, at the October term in the same year. A bill being filed in the Superior court, contesting the probat, an issue was directed, on the trial of which the jury found a special verdict, to the effect, that the said paper writing was written on the day on which it bears date, at the request and dictation of the deceased, and after it was written was read to him, and then read by him carefully; and was then signed by him in the presence of the three subscribing witnesses, who were by him requested to sign it as witnesses; that the will was then taken by the witnesses into the passage and there signed by them in the presence of each other; after which they carried it back and handed it open, with their names subscribed to it, to the testator, who held it a minute or more and looked at it, and then gave it to one of them to be folded up for preservation. That the testator lying in his ordinary position in his bed, could not have seen the attesting witnesses sign their names, but he might have seen them if he had gotten out of bed, or by changing his position in the bed so as to lean out over the foot of the bed, and that his state of health and strength was such at the time that he might have gotten out of bed or have so changed his position in it, if he had desired to do so; but that the testator did

not get out of bed nor change his position in the bed so as to lean out at the foot of it, and that the testator at the time was of sound and disposing mind and memory and of lawful age to make a will.

It is conceded that the paper in question is a good will of personal property, as prior to the passage of the act of the 4th March 314 1835, entitled "An act prescribing *the manner of making wills and testaments of personalty," the attestation by the witnesses was not one of the requisites of the due execution of wills of personals. The only question here is whether it was duly executed as a will of realty; and turns upon the construction of the words of the last clause of the second section of the act of the 17th February 1823, entitled "An act concerning the probat of wills in certain cases." The second section of the act is in these words, "That no last will and testament shall be good and valid to pass any estate, right, title or interest in possession, reversion or remainder, in lands, tenements or hereditaments, or annuities or rents charged upon or issuing out of them, unless such last will and testament be signed by the testator, or testatrix, or by some other person in his or her presence, and by his or her direction, and moreover if not wholly written by himself or herself, be attested by two or more credible witnesses subscribing their names in his or her presence."

The only difference between the language of this section and that of the first section of the act of the 3d March 1819, entitled "An act reducing into one the several acts concerning wills" &c. in regard to the attestation is, that the act of 1823 requires the will to "be attested by two or more credible witnesses subscribing their names in the presence" of the testator, whilst that of 1819 simply requires that it "be attested by two or more credible witnesses in the presence" &c.

The only reported case, in which the meaning to be given to the words "attested in the presence of the testator" has been heretofore directly before this Court for adjudication, is that of *Neal v. Neal*, 1 Leigh 6.

In that case it was proved that the testator who was very weak and not able to rise from his bed or turn himself without assistance, was raised up and placed on the side of his bed, and a small table set by, and the will placed on it; and that the testator sup- 315 ported there, *signed it; after which the table was removed and he placed in his bed; that he was laid with his back to the table on which the will was laid, when two of the attesting witnesses subscribed their names; and that the testator could not see the witnesses attest the will, or the will itself, being unable to turn his face towards them. That the third witness came into the room sometime after this and put his signature, as he said, in a situation where the testator could have seen him; though other witnesses said they thought differently. It was also proved, that before any of the witnesses subscribed, the testator was asked if he acknowledged the paper to be his last will and testament, and if he desired that the witnesses should

respectively attest it; to which questions he answered in the affirmative.

On an appeal from a decision sustaining the will, all the English cases bearing upon the construction of the clause of the statute of 29 Charles 2, (from which our statute of 1819 is taken,) requiring the attestation of the witnesses in the presence of the testator, were cited and reviewed by the Judges of this Court in their opinions. The case it is true was one of a will attested in the same room with the testator, yet the circumstances of the case and the nature of the question not only justified but necessarily called for the declaration of certain rules and definitions equally as controlling in questions arising on attestations out of the room. The construction therefore of the words "in the presence of the testator," drawn by the Court as well from the cases where the attestation was out of the room, as from those in which the attesting witnesses and the testator were, at the time of the attestation, in the same room, carries with it the same weight as a decision when sought to be applied to a case like the one before us, as if it had been pronounced in one of the same class. The true meaning and objects of the requirement of the statute

are, I think, more fully developed in 316 the case just cited *than in any of the English cases on the same subject; and in a recent work, *Modern Probate of Wills*, the opinion of Judge Cabell is referred to as containing one of the best commentaries on the construction of the word "presence" in the statute, to be found. With such views of the character of that case, I do not deem it necessary to repeat here an extended notice of the English decisions preceding it, and shall content myself with citing such portions of the opinions of the Judges as I think particularly applicable to this case, and with endeavouring to shew that the authority of *Neal v. Neal* is not only not impaired, but is fully sustained by decisions of a more recent date.

The object of this requisition (says Judge Cabell in his opinion), is "to enable the testator to see that those who attest the will are the persons in whom he confides, and to prevent a false paper from being surreptitiously imposed on the witnesses." The object of the law will be completely effected, and can only be effected by the testator's being in such a situation in relation to the will and the witnesses that he may, if he will, see from that situation, both the will and the witnesses in the act of attestation. This capacity in the testator is unquestionably the test of presence, in all cases of attestation out of the room in which the testator may be, for all the cases shew, that an attestation out of the room of the testator, is held to be in his presence, if he might see it, and not in his presence if he could not see it. Now, as the reason of the law in requiring an attestation to be in the presence of the testator is precisely the same, whether that attestation be in the same room, or in a different room, the law will apply the same test of presence to both cases. An attestation, therefore, in the same room with the testator, will as in the

case of an attestation in a different room, be held to be in his presence or not in his presence, according to the capacity or want of capacity in the testator to supervise the transaction.

317 *There is however one important difference between an attestation in the same room and one not in the same room with the testator: in the absence of all proof a man is presumed to be able to see what is done in the same room with him, and to be unable to see what is done in a different room. An attestation, therefore, in the same room is *prima facie* good, an attestation in a different room is *prima facie* bad. But this presumption must yield to positive proof. An attestation therefore, out of the room of the testator, but proved to be within the scope of his vision, becomes good as being in his presence; and an attestation in the same room, but proved to be out of the scope of his vision, becomes bad as not being in his presence."

Judge Coalter says that the words and intention of the statute are satisfied only when it is proved "that the testator was so present to the witnesses and they to him as that he might and therefore probably did see the attestation."

Judges Carr and Brooke, who thought that the will had been duly attested, endeavoured to maintain that though the testator was not able to change his position without the aid of others, yet as the attestation was in the same room, and the testator could by his attendants have caused himself at any moment to be turned so as to bring the will and witnesses in full view, and so near to him as to afford him an opportunity to distinguish a false will if such had been substituted, the attestation ought to be held to be virtually in the presence of the testator; that a knowledge on the part of all present that the testator could in an instant cause the transaction to be subjected to the test of his senses, united with the fear which guilt always feels, would give to any party meditating such a fraud, a consciousness so strong of the presence and power of detection of the testator as to furnish substantially those guards intended by the statute.

318 *But a majority of the Court held that this capacity of the testator to cause the relative position of himself and the witnesses to be changed, was of no avail. "A power of that sort (said Judge Cabell) exists in every case: in every case the testator may cause his own situation, or that of the witnesses, to be so changed as that he may see the attestation. Such a power was expressly held to be insufficient in the cases of *Doe v. Manifold*, and *Tod v. The Earl of Winchilsea*.

Judge Coalter in reply to the same view, said, "If the doctrine contended for be tenable, why shall not a will executed in an adjoining room be good, when the testator could direct the table to be set out within his view whereat to attest it? Why not if attested in an obscure corner in the same room, because he might have ordered it to

be done in a part of the room where he could see what was doing. The law is not that it shall be attested in his presence if he thinks it proper to superintend the act himself, otherwise he may trust to the honesty of his friends and the witnesses to see for him that no fraud is done: no; the law requires him to be present himself, body and mind. If he can by turning his eye see what is doing, he will be presumed to have seen it, and no further proof that he did see is necessary; but if interposing walls or other obstructions render it doubtful whether he could see or not, the power to see must be made apparent; as that a door or window was open, (not that it might have been opened if requested,) and that his position in bed was such (not might have been such had he desired to be raised or turned) as that he had it in his power by simply looking on to see."

The reasoning of Judge Green, the other member of the majority of the Court, was to the like effect, and need not be repeated.

In the three cases of *Shires v. Glasscock*, 2 Salk. 688; *Davy v. Smith*, 3 Salk. 395, and *Casso v. Dade*, 1 Bro. Ch. R. 99, (cited in *Neal v. Neal*), in which attestations out of the room were sustained, it was shewn that the witnesses and the testator were so situated in proximity and relation of situations that the testator might have seen the act of attestation. And Judge Carr admitted that all the attempts made to support wills out of the room of the testator, and also out of his sight, had failed; and that in many cases it had been decided that though the signing was in a room contiguous, yet the devise would be void unless the testator was in a position, from which he might if he chose, see the witnesses subscribe without changing his position. The cases of *Eccleston v. Speke*, Carth. 79; *Broderick v. Broderick*, 1 P. Wms. 239; *Machell v. Temple*, 2 Show. 288, and *Doe v. Manifold*, 1 Mau. & Selw. 294, referred to by him and cited by the bar here, are all of that class.

In looking to more recent cases it will be found that the rule has been in no degree relaxed. In the case of *Reynolds v. Reynolds*, 1 Spears' R. 253, decided by the Supreme court of South Carolina in 1843, the witnesses after seeing the testator sign, being ignorant that it was necessary that the testator should see them subscribe, withdrew for convenience to a table in the hall and subscribed their names. It was proved that the testator could not as he lay in his bed have seen them so subscribe. But it was also proved that if he had risen from his posture, and sat on the side anywhere from the centre to the foot of the bed, he might have seen them; and it appeared that he had strength enough to have done so; but it was also proved that he did not alter his recumbent posture at all. It was held that the attestation was not good; that although the testator need not actually see the witnesses sign the will, yet they must have stood in a position to let him see their subscribing; which means that

they must not withdraw themselves from the continued observance of his senses, although *the testator may himself refrain from using such senses; that such discretion is with him, but not for the witnesses to avoid the opportunity of his doing so.

In the case of Edward Colman, 7 Eng. Eccl. R. 392, the will was signed by the deceased in the presence of two witnesses; but subscribed by them in an adjoining room communicating with it by folding doors, which were open, the witnesses being in such a situation, that the testator could not, without a change of position, see them. The motion for probat was rejected. So in the case of Alexander Ellis, 7 Eng. Eccl. R. 150, it was proved that the will was signed by the testator in the presence of the witnesses, who took the paper into another room which communicated with the testator's by two separate doors, both of which were open, and there subscribed it in a situation where the testator could not see the witnesses, nor they him, yet so near to the testator that they could hear him breathe. The Court held that the will was not attested in the presence of the testator, actual or constructive. They said that the case was a hard one, but the law was imperative; and the probat was refused. No case has been cited at the bar, and I have not been able to find one, in which a will attested out of the testator's room and in a situation where the testator could not see the act of attestation, has been sustained. In the case before us it is not only found that the testator could not see the witnesses attest without a change of position, but all inference of such a change of position deducible from the fact that the state of the testator's health and strength admitted of his altering his situation, is cut off by the express finding of the jury that he did not get out of bed nor change his position in it. I cannot therefore perceive on what ground the due attestation of the paper is to be maintained.

321 *It is suggested that such a ground may be discovered in the circumstances which transpired after the witnesses had subscribed. It is difficult to conceive what further validity can be imparted to the paper by those circumstances; which are, as already set forth in the statement of the facts, that after the witnesses signed their names, they carried back the will and handed it open with their names subscribed to it to the testator, who held it a minute or more and looked at it, and then gave it to one of them to be folded up for preservation. It is to be borne in mind that the verdict of the jury is a special one, and therefore there is no room for presumption; and as the circumstances just detailed do not of themselves import a second attestation by the witnesses after their return into the presence of the testator, I cannot perceive that they are of any value in the controversy.

If however it is to be inferred that the testator intended by what he did to approve

of the manner in which the witnesses had discharged the office they had been requested to perform, such inference would, I think, be of no legal weight. In the most of such controversies it might be doubtless shewn that the testator was satisfied with the attestation, as otherwise, he would cause it to be so made as to conform to his views. The mode of attestation is one of the safeguards which the law has enacted for the protection of the testator, and it does not permit him to dispense with it by substituting it by another, however well he may approve of the latter, or however fair and free from all suspicion it may in fact be shewn to be.

All implications and influences favourable to the will, which could in any way be deduced from the conduct of the witnesses and the testator, after the subscribing by the former (supposing that it were allowable to imply facts not found in the verdict) are, I think, fully met by adjudicated cases.

322 *In the case of Edelen v. Hardey's lessee, 7 Har. & John. 63, which was an action of ejectment, the case turned upon the due execution of a will which was offered as evidence on the trial. It appeared that after the testator had signed the will, the witnesses by his request went out of the room into an adjoining room and there signed. After it was so signed by the witnesses, a friend of the testator who had written it, carried it back to the testator and read it to him; informed him that the witnesses had attested it, shewing him at the same time their hand writing, at which the testator nodded his head by way of assent, appeared quite satisfied, and added as witness thought, "well" or "very well." The Court was asked to instruct the jury that this evidence, if believed by them, furnished presumptive proof of a compliance with the requisites of the statute. This instruction the Court refused to give; and on an appeal its refusal was sustained. The case was, I think, a stronger one for the will than the one under consideration.

Even were it considered that the conduct of the witnesses after their return into the room of the testator, implied a reacknowledgment by them of their signatures to the will as witnesses, such reacknowledgment would not, I think, according to the decisions on the subject, cure the defective attestation. In the case of Ragland v. Huntingdon, 1 Iredell R. 561, it was proved by one of the subscribing witnesses that he was requested by the testator to prepare his will according to his instructions, and he did so, and signed his name as a witness before the testator signed, but not in his presence, and then read the will to the testator and told him he had signed as a witness; and the testator approved and executed it; and the other witness then signed in the presence of the testator. It was held not a valid execution of the will—the statute requiring both witnesses to sign in the presence of the testator.

323 *The ninth section of ch. 26, Victoria 1, declares that no will shall be valid unless signed at the end or foot thereof by the testator or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator &c.

In a case arising under this law, *Moore v. King*, 7 Eng. Eccl. R. 429, the Ecclesiastical court held, that though both the witnesses attested and subscribed in the presence of the testator, yet as the law required the witnesses to be present at the same time, that the attesting and subscribing by one of the witnesses on one day and the attesting and subscribing by the other on another day, though the first witness on the latter occasion acknowledged his signature in the presence of the testator and of the other witness, did not fulfil the requirements of the law. The facts as stated were, that the testator signed a codicil in the presence of a witness (his sister). On a subsequent day when his sister and another person were present, he desired her to bring him the codicil, and requested the other person present to attest and subscribe it, saying in the presence of both parties and pointing to his signature, "This is a codicil signed by myself and by my sister as you see; you will oblige me if you will add your signature, two witnesses being necessary." The second witness then subscribed in the presence of the testator and of his sister, the latter who was standing by him pointing to her signature and saying, "there is my signature, you had better place yours underneath;" she however did not resubscribe.

If this case is entitled to respect as authority, it seems to me decisive of the question under discussion, as it is manifest that the only thing causing it to fall short of a literal compliance with the requisitions of *the statute, was the substituting the acknowledgment by the first witness of her signature in the place of a resubscribing.

As before intimated however, I do not deem it necessary to the decision of this case to rely on such decisions, the character of the verdict forbidding, in my opinion, any inferences or implications that make it necessary for those denying the validity of the will to invoke the aid of such authority.

Nor do I think that the decisions in relation to the proof by the witnesses of the signing by the testator, tend in any measure to impair the force of the authorities I have cited. There is no question here as to the execution of the will on the part of the testator, but the case turns on the manner in which the act of attestation has been performed by the witnesses; and the requirements of the law in relation to the two things are of a wholly different character, for whilst it is positive in re-

quiring that the will shall be attested by the witnesses subscribing their names in the presence of the testator, it does not require that the testator shall sign the will or cause it to be signed for him in the presence of the witnesses. The kind or degree of proof by which the fact of signing by the testator or some one for him, is to be established, is not prescribed. No doubt therefore is thrown on the proposition which I have endeavoured to maintain, nor any inconsistency in the opinions of Judges exhibited, by shewing that a long series of decisions commencing at an early period, declare that it is not necessary for the witnesses to see the testator sign, and that the fact of signing may be inferred from his acknowledgment of the instrument to be proved as his will, whilst it is at the same time shewn that a uniform current of decisions emanating from the same tribunals, announce in effect that the witnesses must attest under the immediate supervision of the testator. For these reasons I am

325 of opinion that the will was *not duly attested, and that the sentence of the Court below should be reversed, and that the instrument should be admitted to record as a will of personals and rejected as a will of real estate.

BALDWIN, J. The joint of the objection taken to the probat of this will is, not that the attestation of the subscribing witnesses was made out of the room where the testator was at the time, nor that the testator did not see the witnesses in the act of signing their names to the instrument, nor that he was incapable, either mentally or physically, of observing, understanding and controlling the act which they thus performed: but it is that the position of the testator's body was such at the time that the attestation did not fall within the scope of his vision, and could not without a change of that position, which although he was fully capable of making, he did not in point of fact make. If therefore the objection prevails in this case, it must be fatal to every will in regard to which it occurs, under all conceivable circumstances. We are at liberty therefore to make the case, strong as it is, if possible still stronger. We may suppose that a testator in a perfect state of health both of body and mind, and actively engaged in the pursuits of life, sends for his most confidential friends to attend and witness his will, that he dictates it to one of them who writes it at his side; that he forthwith reads it over, signs and acknowledges it to the witnesses, they sitting or standing around him; that it being more convenient from the condition of the room, or the furniture, or any other cause, they then at his request or by his permission, pass into an adjoining room, through a door between the two rooms, kept wide open during the entire transaction, immediately subscribe their names to the instrument, and instantly return with it to the testator, presenting it to him open and pointing to their signatures with the ink

thereof still wet; that he thereupon
 326 *receives it, carefully inspects it, expresses his approbation, folds it up and puts it away amongst his papers, or deposits it with one of the witnesses for safe keeping; that while the witnesses are signing their names, the testator remains in the room from which they passed, without the slightest impediment to his seeing through the open door every stroke of the pen with which they wrote, except only that he happens at the moment to stand or sit or lie with his back towards the witnesses, instead of his face. Is such a will so made and attested null and void under the provisions of our statute, 1 Rev. Code, p. 365, because the witnesses when in the act of subscribing did not fall within the range of the testator's vision?

The terms of the statute require that if the will be not wholly written by the testator, it shall "be attested by two or more credible witnesses in his presence." It is not prescribed that the testator shall see the witnesses sign, nor is the character of the place of attestation designated: it may be done in a small chamber or a spacious hall, a public street or an open field. The word "presence" is rather indefinite in its signification, but may be somewhat explained by contrasting it with its opposite, "absence." The attestation must not be in the absence of the testator. It is adequate to preventing the mischief of a will being brought already drawn and subscribed with the names of witnesses, and obtaining the testator's signature or acknowledgment in a brief space of time, or of procuring such signature or acknowledgment, and taking it away to be thereafter subscribed by witnesses according to their own convenience or purposes. It may also present some slight impediment to the foisting of a false paper upon the testator or the witnesses about the time of attestation; but it is obvious that there can be no absolute security against such a fraud, which can be best detected by looking to all the circumstances of the transaction; and

327 *it is clear that the legislature did not intend by a rigid formality to impair seriously the testamentary power. And it surely is not competent for the Courts to interpolate words not found in the statute, and by an inexorable adherence to them, defeat fair wills, liable to no suspicion of fraud or malpractice, and so sacrifice the object to be attained, the safe exercise of the testamentary power, to mere slips in matters of form.

It is conceded by every one that it is unnecessary the testator should actually see the witnesses sign, if he could do so from the situation in which he was, by the mere exercise of his volition, and the question is placed upon the narrow ground whether that volition is to be accomplished without a change of place, or position, or posture, in the room where he sits or stands or lies. There is no warrant I think, either in reason or authority for the proposition that subscribing witnesses must be within the

range of the testator's vision from the spot of the room where he is at the time, as he happens to sit or lie or stand, if he is mentally and physically capable of changing his position in his bed or chair or room so as to enable him to see the subscribing witnesses in the adjoining room.

In the present case there is a strong and controlling feature not to be found in any other that I have seen. The will after being signed by the witnesses, was brought by them to the testator, and inspected and identified by him, and their attestation fully approved. This in connection with the other circumstances of the transaction, for which I refer to the special verdict, made the attestation one entire, continuous act, substantially in the testator's presence, and in conformity with the fair interpretation and true spirit of the statute. And the establishment of this will cannot introduce any injurious principle or precedent: whereas its rejection would, as I conceive, tend to such a result.

328 *ALLEN, J. The facts found by the special verdict raise the question whether the will was so subscribed by the attesting witnesses in the presence of the testator as to constitute a valid will of realty under the statute. The cases in the English courts in reference to the subject are fully examined and commented on by Judge Carr in the case of Neal v. Neal, 1 Leigh 6, and the result to be deduced from them is that an attestation in the same room is prima facie good, and that an attestation out of the room is prima facie bad; but that in the latter case such attestation becomes good if shewn to be within the scope of the testator's vision. In the latter proposition all the Judges of this Court concurred. The statute intended to protect the testator from witnesses in whom he did not confide, and to prevent a false paper from being fraudulently imposed upon him and the witnesses: and hence the necessity of such a presence as will give him a control over the attestation during the whole progress of the transaction. Where they are in the same room they are mutually present, and if the testator has the capacity by his own unaided power to see what is transpiring, he has the control over the attestation which the statute designed to give him. He may not choose to overlook the transaction, but the power to do so at any instant is a sufficient security against fraud, and constitutes such a presence as conforms to the requisitions of the statute as construed by the Courts.

But where the attestation is not in the same room, sight comes in place of the mutual presence in the same room. If without a material change of position the attestation comes within the scope of his vision, if by the exercise of his own volition he may in his then position see what is passing at any instant of time the act is in progress, the attestation is in his presence though he may not in fact see it. The knowledge of

the fact that he has the capacity to
 329 overlook the transaction, *gives him

the same control over the attestation which is afforded by mutual presence in the same room. It is found in this case by the jury that the testator lying in his ordinary position in his bed could not have seen the attesting witnesses sign their names, the witnesses having carried the will out of the room into a passage and there subscribed it; but that he might have seen them if he had got out of his bed, or by changing his position so as to lean out over the foot of the bed, and that he had the physical capacity to have done either if he had so desired; but that he did neither.

I have found no case, and we have been referred to none, in which the question turned upon the physical capacity of the testator to have followed the witnesses, where the attestation was out of the room, or to have materially changed his position in his room so as to bring the subscribing witnesses within the scope of his vision during the attestation. If such enquiry were proper, then it would follow that an attestation, no matter where made, would have been sufficient, provided the testator had the capacity to supervise it if he desired to do so. This would be to substitute the confidence of the testator in the witnesses and friends about him for the actual presence and control provided by the statute.

If the will in this case had been attested in the same room in the presence of the testator, it would have been a valid instrument, for it had been signed and published as his last will, and nothing was wanting to its completion but a legal attestation. No subsequent inspection or recognition was required to add to its legal effect. But how would it have been if the attestation having been made in the manner disclosed by this record, one of the witnesses by the previous request of the testator, or of his own accord, had folded it up and placed it away in the testator's desk or taken charge of it himself? Would it be main-

330 tained that a paper so *attested out of the room and out of his sight could be sustained as conforming to the law? If not, then it must be conceded that the attestation here alone would not have sufficed to give validity to the instrument; something must be superadded, or substituted rather, in the place of a regular attestation. This would be adding a new term to the statute, and declaring in effect that the will should either be attested in his presence, or if not, that the witnesses after subscribing their names should exhibit the will so subscribed to the testator and acknowledge their signatures. It is unnecessary to enquire whether such a provision would have furnished as great a security against the imposition of a surreptitious paper on a man in extremis, as the actual safeguards thrown around him by the statute. It is sufficient to say that the law contains no such provision, and it is the province of this Court to declare what the law is, and not to enact new laws.

Our statute of wills, so far as respects at-

testation, was copied from the statute of 29 Charles 2, and it is a well established principle, that where an English statute is copied the decisions of the Courts at Westminster may be considered as having been adopted with the text they expounded.

The case of Eccleston v. Speke or Petty, Carthew 79, occurred in 1st William and Mary, not very long after the passage of the English statute. In that case the testatrix signed the will in the presence of the subscribing witnesses in her bed chamber, the witnesses subscribed it in a hall, and it appeared that it was not possible to see from her chamber what the witnesses did at the table in the hall. The testatrix continued in her chamber all the time they were subscribing. And it was held that the attestation did not conform to the statute. Nothing was said as to the physical power of the testatrix to have left her chamber.

The case established that not being in 331 her chamber where she could *have seen if she had chosen, and being out of her chamber and without the scope of her vision, the attestation was invalid. This has been recognized as the leading case on this point, giving a construction to the statute soon after its enactment, and so far as I have seen, has never been controverted by any subsequent case in the English courts or the courts of the different states. The principal of the case was distinctly recognized by all the Judges of this Court in Neal v. Neal, and it seems to me is conclusive against the attestation in this case, if the case is to be decided upon the regularity of the attestation alone, as I think it must be. The facts found that the witnesses after subscribing their names in the passage, carried it back and handed it open with their names subscribed to it to the testator, who held it a minute or more and looked at it, and then gave it to one of the witnesses to be folded up for preservation, whilst they furnish a moral certainty that no fraud or imposition was practised on the testator, do not amount to an attestation in his presence, the only security against fraud which will satisfy the requisitions of the law. A will not wholly in the hand writing of the testator may be acknowledged in the most solemn form before any number of witnesses, and under circumstances excluding the possibility of fraud, yet the law presumes it fraudulent, and in the language of one of the Judges in Neal v. Neal, no proof of actual fairness can avail to supply the requisites of the statute.

The will being dated, and the testator having died before the passage of the act of March 4, 1835, Sess. Acts 43, requiring the same kind of proof as to wills of personalty that was requisite to the validity of a devise of realty, I think the facts found are sufficient to authorize its admission to probat as a will of personalty, Redford v. Peggy, 6 Rand. 316, and am therefore of opinion that the sentence 332 so far as it admits it to probat *as a will of personalty should be affirmed,

and reversed so far as it was admitted to probat as a devise of realty.

MONCURE, J., thought the will attested in the presence of the testator within the meaning of the statute; and concurred fully with Judge Baldwin.

Glazebrook's Adm'r v. Ragland's Adm'r.

October Term, 1851, Richmond.

(Absent CABELL, P.)

Deed of Trust—Unrecorded*—Case at Bar.—A deed of trust by husband in favour of himself and wife was not duly recorded; but the land was sold by the trustee under a decree of the Court in a friendly suit by the *cestuis que trust* against the trustee, and conveyed to the purchaser by deed duly recorded. Years afterwards, but before all the purchase money was paid, the purchaser became the surety of the husband in a forthcoming bond, and was compelled to pay the money. In an action on the bond for the purchase money by the trustee against the administratrix of the purchaser, she pleaded as a set-off the debt paid by the purchaser as surety of the husband.

Held:

1st. Same—Same—Validity.—That though the trust deed was not duly recorded, yet under the circumstances it was valid; and neither the land nor the purchase money was liable for the husband's debts.

2d. Same—Same—Same—Set-Off—Joint and Several Demand.—The deed of trust being valid the interest of the husband in the trust subject is a joint interest, and therefore cannot be set off by a debt due from himself.

This was an action of debt brought originally in the County court of Hanover in the year 1825, by John Glazebrook against Sarah Ragland administratrix of Absalom Ragland deceased. The facts of the case were as follows:

333 *In the year 1807 Oliver Cross executed to Doswell and Day trustees, a deed conveying to them a tract of land in the county of Hanover and other property, in trust, to sell the land, and out of the proceeds to pay a moiety to said Oliver Cross, and with the other moiety to purchase other land for the use of Sarah, wife of Oliver Cross, during her widowhood, or dispose of the money as they may think most advantageous, paying her the interest on such moiety, if not appropriated to the purchase of land; and at the death of said Sarah, or her marriage, the land or money

to be divided among the children of Oliver and Sarah Cross. The deed was made expressly "to secure to the children and their heirs a fee simple estate, and also to provide for his wife a competent and decent maintenance during her widowhood."

The deed was proved in Hanover County court on the 27th of May and the 26th of August 1807, by the oaths of two witnesses as to the grantor, and on the said 27th of May was acknowledged in Court by the trustees.

On the 28th of February 1811, friendly proceedings were had between Oliver Cross and Sarah his wife, and James Doswell as trustee, (Day being dead,) whereby John Glazebrook was substituted as trustee in lieu of Doswell, and empowered and directed by the decree then pronounced, "to sell and convey the title" of the land embraced in said trust deed, and to report to the Court.

Under authority of this decree Glazebrook sold the land, and Absalom Ragland (the intestate of the defendant) purchased it, and executed for the purchase money a bond for £546, conditioned to pay £273 on demand to "John Glazebrook, acting as trustee under a decree of the worshipful Court of Hanover, bearing date the 28th day of February 1811, in the room of James

334 Doswell, for selling lands belonging to Oliver *Cross and Sarah Cross his wife." This bond bears date 11th January 1812. And the trustee conveyed the land to the purchaser the same day.

By an endorsement on the bond, John Darracott, substituted as trustee for Glazebrook, appears to have credited a payment of 990 dollars, as of the 24th of July 1823. When that substitution took place does not appear.

On the 7th of February 1825, the present suit (an action of debt) was instituted on the said bond in the name of Glazebrook, the substituted trustee, "for the benefit of John Darracott, the present trustee," against Sarah Ragland, administratrix of Absalom Ragland. The suit in its progress was revived in the name of William L. White as administrator of Glazebrook, for the benefit of the administrator of the trustee Darracott, and of John B. Timberlake as administrator of Ragland.

The defendant Timberlake, at a Court held for the county of Hanover on the 24th of October 1832, and continued to the 27th of that month, withdrew the plea of "payment" previously filed, and upon which the cause had been once ineffectually tried, and as the record states, "thereupon he further pleads payment, no assets, and fully administered, and files a set-off to the plaintiff's demand in this suit."

On the 25th of July 1838, the cause was transferred from the County to the Circuit court of Hanover. None of the pleas were in writing, nor appeared in any other form than the above entry by the clerk; nor was any issue ever joined on any of the pleas.

The cause was tried on the 11th of April 1845, and a verdict was found for the plaintiff for the sum of 34 dollars 67 cents, with

***Deed of Trust—Unrecorded—Effect as between Parties.**—In *Re Wynne*, 30 Fed. Cas. 756, it is said that an unrecorded deed is perfectly valid and effectual as between the parties citing *Glazebrook v. Ragland*, 8 Gratt. 332; *McClure v. Thistle*, 2 Gratt. 182; *Johnston v. Slater*, 11 Gratt. 321. Also, it is said even the recitals in an unrecorded deed are evidence against the grantors and all claiming under them, citing *Wiley v. Givens*, 6 Gratt. 277. See *Campbell v. Nonpareil F. B. & K. Co.*, 75 Va. 294, where dictum of the principal case is criticised.

interest from the 24th of July 1823; the recovery being thus reduced by the admission of an offset, to the admission of which by the Court the plaintiff filed two exceptions.

335 *By the first exception it appears that after the plaintiff had given in evidence the bond on which the suit was brought, the defendant introduced and offered as an offset to the plaintiff's demand, a copy of a judgment in the name of Joel Cross, executor of Joseph Cross, against Oliver Cross and Absalom Ragland, defendant's intestate, rendered in Hanover County court on the 22d of May 1816, upon a motion for a judgment on a forthcoming bond for £295. 2. 6., to be discharged by £147. 11. 3., with interest from the 20th of March 1816, and the costs, with a statement endorsed of the amount due, (503 dollars 75 cents,) interest being calculated in said statement up to the 1st of August 1816; and also an endorsement thereon, signed "C. P. Goodall," to the effect that "the within judgment was for the benefit of the within named A. Ragland, he having paid me the same;" but that said Goodall "was not to be liable in any respect for the amount thereof, should the within Oliver Cross prove insolvent." To the introduction of which as an offset, the plaintiff objected. But the defendant stated he intended to follow up that evidence with proof that Absalom Ragland paid the money to Goodall (who had authority to receive it) as security for Oliver Cross; that the said bond was given by him for the purchase of the land embraced in the deed aforesaid from Oliver Cross to Day and Doswell; that the deed was irregularly recorded, not being proved by the requisite number of witnesses, and was for that reason void as to the creditors of Oliver Cross. Whereupon, "the Court being of opinion, upon the case stated, that the deed from Oliver Cross to Doswell and Day, not having been recorded, passed no title as against Joseph Cross's executor, and constituted no barrier to the recovery of the debt due to him out of the fund thereby conveyed; that Glazebrook should be considered, as regards the creditors of Oliver Cross, as a mere trustee for him; that A. Ragland is

336 entitled to *be substituted to all the rights of Joseph Cross's executor, and is therefore entitled to set off the debt which he has paid for Oliver Cross against the demand here asserted;" admitted the said copy and endorsement to go to the jury as evidence, should the defendant exhibit to the jury the proof with which he proposed to support the offer of said copy and endorsement.

By the second exception it appears, that the defendant "did support his offer of said copy and endorsement," by the proof "that the defendant Absalom Ragland did, on the 1st of August 1816, pay as security for Oliver Cross, on said judgment in favour of Joseph Cross's executor, the sum of 503 dollars 75 cents, which is the amount of the set off so insisted on by the defend-

ant." Whereupon the plaintiff objected to said set off, that it was barred by the statute of limitations, and should not be allowed for that reason; and moreover that if it appeared to be due more than five years before the death of Glazebrook, the plaintiff, it should be disregarded; and asked the Court so to instruct the jury. But the Court being of opinion that Ragland was substituted to the rights of Cross's executor as a judgment creditor of his principal Oliver Cross, and for that reason, and because the said claim had been relied on as an offset in this cause before the judgment was barred, the said offset is not barred by the statute.

The Court having entered up a judgment according to the verdict, the plaintiff applied to this Court for a writ for error, which was allowed.

R. T. Daniel, for the appellant.
Lyons, for the appellee.

MONCURE, J. I concur in the results of Judge Baldwin's opinion in this case, and in much of his reasoning; but as I am not prepared to assent to or dissent from some of the views expressed by him, it
337 may be proper *that I should give the reasons which have led me to the same results to which he has arrived.

In 1807 Oliver Cross conveyed 600 acres of land and certain slaves to Doswell and Day, in trust for the benefit of himself and his wife and children. In the same year the deed was acknowledged by and recorded as to the trustees, and was proved by two witnesses as to the grantor, but never having been further proved, though there were four subscribing witnesses to the deed, it was never recorded as to him. In 1811 Day the acting trustee having died, and Doswell being unwilling to act, a suit in chancery was brought by Cross and wife to have a trustee substituted and the trusts of the deed carried into execution; and a decree was accordingly made substituting Glazebrook as trustee and authorizing him to sell and convey the land, and further to act in all respects as trustee under the deed. In 1812 Glazebrook acting as trustee under the said decree sold 277½ acres of the said land by metes and bounds to Ragland, who executed his bond for the purchase money, payable on demand, to said Glazebrook as trustee aforesaid. The decree was particularly referred to both in the deed to Ragland and in his bond; and the deed was duly recorded. In 1816 Ragland became the surety of Oliver Cross in a forthcoming bond to Joseph Cross, on which a judgment was obtained, which was paid by Ragland. In 1825 suit was brought in the name of Glazebrook for the benefit of Daracott, (who it seems had been substituted as trustee in Glazebrook's place,) against Ragland's administratrix, upon Ragland's bond for the purchase money of the land bought by him as aforesaid. In 1832 the claim of Ragland for the payment made by him of the judgment on the forthcom-

ing bond aforesaid, was filed by his administratrix as a set-off to the plaintiff's demand. In 1845 the suit was tried, and the Circuit court being of opinion that the deed from Oliver Cross to Doswell *and Day, not having been recorded, passed no title as against Joseph Cross's executor, and constituted no barrier to the recovery of the debt due to him out of the fund thereby conveyed; that Glazebrook should be considered, as against the creditors of Oliver Cross, as a mere trustee for him; that Ragland was entitled to be substituted to all the rights of Joseph Cross's executor, and was therefore entitled to set off the debt which he had paid for Oliver Cross against the demand asserted by the plaintiff in the suit, admitted the evidence offered by the defendant of the said set-off, which was thereupon allowed by the jury, and verdict and judgment were rendered for the balance of the plaintiff's demand, after deducting the amount of said set-off. Was the set-off a good one? is the question now to be considered.

It is not necessary to consider in this case, whether to an action brought by a trustee, a set-off may be made of money due from the cestui que trust; or whether the law on this subject was correctly expounded in the cases of *Bottomley v. Brook*, and *Rudge v. Birch*, cited in *Babington on Set-off*, p. 60. It will be admitted by all, that debts which are not mutual cannot be set off at law; nor in equity, without special reason for so doing. If Oliver Cross had any interest in the bond to Glazebrook as trustee, it seems to have been an interest in common with his wife and children. Had the bond been payable to the cestuis que trust, instead of the trustee; to Oliver Cross, and his wife and children, instead of to Glazebrook; money paid by Ragland on account of Oliver Cross alone, could not have been set off in a suit at law upon the bond. A fortiori the set-off is inadmissible, the bond being payable to the trustee. The same objection of want of mutuality exists in the latter as in the former case; besides which a question arises in the latter but not in the former, to wit, the question above mentioned, "whether
339 to an action *brought by a trustee, a set-off may be made of money due to the cestui que trust?"

But the opinion of the Court below does not controvert the proposition that debts which are not mutual cannot be set off against each other. On the contrary, it proceeds upon the supposition that the debts in this case are mutual; that the deed from Oliver Cross to Doswell and Day, not having been recorded, passed no title as against the creditors of said Oliver; that Glazebrook should be considered as against said creditors, as a mere trustee for said Oliver; and that Ragland was entitled to be substituted to all the rights of Joseph Cross, a judgment creditor of said Oliver, and to set off the judgment paid by him against the demand of the plaintiff.

If it were true that Joseph Cross was en-

titled to have the amount of his judgment against Oliver Cross paid out of the purchase money due by Ragland, without regard to any rights or interests of the wife and children of Oliver Cross, under the deed of trust of 1807, then it would follow that Ragland, having paid the judgment as surety, would have a right to be substituted to all the rights of Joseph Cross the judgment creditor. But was Joseph Cross so entitled? I think not. The deed of trust of 1807 is not impeached as fraudulent or voluntary, and therefore void as to creditors. It does not appear that Joseph Cross was a creditor, or that there were any creditors of Oliver Cross when that deed was executed. It is assailed solely on the ground that it was never recorded. But though unrecorded it was good against the grantor and his heirs; and good against his creditors also until judgments were obtained by them. The judgment of Joseph Cross was not obtained until nine years after the execution of the deed of trust; nor until Ragland had become a purchaser of the land under a decree of a Court of chancery, received his deed, had it recorded, and been four years in possession of
340 the *land. Under these circumstances I think the judgment was a lien or charge neither upon the land nor upon the purchase money; and that the cestuis que trust under the deed of 1807 are entitled to receive and hold the said purchase money against any claim of Joseph Cross founded on the said judgment, and of course against any claim of Ragland to stand in his place; except that to the extent of any interest of Oliver Cross in the said purchase money, a Court of equity may, for special reasons, afford relief, as it might in any case in which it is sought to set off a several against a joint demand. I regard the institution of the suit in chancery for the appointment of a trustee and the execution of the trust; the rendition of the decree in that suit; and the sale and conveyances under the decree, and the recordation of such conveyance; as equivalent to the recordation of the deed of trust; and I think the cases of *Childers v. Smith*, *Gilm.* 196, and *Dabney v. Kennedy*, 7 Gratt. 317, fully sustain this view of the case.

It is not pretended that the land itself is bound by the lien of Joseph Cross's judgment; but it is insisted that the purchase money yet remaining in the hands of Ragland is bound in place of the land. The purchase money was payable on demand four years before the judgment was obtained. If it had been actually paid before the judgment was obtained, it would hardly be contended that it would have been bound by the judgment, in the hands of the cestuis que trust. And yet it is not perceived how the default of the purchaser in not paying the purchase money until after the judgment was obtained, could give any right to the judgment creditor, or take any away from the cestuis que trust. If such default could have the effect of giving any

right to the judgment creditor, it would seem that the loss should fall on him who committed the default; and that the lien of the judgment should operate on the land rather than the purchase money.

341 *If the land could be considered as bound in the hands of the purchaser, for the judgment of Joseph Cross, Ragland could not, I think, claim to have it paid out of the purchase money; first, because he bought with notice that the deed was unrecorded, and might have protected himself by having it recorded at any time before the judgment was obtained. When he bought, the title was perfect, and it became imperfect, if at all, only by his suffering the deed to remain unrecorded until after Joseph Cross had obtained his judgment. And secondly, because Ragland purchased with special warranty only, and the covenants contained in the deed to him do not extend to the incumbrance of the judgment.

I think therefore that the evidence of the set-off was improperly admitted; and being of that opinion it is unnecessary to consider the other questions presented by the record.

BALDWIN, J. It appears that a set off was claimed at the trial for a sum of money paid by Ragland, the defendant's intestate, in discharge of a judgment on a forthcoming bond in which he was surety for Oliver Cross, on the ground that the bond on which the action is founded was executed to Glazebrook, the plaintiff's intestate, in trust to secure a debt due to the said Cross: And in proof of these facts, evidence was introduced of a deed of trust made in the year 1807 by Cross, conveying a tract of land and other property to trustees, in trust to sell the land, and out of the proceeds pay a moiety to Cross, and with the other moiety to purchase other land for the separate use of Sarah, the wife of Cross, or dispose of the money as the trustees should deem most advantageous, paying her interest on her moiety of the money if not appropriated to the purchase of land; and on the death or future marriage of said Sarah, her moiety of the money, or the land therewith purchased, to be divided amongst the

342 *children of the said Oliver and Sarah Cross; and it was proved that in the year 1812, a sale was made by Glazebrook, as substituted trustee, under the trust deed, of part of the land thereby conveyed, and Ragland becoming the purchaser he executed the bond on which the action is founded to Glazebrook, and received from him a deed of conveyance. The set off so claimed was objected to by the defendant, but allowed by permission of the Court.

I can perceive no sound objection where an action is brought on a bond or note executed to the plaintiff to secure a debt due to another, to allowing the defendant to prove payment to, or a good set off against, the person so beneficially entitled. But such a set off must be governed by the rules in regard to mutuality prevailing at law, and for the most part in equity, which in-

hibit the set off of a joint against a separate, or a separate against a joint debt. And in this case it does not appear that Oliver Cross was entitled to the whole proceeds of the sale under the deed of trust; and to ascertain whether the fact be so would require a settlement of the trust subject and transactions by means of a suit in equity, to which all the cestuis que trust would be necessary parties. To obviate this objection it is contended on the part of the appellee that the deed of trust, which was not admitted to record, was therefore void as against Ragland, who became a subsequent creditor of Oliver Cross, the grantor, by the payment in the year 1816 of the judgment on the forthcoming bond. And this presents the question, whether the provision in our registry law declaring deeds of trust and mortgages not duly recorded void as to creditors and subsequent purchasers without notice, is applicable to a case such as the one before us.

It might be proper to consider here whether it is competent for Ragland, he having purchased under the trust deed, to impeach in his character of creditor 343 the *title which he holds and enjoys in his character of purchaser. But waiving that enquiry as unnecessary in this case, let us proceed to the question above stated, as it concerns the creditors in general of Oliver Cross. And in considering that question, we must first ascertain what purchasers are contemplated by the statute; for if a purchaser under and by force of an unrecorded deed of trust acquires a perfect title, then he holds the property subject only to his own debts, and not to those of any other person.

The statute, 1 Rev. Code, p. 362, § 4, provides that all bargains, sales and other conveyances whatsoever, of any lands, and all deeds of trust and mortgages, shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged or proved and lodged with the clerk to be recorded, &c.

Now this enactment does not embrace purchases under and by force of the very deed from which they derive their title. It is directed against purchasers subsequent to the deed required to be recorded, who acquire their right or title from some other instrument, for example, a subsequent deed from the same grantor. This is manifest in regard to a purchaser by an absolute deed: he is not in reference thereto a subsequent purchaser, and it would be absurd to talk of his having or not having notice of his own deed. It is equally true in regard to a purchaser under and by virtue of a mortgage or deed of trust: he cannot be considered a subsequent purchaser in reference to that deed, and it would be idle to discriminate in reference to him between purchasers with and without notice. He always has notice of the deed under and by the authority of which he purchases. It will be seen at a glance that the notice spoken of by the statute is not of the fact

that the deed is unrecorded but of the deed itself, in reference to a title subsequently acquired, and which *could not have been good if the prior deed against which the second purchaser claims had been duly recorded.

It is true that the terms of the statute, and its spirit too, embrace unrecorded deeds of trust and mortgages while they continue incumbrances, while they remain executory, but not after they have ceased to be incumbrances; not after they have been executed and extinguished by a sale or foreclosure, and a conveyance of the title to the purchaser. While they continue executory, they may be successfully impeached or resisted by creditors of the grantor, whether prior or subsequent, with or without notice, or by subsequent purchasers without notice, but not afterwards by creditors who had acquired no specific lien or incumbrance, nor by purchasers from the grantor, after he by himself, or his trustee, or judicial authority, had become denuded of all title.

A man however much embarrassed with debt may make a fair sale of his property, and convey a good title thereto beyond the reach of his creditors; and so long as he can do this by himself, he may do it by his agent, (and his trustee authorized to sell is his agent,) and the power or authority to his agent need not be recorded. A mortgagee or cestui que trust for value is a creditor, and the deed though unrecorded being good between the parties, is only void in the preference which it gives over other creditors; and the title therefore passes, subject to the priorities which they may gain by a due course of proceeding. But the law does not shove the mortgagee or cestui que trust aside, and place the creditors at large in his seat. The latter may never assert their demands, and while they choose to lie dormant, the incumbrancer is not bound to sleep also. The deed being good between the parties, they may proceed to enforce it, otherwise it would be good for nothing. If the creditors at large

345 ever come, they *must come in time, and not after the property has been sold under the authority of the deed to a bona fide purchaser, who has paid his money and received his title, and thereby extinguished quoad that property, the incumbrancer on the one hand, and the creditors at large on the other. The property is thenceforth his, and he may defy them all. In this case, it is true, the whole of the purchase money has not been paid by Ragland the purchaser under the trust deed, and this action is brought to recover the balance due, but as already shewn it does not appear that Oliver Cross is exclusively entitled to it.

The payment above mentioned by Ragland in 1816, of the judgment against him and Cross on the forthcoming bond, in which Cross was the principal and he was the surety, thereby created a simple contract debt from Cross to Ragland, recoverable in assumpsit, which was barred when this action was brought in 1825 on Rag-

land's bond to Glazebrook; and so, for that reason also, was not a good setoff against that bond. Ragland by that payment did not acquire the right of being substituted at law to the judgment creditor. The doctrine of substitution is the mere creature of equity, and if introduced into the Courts of common law, must carry with it the marshalling of assets, and other kindred doctrines, and so tend to a confusion of jurisdictions. Of these subtle and pervading equities, the common law is ignorant. They have been devised by Courts of equity for their own purposes of justice, and are administered by means of their own peculiar powers, by which all parties in interest may be convened before them, all matters of account and trust adjusted, and new life infused into extinguished securities. To such purposes and means the common law forum, by reason of its forms, its technicalities and its modes of trial, is but ill adapted.

346 *These views of the merits dispense with the necessity of considering the formal errors assigned by the plaintiff in error.

It seems to me therefore, that the Circuit court erred in permitting the evidence of set off in the bills of exception mentioned to go to the jury; and that its judgment is therefore erroneous.

ALLEN, J., concurred in the opinion of Judge Moncure.

DANIEL, J., concurred in the opinion of Judge Baldwin.

Judgment reversed.

Nowlin & Wife v. Winfree.

January Term, 1852, Richmond.

(Absent CABELL, P.)

Wills—Construction—Estate Tail—Effect of Statute *

Prior to 1819, a testator devises to his three daughters by name his estate "both real and personal." "to them and their heirs lawfully begotten of their bodies." "And in case either of my daughters should die without heir or heirs as above mentioned, the surviving ones to enjoy their equal part." This is an estate tail, which by the statute is converted into a fee. And the limitation over is after an indefinite failure of issue, and void.

This was an action of detinue brought in 1845 in the Circuit court of Halifax county, by Hopkins Nowlin and Cloe Irby his wife, against Matthew Winfree, to recover a number of slaves. On the trial the jury *found a special verdict which presented the case as follows:

Benjamin Hall died in the year 1803, leaving a will which was duly admitted to probat in the County court of Halifax.

*Wills—Estate Tail—Effect of Statute.—For cases similar to the principal case, see *Bells v. Gillespie*, 5 Rand. 273; *Broadus v. Turner*, 5 Rand. 308.

See further, on this subject, cases collected in footnote to *Callis v. Kemp*, 11 Gratt. 78.

After directing his debts to be paid, and giving to his wife for her life certain real estate, slaves and other property, he gave to each of his three sons by separate clauses of his will certain parts of his estate, in fee, including in the gift to one of them the land given to his wife for life; and he declared that they were not to have any further interest in his estate. Then comes the two following clauses:

"I give and bequeath to my three daughters, to wit: Caty Miller, Sally Hall and Cloe Irby Hall, all that part of my estate not hereinbefore mentioned, both real and personal, after the payment of my debts before mentioned, to them and their heirs lawfully begotten of their bodies: The above mentioned Caty Miller to account for all that part of my estate which she hath heretofore had in possession when a division is made."

"Also it is my will and desire that all that part of my estate which I have lent to my wife, and not herein otherwise given, should after her death be divided as above mentioned; and in case either of my daughters should die without heir or heirs as above mentioned, the surviving ones to enjoy their equal part."

Of the three daughters of the testator, Caty Miller died first, leaving children. Sally Hall married the defendant Winfree, and died before the institution of this suit, leaving no child or other descendant; and Cloe Irby married the plaintiff Nowlin, and is yet living. The slaves claimed in the action are either the slaves received by Mrs. Winfree from her father's estate or their descendants.

Upon the special verdict the Court rendered a judgment for the defendant. Whereupon the plaintiffs applied to this Court for a supersedeas, which was granted.

348 *The cause was elaborately argued by Stanard and Bouldin, for the appellants, and Robinson, for the appellee; but the authorities have been given in two late cases; and the question has almost ceased to be of any practical importance.

ALLEN, J., delivered the opinion of the Court.

The question presented by the special verdict as to the proper construction of the will of Benjamin Hall deceased, has been frequently under consideration in this Court. The case of *Bells v. Gillespie*, 5 Rand. 273, presented precisely the same question, and the principle there settled rules this case. That case conformed to the earlier decisions of this Court, giving a construction to the laws docking entails; and it has been recognized and followed in the subsequent cases of *Broadus & wife v. Turner*, 5 Rand. 308; *Griffith v. Thomson*, 1 Leigh 321; *Callava v. Pope*, 3 Leigh 103; and *Deane v. Hansford*, 9 Leigh 253. The principle thus firmly established by a series of adjudications has become a rule of property in the construction of wills made prior to 1819, and ought not now to be questioned,

the more especially as but few cases are likely to occur hereafter in which the question can arise. According to these authorities the will in this case created an estate tail in the first taker by express words; and the bequest over after the death of the daughter without heirs, was an executory limitation after an indefinite failure of issue, and therefore void, and the daughters took the slaves in absolute property.

Judgment affirmed with costs.

BALDWIN, J., dissented.

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*Lenows v. Lenow.

January Term, 1852, Richmond.

(Absent CABELL, P.)

Foreign Attachment—Failure of One Defendant to Appear—Joint Decree.—A proceeding by foreign attachment is instituted against two persons, as jointly indebted to the plaintiff. One of them appears and answers the bill; but the other is regularly proceeded against as an absent debtor, and there is a joint decree against both defendants. **HELD:**

1st. **Same—Same—Same—Appeal.***—That the absent defendant who did not appear, cannot appeal

2d. **Same—Same—Same—Same.†**—But the decree being a joint decree, and being erroneous, the appellate Court will, upon the appeal of the absent defendant who did appear and answer, reverse the decree as to both.

This was a case of foreign attachment brought in the Circuit court of Southampton county, by Jacob Lenow against Joseph and James Lenow as absent debtors, and Frances Lenow as a home defendant having effects of Joseph Lenow in her hands. The bill charged that Joseph and James Lenow were indebted to the plaintiff by a bond in which they were both bound for

***Decree against Nonresident Defendant—Appeal.**—A nonresident defendant, against whom a decree has been rendered upon publication, and who did not appear in the court below, cannot in the first instance appeal from such decree. His only remedy is that provided by statute. See principal case cited for this proposition in *Grinnan v. Edwards*, 5 W. Va. 114; *Vance v. Snyder*, 6 W. Va. 33; *Meadows v. Justice*, 6 W. Va. 199; *Handy v. Scott*, 26 W. Va. 718. See, in accord, *Platt v. Howland*, 10 Leigh 507; *Barbee v. Pannill*, 6 Gratt. 442.

†**Appeal—Parties Standing on the Same Right—Effect on Parties Not Appealing.**—To the point that, where the parties appealing, and the parties not appealing, stand upon the same ground, and their rights are involved in the same question, and equally affected by the same decree or judgment, the appellate court will consider the whole case and settle the rights of parties not appealing as well as those who bring their case up by appeal, the principal case was cited in *Walker v. Page*, 21 Gratt. 637; *Saunders v. Griggs*, 81 Va. 517; *Newman v. Mollohan*, 10 W. Va. 488; *Lyman v. Thompson*, 11 W. Va. 427; *Vance Shoe Co. v. Haight*, 41 W. Va. 282, 23 S. E. Rep. 556. See also, on this subject, *foot-note* to *Walker v. Page*, 21 Gratt. 637; *foot-note* to *Percell v. McCleary*, 10 Gratt. 246.

1600 dollars. Frances Lenow answered the bill admitting that she had in her hands effects of Joseph Lenow. Joseph Lenow appeared and was permitted to file his answer, in which he denied that he or James owed the plaintiff any thing. He admitted that the bond for 1600 dollars had existed, but that upon a settlement it had been delivered up and a bond for 700 dollars, the balance due, was executed by James Lenow who was the principal debtor; and that this bond had been afterwards discharged by him. James Lenow was proceeded against as an absent defendant, and the bill was taken for confessed as to him.

350 *Whether any thing was due to the plaintiff from the defendants Joseph and James Lenow was a mere question of fact, and this Court thought there was nothing due. The Court below directed a commissioner to state an account of the payments made upon the bond, and according to the commissioner's last report there was due the sum of 368 dollars 83 cents, with interest thereon from the 6th of October 1841; and for this sum with its interest, the Court gave to the plaintiff a joint decree against Joseph and James Lenow; and directed the sheriff to sell the interest of Joseph Lenow in the slaves in the possession of Frances Lenow; and out of the proceeds to pay the debt, interest and costs. From this decree Joseph and James Lenow applied to this Court for an appeal, which was allowed.

Stanard and Bouldin, for the appellant.

Although the absent defendant James Lenow, who did not appear in the Court below, could not appeal from that decree, as it has been held by this Court in *Platt v. Howland*, 10 Leigh 507, and *Barbee v. Pannill*, 6 Gratt. 442, yet Joseph Lenow did appear and answer; and his appeal is properly here. The decree appealed from is a joint decree against both Joseph and James Lenow. Joseph Lenow is interested to have the whole decree reversed, because if affirmed as to James, when he pays the money, he may call upon Joseph for contribution. But further, as we have said, the decree is a joint decree against both; and if the Court reverses the decree, from the necessity of its nature, the whole decree is reversed: And as James Lenow is not before the Court upon this appeal, the Court cannot enter another decree against him.

Macfarland, for the appellee, referred to *Platt v. Howland*, 10 Leigh 507, to shew that if there was error against the absent defendants it could not be corrected

351 *by appeal. He also referred to *Heffernan v. Grymes*, 2 Leigh 512, to shew that the home defendant could not correct the decree as to the absent defendants, by appeal to this Court. Then the question is whether one of two absent defendants can come in and make himself a party and contest the plaintiff's claim as to both. There is no principle which will authorize him to defend the case for the other absent defendant, that did not equally

apply to a defence made by a home defendant for the absent defendant. The policy of the statute too forbids the relief to the one upon the appearance and defence of the other. It is enabling one to make defence without giving to the plaintiff the security to which the law entitles him. Moreover, although the party appealing is bound if the decree is affirmed, yet the other absent defendant is not bound. And he thus plays the safe game, of heads I win, tails you lose: If the decree is reversed he has the full benefit of it; if it is affirmed, and it may be affirmed by a divided Court, he is not bound.

DANIEL, J., delivered the opinion of the Court.

The Court is satisfied by the pleadings and proofs in the cause, that the bond of sixteen hundred dollars, in the bill and proceedings mentioned, had been reduced prior to the 1st September 1840, by payments, to about the sum of seven hundred dollars; that on the day last mentioned, a new bond (whether executed by James Lenow or Joseph Lenow does not distinctly appear,) for the said balance of seven hundred dollars was delivered by the said Joseph to the appellee Jacob Lenow, and accepted by the latter in satisfaction and discharge of the said balance, and that the said bond of sixteen hundred dollars was thereupon surrendered by the said Jacob to the said Joseph; and that thereafter and prior to the institution of this suit the said

352 bond of seven hundred dollars was fully satisfied, by payments *made by the said James and Joseph. The Court is therefore of opinion, that the Circuit court erred in adopting the special statement of the commissioner as the basis of its decree, and in rendering a decree against the appellants for the balance reported in said statement; and in ordering a sale of the property attached; and that it ought instead thereof, to have confirmed the original report of the commissioner, and dismissed the bill. The Court is also further of opinion, that notwithstanding James Lenow was regularly proceeded against as an absent defendant, and therefore, according to the decisions of this Court in the cases of *Platt v. Howland*, 10 Leigh 507, and of *Barbee v. Pannill*, 6 Gratt. 442, had no right to appeal to this Court on account of any error in the decree against him; yet that as Joseph Lenow filed his answer under the permission of the Court, and thus entitled himself to the privileges of a home defendant; and succeeded, in the opinion of this Court, as above indicated, in proving a defence which was in no respect personal, but established the satisfaction and discharge of the joint obligation on which the suit was founded, the appeal of the said Joseph necessarily brings under review the propriety of the whole decree, and devolves upon this Court the duty of correcting and reversing it, in favour as well of the said James as of the said Joseph. The Court is therefore of opinion to

reverse the whole decree with costs to the appellant Joseph Lenow. And this Court proceeding to render such decree as the Circuit court ought to have rendered, doth confirm the original report of the commissioner, and dismiss the bill with costs to the said Joseph Lenow.

Decree reversed.

353 *Dickinson v. Hoomes's Adm'r & als.

January Term, 1852, Richmond.

(Absent CABELL, P.)

Wills—Devisees—Deed of Conveyance by Devisee and Contingent Devisee—Covenant of Warranty*—Case at Bar.—There is a devise to J, with a limitation over upon his dying without issue at his death, to his brother R if he should survive him, or his representatives, and R dies in the lifetime of J. J sells and conveys the land to A; and R though he does not convey the land, is a party to the deed, and J and R covenant as follows: That the said J for himself and his heirs, and the said R, as contingent devisee under the will of Col. J, by whom said land was devised to J, do hereby covenant and agree to and with the said A, that they will warrant and defend the fee simple estate &c. to said land, to him and his heirs forever, against the claim of themselves and their heirs, and the claim of any person claiming under them by virtue of the will aforesaid, and do relinquish and fully confirm to said A, all the right they or their heirs now have or may hereafter have to said land or any part thereof, to him and his heirs, free from the claim of the said J and R and their heirs, and of all other persons in the whole world.

HELD:

1st. **Same—Same—Same—Same—Effect as to Children of Contingent Devisees.**—That this covenant of R extends to the claim of his children to the land, though they claim not as his heirs, but as devisees under the will of Col. J.

2d. **Same—Same—Same—Same—Effect—Purchasers.**—That the covenant of R is a covenant running with the land, and a purchaser claiming under A, a portion thereof, by a regular chain of conveyances, is entitled to the benefit of said covenant for his indemnity against said claims.

3d. **Jurisdiction—Lands Descended to Heirs in Another State—Liability for Debts of Ancestor.**†—That

***General Warranty—Restricted Covenants of Title Followed by Other Covenants.**—In *Allemon v. Gray*, 92 Va. 316, 23 S. E. Rep. 298, it is held that, where the warranty is special and is followed in the same sentence by other covenants, in more general language, the subsequent covenants are restricted by the special covenants of warranty, unless a different intention is manifest. In commenting on the principal case at page 222, it is said: "The only case in Virginia Reports to which we have been referred as bearing upon this question is that of *Dickinson v. Hoomes's Adm'r*, 8 Gratt. 353. The decision there was that the limited covenant did not operate to restrain the subsequent unlimited covenant. The reasoning of the majority of the court is not given, and therefore the decision sheds very little light upon the subject under investigation."

†**Jurisdiction—Lands in Another State Descended to Heirs—Liability for Debts of Ancestor.**—A court of

the children of R having inherited from him lands in Kentucky, and as by the laws of that state, lands descended may be subjected to the payment of the debts of the ancestor, and the heir is bound by such a covenant of warranty by the ancestor, a Court of equity in the state of Virginia may compel the children of R residing within the jurisdiction, to account for any lands in Kentucky descended to them as his heirs, as a trust subject for the payment of his debts: And under the circumstances of this case, the power should be exerted.

354 *4th. **Same—Same—Same—Extent.**—Under the circumstances of the case, the heirs held bound to account for only so much of the Kentucky lands as they have actually gotten or may get possession of, with the rents and profits derived therefrom, deducting the cost and expense of recovering the lands.

John Hoomes the elder died in 1805, leaving a will dated in 1804, whereby he gave to each of his sons John, William, Richard and Armistead, to his daughter Sophia, and grandson John Waller Hoomes, land and slaves in fee simple; but directed that if any of them should die without issue living at his death, his estate should be divided equally between the survivors, or their representatives, according to the principles of the law of descents. All of them survived the testator, and took possession of the estates devised to them. In 1819 John Hoomes the younger sold and conveyed the land devised to him, to Samuel A. Apperson; and Richard Hoomes and the other children of John Hoomes the elder united in the covenants contained in the deed.

These covenants are as follows: "And the said John Hoomes for himself and his heirs, and the said William Hoomes, Richard Hoomes, Armistead Hoomes and Wilson Allen and Sophia his wife, for themselves and their heirs, as contingent devisees or legatees under the will of Col. John Hoomes, late of the Bowling Green, deceased, by whom said land was devised to John Hoomes, do hereby covenant and agree to and with the said Samuel A. Apperson, that they will warrant and defend the fee simple estate and complete right and title to said two tracts of land, to him and his heirs and assigns forever, against themselves and their heirs, and against the claim and demand of any person or persons claiming from, by or under them, in virtue of the will aforesaid, and do relinquish and fully confirm to said S. A. Apperson, all the right they or their heirs now have, or might or may hereafter have, to said land,

equity in this state may compel children residing within its jurisdiction, to account for lands in another state descended to them as heirs of their ancestor, as its first subject for the payment of his debts. This proposition laid down in the principal case is approved in *Wimer v. Wimer*, 82 Va. 901, 5 S. E. Rep. 536, but in that case it is held that the court has no jurisdiction to compel the partition of land situated in another state, citing *Poindexter v. Burwell*, 82 Va. 507. See principal case cited in *foot-note* to *Barger v. Buckland*, 28 Gratt. 862; *Leach v. Buckner*, 19 W. Va. 45; *Chapman v. R. Co.*, 26 W. Va. 309.

or any part thereof, to him and his heirs and assigns forever, free from them
 355 the said *John Hoomes, William Hoomes, Richard Hoomes, Armistead Hoomes, Wilson Allen and Sophia his wife, late Sophia Hoomes, and their heirs, and of all other persons in the whole world."

This land, or the greater part of it, passed by a regular chain of conveyances from Apperson to William W. Dickinson. John Hoomes the younger died in 1825, without issue. William and Richard died in the lifetime of John, the former without issue, the latter leaving several children. In 1827 the children of Richard filed their bill against Dickinson, claiming to be entitled as purchasers under the will of their grandfather John Hoomes the elder, to one undivided fourth of the land devised to John Hoomes the younger; and praying for partition thereof and an account of rents and profits. Their claim was sustained by the Circuit court, and also by this Court on appeal; and the decision of this Court is reported in 1 Gratt. 302.

As to the construction and effect of the covenant of warranty in the deed of conveyance embracing the land in question, executed by the said Richard and others, if coupled with the descent of assets from him to the appellees, this Court deemed it irrelevant to go into the consideration thereof, inasmuch as no such defence was made in the Court below; nor could any cause of action founded upon said warranty be prejudiced by the decision aforesaid.

After the case went back to the Circuit court, to wit, in 1844, Dickinson filed a cross bill charging that a tract of land called Ruffin's, of greater value than the land in controversy, had come by descent from Richard Hoomes to his children, and had been divided among them; and that the said children, except one of them, who had intermarried with Alfred H. Garnett, of whose circumstances said Dickinson knew nothing, were wholly insolvent; and praying an injunction of the inter-
 356 locutory *decree which had been affirmed as aforesaid, and for general relief.

The injunction was granted; but was afterwards dissolved; it appearing that the tract of land called Ruffin's had been sold under a decree of a Court of chancery, and the entire proceeds of sale applied to the discharge of the debts of Richard Hoomes.

In 1845 Dickinson filed a supplemental bill, charging that since the filing of his original bill he had ascertained that lands in Kentucky, which had been devised by John Hoomes the elder to the said Richard, had come by descent from Richard to his said children, and greatly exceeded in value the subject of controversy in the suit, and praying that the injunction should be reinstated, and for general relief. The injunction was accordingly reinstated. The children of Richard Hoomes filed their answer, relying on various grounds of defence. Dickinson afterwards answered the original bill of the said children, relying

on the same grounds which he had taken in his supplemental cross bill.

In May 1849 the two causes were heard together; and the Circuit court being of opinion that it had not been shewn in the cases that assets had descended from Richard Hoomes to his children, therefore dismissed the bills of Dickinson with costs.

From this decree Dickinson applied to this Court for an appeal, which was allowed.

The facts in relation to the liability of the heirs of Richard Hoomes upon his covenant of warranty, for lands descended to them, will be found stated in the opinion of Judge Moncure.

R. T. Daniel, for the appellant.

The first enquiry which arises in this case is, as to the extent of the covenant of Richard Hoomes in the deed to Apperson; and what is its effect as against his heirs.

The exposition of the clause in the
 357 will of John *Hoomes the elder, under which these appellees claim an interest in the land conveyed in the deed to Apperson, was made by this Court in the case of Dickinson v. Hoomes, 1 Gratt. 302. In that case the Court held that the children of Richard took as purchasers under the will of John Hoomes the elder. And the question is, Did Richard Hoomes mean to covenant against the claim of his children merely as his heirs, or also as devisees under the will of John Hoomes. We say it was plainly his object and purpose to covenant for a good title out and out.

In construing the covenant it is to be taken most strongly against the covenantor. *Iggulden v. May*, 7 East's R. 241. And the intention of the parties was, obviously, to unite in confirming to John Hoomes the younger a good title. This covenant was one running with the land; and was, in the language of the books, an inherent covenant. The distinction between a pure technical warranty and a covenant to warrant is stated in 2 Thom. Coke 361, 362, and *Tabb v. Binford*, 4 Leigh 132. A covenant to warrant may be made by a stranger even, if the covenantee has an interest in the land. For the doctrine in relation to covenants running with the land, the Court is referred to *Spencer's Case*, *Smith's Leading Cas.*, 43 Law Libr. 75, 82.

The fact if it was so, that the land has been sold to several alienees, does not impair the effect of the covenant. There is, however, no proof that all the land was not conveyed to Dickinson. It is true that it is stated in 3 Preston on Abstracts of Title 58, that "a covenant cannot be divided and split up. But he cites no authority for the proposition; and on the next page of his book he seems to contradict it. It is moreover opposed to the decision in *Twynam v. Pickard*, 2 Barn. & Ald. 105, and to the doctrine as stated in *Platt on Covenants* 495, 496; and 2 Thom. Coke 362, seems also to assert a doctrine in conflict with it.

358 *It will be said that a Court of equity in Virginia cannot make a decree subjecting these appellees for assets

derived from lands in Kentucky. It is true that a Court of equity in Virginia cannot make a decree to subject lands in Kentucky by sale or sequestration. But the Court has power over the parties to this suit, and may deny them relief, except on condition that they will account for these lands. Or a Court of equity may by a decree in personam compel these parties to do whatever it is equitable they shall do either with respect to the lands or their proceeds. *Massie v. Watts*, 5 Cranch 148. It is said that there is no proof of what is the law of Kentucky on this subject. If the proof is not authenticated in strict accordance with the statute, it is too late to take the objection in this Court; and it should have been made in the Court below, when it might have been readily obviated.

Morson, for the appellees.

The appellees claim as purchasers under John Hoomes the elder, and not from, by, through or under Richard Hoomes. And yet it is claimed that this warranty bound them as the heirs of Richard Hoomes so far as they had assets; and the bill alleged that they had assets descended to them from Richard in Virginia. This turned out not to be the fact, and then an amended bill was filed alleging that the heirs of Richard Hoomes had received assets by descent in Kentucky. To this bill various defences were set up. The Court below regarded the defence that no such assets had descended to these appellees from their father, in Kentucky, as supported by the proofs; and upon that ground mainly, if not entirely, rested its decree. In this opinion the Court was fully warranted by the proofs, which shew that upon an enquiry made before a commissioner as early as 1826, the

assets of Richard Hoomes's estate
359 *were exhausted, leaving many debts unpaid; and which shew further that they never were entitled to the lands in Kentucky, as the lands of Richard Hoomes, but of John Hoomes the elder; and that they never in fact obtained possession of them either as the lands of John or Richard Hoomes; but after the division among the heirs of John Hoomes, and without any possession of them having been taken under that division, they were a second time forfeited for non-payment of taxes; and if they got them at all they obtained them by purchase under the delinquent land laws of the State of Kentucky.

Is it to be contended that these appellees were bound to redeem these forfeited lands in Kentucky for the benefit of the creditors of Richard Hoomes? If they are under any such obligation the position of heirs would be one of grievous hardship. But such a proposition is against all law and justice.—Bouldin, counsel for the appellants. I shall contend that the lands were not forfeited at the time of the death of Richard Hoomes; and that the heirs by forfeiting them subjected themselves personally to creditors for their value, as for so much real assets descended.—Morson.

This proposition of law cannot be sustained. The heirs were not bound to take or accept the lands as heirs; but might permit the lands to be forfeited; and then had as good a right to purchase them from the state as any other person.

Richard Hoomes was never seised of these lands; and by the common law "seisina facit stipitem." The common law did not, therefore, give the appellees these lands as heirs. *Ram on Assets* 155, 8 Law Lib. But if the appellees did have lands by descent in Kentucky, they are not liable therefor to the appellant in this suit. The covenant of Richard Hoomes in the deed to

Apperson has not been broken, and
360 cannot *therefore be enforced against his heirs. Richard Hoomes does not convey the land: That was devised to John Hoomes the younger with a contingent interest over to Richard Hoomes and the other brothers and sisters. And the object of the deed was not to convey a perfect title to the land, but to convey so far as Richard Hoomes was concerned, his contingent rights and interests; or rather to covenant against these contingent rights and interests. That the covenant has not been broken is *res adjudicata*, as appears from the case between these same parties, 1 Gratt. 302. That case shews that the appellees claim under John Hoomes the elder, not under their father Richard Hoomes: They claim over and above him.

Again. The covenant is not a covenant running with the land. It is clearly not such a covenant as by assignment would confer on the assignee a right to sue in his own name. See *Spencer's Case*, and the American notes, 43 Law Lib. 75 to 108; *Randolph v. Kinney*, 3 Rand. 394; *Shepherd's Touch*. 316, 330, 30 Law Lib. Assignees are not bound except by inherent covenants running with the land. And if the grantor does not deliver possession, and conveys no title, any covenant he makes does not run with the land. See 2 Lomax Dig. p. 82, § 25, and p. 242; 2 Sugden on Vend., p. 90 top, 79 margin; *Urquhart v. Clarke*, 2 Rand. 549. This was a case of the sale of a wife's land by the husband and wife. The children claiming were the children of the husband Dunkinson. On the face of the deed Dunkinson and wife claimed to convey and warrant a fee simple estate. Mrs. Dunkinson had not conveyed properly; and it was held that as the land descended from the mother, the claimants were not barred by the deed and warranty of the father. And it was further held, that though real assets descended to the children from the father, they

361 were not *bound. The assignee cannot recover in his own name where there is no estate conveyed by the covenantor. By the warranty which we are considering, the covenantor only covenants against himself and his heirs, and those claiming by, through or under him. And the appellees do not claim by, through or under him. The warranty therefore is not broken. 2 Lomax Dig. 263.

Even if it was established that lands had descended in Kentucky to the appellees, still no recovery could be had against them in a Virginia forum. Story's Conf. of Laws, § 551, 555. Each state and country has exclusive jurisdiction over the real and immovable estate within its territories. Each state has its own rules with regard to the disposition of such estate. Story's Conf. of Laws, § 523. The *lex loci rei sitæ* governs creditors, the *lex domicilii* governs the succession. Real assets abroad cannot be reached in Virginia. In *Ram on Assets*, p. 236, 8 Law Libr., will be found an English statute making lands in the colonies liable to specialty debts; and another statute extending the like provisions to the English possessions in India. Why were such statutes necessary there, if the heir in England was liable for real assets descended to him in the colonies? Are not our states separate and independent of each other? more so than the colonies of the mother country?

At common law the seisin of the ancestor was necessary to enable an heir to maintain a writ of right. 1 Lomax Dig. 617; 2 Tuck. Com. 181. And unless therefore there is such a statute in Kentucky as our Virginia statute, 1 Rev. Code, ch. 128, § 90, the heirs could not have recovered these lands in Kentucky. 2 Lomax Dig. 246-7.

The appellees are not bound for profits, if bound for the value of the land. *Blow v. Maynard*, 2 Leigh 29; *Hobson v. Yancey*, 2 Gratt. 73.

362 *Barton, on the same side, submitted a printed argument.

For the appellees, we humbly contend that the decree is right in its effect, and ought to be affirmed:

1. Because we say that the covenant of Richard Hoomes made to Apperson in the deed to him by John Hoomes, jr., has never been broken: at least that it was not broken by our recovering the land in controversy as purchasers from Col. John Hoomes.

We contend that the covenant of Richard Hoomes is a special covenant of a most limited nature; and that so far from the insertion of the words "as contingent devisees or legatees under the will of Colonel John Hoomes, late of the Bowling Green, deceased, by whom said land was devised to John Hoomes," enlarging the covenant, that taken in their proper meaning, they restrict and limit still further what was without them a mere special warranty, or covenant of warranty. If we leave out these words the covenant reads thus:

"And the said John Hoomes for himself and his heirs, and said William Hoomes, Richard Hoomes, Armistead Hoomes, and Wilson Allen and Sophia his wife, for themselves and their heirs, do hereby covenant and agree, to and with the said Samuel A. Apperson, that they will warrant and defend the fee simple estate and full and complete right and title to said two tracts of land, to him and his heirs and assigns forever, against themselves and their heirs, and against the claim and

demand of any person or persons claiming by, from or under them."

Now this is a mere special covenant of warranty, guarding against the covenantors, their heirs, and those claiming by, from or under, the covenantors; and this covenant would clearly not have been broken by our recovery of the land. For we succeeded not as heirs of Richard, nor as claiming by, from or under, Richard 363 and *Hoomes, but as purchasers from Col. John Hoomes. It is true the appellees were the children of Richard Hoomes; but it is not true that quoad this land they were the heirs of Richard Hoomes. And the words "by," "from," and "under," do not refer to kin or blood relationship, but to the derivation of title and interest in or to the land.

If we insert the words before given, we then see that the covenant becomes more special and restricted. John Hoomes, the grantor, covenants for himself and his heirs generally. The others covenant for themselves and their heirs, as contingent devisees or legatees &c. Why insert these words unless some meaning was designed to be conveyed by them? It is obvious that they did not intend to covenant in any other character than as contingent devisees or legatees; and this becomes very plain hereafter. They warrant and defend against themselves and their heirs, and all claiming by, from, or under them, in virtue of the will aforesaid. It is not or by virtue of the will &c.

This does not enlarge the class of claimants guarded against, to all who may claim by virtue of the will, whether by, from or under the covenantors or not. But it requires that the claimant, to be included in the covenant, shall not only claim by, from or under the covenantors, but also in virtue of the will aforesaid. So that a claimant might claim by, from or under the covenantor, and the covenant would not be broken; or he might claim in virtue of the will, and the covenant would not be broken. His claim only would be covenanted against who claimed both by, from or under the covenantor, and in virtue of the will aforesaid.

The appellees have not claimed this land either as heirs, or by, from or under the covenantor, much less in either of those ways, in virtue of the will aforesaid. Can this covenant then be said to be broken by the appellees taking the land as purchasers from Col. John *Hoomes? a 364 contingency which is not included in the obligation.

While surrounding facts are properly admissible to explain or remove ambiguities or difficulties caused by matters extraneous to the instrument, there is no ground for the introduction of loose speculations as to the probable meaning or intention of parties in such an instrument as this. In its interpretation we must look to the language in which the meaning of the parties is expressed,—the terms of the obligation.

If extraneous matters were admissible,

we might very reasonably contend, that these parties having received no portion of the consideration, all of which appears upon the face of the deed to have been paid or secured to John Hoomes, that the terms of their covenant should not be enlarged by construction to create an obligation that was not intended.

The covenantors might have chosen to yield all rights which they then had, or might thereafter acquire, to enable their brother to obtain a higher price for the land; and they might be willing to covenant against themselves and their heirs, and claimants by, from or under them &c., and yet not be willing to surrender rights which their children might acquire, or being unable to surrender them, to covenant against their children claiming rights acquired from other sources.

This distinction is the very one made in this case, and which the language of the covenant necessarily leads to.

Nor can it be said that it was the avowed object of this conveyance to give a fee simple estate, and full and complete right and title to the land, as against all persons, when John Waller Hoomes, a grandson of Col. John Hoomes, and who occupied the same position to this land that Richard Hoomes did, does not join in the covenant, nor is his name mentioned as one to join;

and when all of those whose names 365 are mentioned *did not execute or sign the instrument. And the purchaser's taking a deed with the relinquishment and covenant from only a portion of those having this contingent interest, shews that he was running a risk with his eyes open, and that he did not understand the covenant to be as comprehensive as is now claimed by the appellant; else he would have insisted upon its protection from all, by requiring all to sign.

The relinquishment and confirmation, though no part of the covenant, and only operating as to the rights of the parties thereto, and their heirs, as heirs,—a proposition which will not be controverted, and is indeed settled by the Court in the case in 1 Gratt. 302—throws some light upon the meaning of the covenant. When they meant to use general terms, language of a comprehensive signification, they knew what terms, what language to use. And the very difference in the terms used in the covenant and the relinquishment, leads us to the conclusion that their own rights the parties were willing to yield in the amplest and most generous manner; but when it came to the imposition of obligations upon others, that the most guarded and limited engagement only would be entered into; only that indeed which would carry out the object of the relinquishment. For it is true, that had Richard survived John his contingent interest would have become a vested interest in him, and if the relinquishment would not have transferred it to the purchaser, yet his covenant would have protected against his heirs; for they would have claimed by, from and under

him, in virtue of the will aforesaid: And this, we insist, was the true and only object of the parties.

If it had been intended to give to this covenant a large and comprehensive character, how easy to have expressed it, by inserting at the end of the covenant, "and all other persons whatsoever." Or to have guarded against the contingency of 366 John's surviving Richard *Hoomes, by merely changing the words, "in virtue of the will aforesaid," to "or by virtue of the will aforesaid," or indeed, by merely inserting the word "or" before the words "in virtue," &c. Had any of these changes been made, there would have been some ground for the allegation of a broken covenant. But as they were not made, and the covenant is in the words we have mentioned, we humbly submit that it is clear that the covenant of Richard Hoomes has not been broken.

2. We contend that the appellant, as assignee, has no right of action upon this obligation, for the reasons assigned in the answer of the appellees, and the opinion of the Court below. 2 Lomax Dig., 242-3, 277; 1 Smith's Lead. Ca., notes, 107, 43 Law Libr.

There is no proof of this land having passed by a regular chain of conveyances with general warranty to the appellant.

3. In order to hold us responsible on account of assets descended, it is necessary that we should have received real estate by descent, not by purchase or gift; and that by descent from the same ancestor that made the warranty. 2 Lomax Dig., 246, § 8. And we contend that it is also necessary that the land should lie within the territorial jurisdiction of the Courts whose tribunals are appealed to.

Real estate is universally conceded to be exclusively under the control of the *lex loci sitæ*; and no other country can take cognizance of controversies concerning it, or bind it in any way. Story's Conf. of Laws, § 363-4 and 5, § 445, 543, § 551-5-6.

From the principles stated by Judge Story, we must infer necessarily, that if this claim of the appellant was on a bond binding the heirs of Richard Hoomes, that our Courts could not enter judgment against them so as to bind lands in Kentucky; and if it should appear in an action at law, that

there were no real assets in Virginia, 367 *that judgment would necessarily be entered for the defendants. That

such is the correct view, the Court is respectfully referred to 3 Vin. Abr. 142; Earl of Kildare v. Sir Morrice Eustace, 1 Vern. R. 419; where Sir John Holt, arguendo, says: "that it was resolved in Evans and Ascough's Case, Latch, fol. 234, and Dowdale's Case, 6 Coke 46, that land in Ireland should be assets to satisfy a bond debt here, but otherwise of lands in Scotland." And just above he stated the reason for the distinction, viz: that Ireland was a conquered country, and hath Courts of its own by the King's grant, but not exclusive of the King's Courts here.

Now Kentucky is certainly as much of a foreign country to Virginia, and as much entitled to exclusive jurisdiction over lands within her limits, as Scotland was to England in 1686, when this was cited as law by Sir John Holt, who was seeking to establish the jurisdiction of the English Court.

And in Dowdale's Case, 6 Coke 46, it was gravely questioned and decided by the Court, whether lands lying in one county in England could be held to be assets by descent, on a suit brought against the heir in another county, where he resided. And while it was of course decided that lands thus situated were to be considered assets, yet, that such a point should have been mooted intimates very clearly what the decision would have been on the question of lands lying in a foreign country.

The doctrine as applied to bonds binding the heirs, of course applies equally to covenants binding the heirs. And upon these authorities, and the exclusiveness of the territorial jurisdiction over lands, we contend, that inasmuch as the Courts of Virginia, in an action brought against an heir on a covenant or bond binding the heirs, could create no lien, impose no liability, nor give any redress for a violated obligation, against lands lying in
368 *Kentucky, that a covenant binding heirs, does so only in respect to lands within the territorial jurisdiction of the country whose tribunals are appealed to.

The English Court of chancery has certainly stretched its jurisdiction to the uttermost limits, and never favours an attempt to circumscribe it, yet I have seen no case where, in respect to controversies concerning lands in foreign countries, the English Chancellor has ever asserted this extraterritorial jurisdiction, save when fraud was charged. And it has been happily said, "that the jurisdiction over fraud, like that over piracy, knew no territorial bounds or restrictions."

The contract between the parties thus fixing and settling their legal rights, the appellant can occupy no better position here than if he were attempting to impose a liability by an original suit of his own. And if he could not hold us responsible in such a suit, we contend that he has no right to use this defence in a suit of ours, even though it be in equity. We are seeking legal rights in an equity suit, and the rights of both parties to this controversy are ascertained by law. And while the maxim that "he who seeks equity, must do equity," is a very good one, when applicable, there is another more germane to the matter, that "equity follows the law."

If, however, the position of the counsel for the appellant be correct, and by acting in personam, a Court of chancery in Virginia can indirectly operate on lands in Kentucky, in a case where no fraud can be alleged, yet, upon the previous references to Story's Conflict of Laws, and perfectly well established principles, it will not and cannot be controverted, that the Courts here can give no further or other remedy than

would be given in Kentucky, can impose no other obligations than are imposed in Kentucky; and that the liabilities of the heirs are to be established here, exactly as they would be in Kentucky. That is,

369 *that our Courts are to ascertain what is the law of Kentucky, and apply it to the case. Now what is the law of Kentucky in regard to the liability of heirs on account of obligations under seal binding heirs?

The Courts of Virginia will not take judicial notice of the laws of a foreign state, but they must be proved as facts. Story's Conf. of Laws, § 637. If they be written laws, copies proved and authenticated must be produced. § 641.

The laws of Kentucky on this point are written or statute law. The appellant has sought to introduce no evidence of the law of Kentucky upon this point, except that contained in Mr. Herndon's deposition, which is not admissible evidence to prove what the law is. Story's Conf. of Laws, § 641. The appellant has therefore entirely failed to prove an indispensable point of his case, were we to concede every point of law and fact to be as he claims. That this deficiency exists in his case is his own fault, and proceeds from his own laches. He had had full time and opportunity to obtain any evidence or legal instrument that he might have desired.

4. The second auditor of the State of Kentucky, in whose office are kept the land books of non-resident proprietors, proves that the lands in the name of Col. John Hoomes, in the State of Kentucky, as appears by the books in his office, amounted to 19,725 $\frac{1}{2}$ acres, divided into various tracts, and lying in different parts of the state. Of this number that 1008 $\frac{1}{2}$ acres were lost by prior claims, leaving 18,717 1-6. Two tracts, one of 1001 $\frac{1}{4}$, the other of 300 acres, were discontinued as the property of citizens of Kentucky. When they were transferred does not appear. It seems however to have been prior to 1826. And they may be the lands referred to as sold by Samuel Chiles, of which we knew nothing, as we were infants at the time, even if it were after Richard Hoomes's death; thus
370 leaving *17,415 acres, of which it is proved that various tracts, amounting to 14,535 acres, were forfeited for non-payment of taxes, prior to 1828, mostly prior to 1826; leaving a tract of 2880 acres which was discontinued, as it was found upon survey to contain 400 acres surplus; 2573 acres of this were afterwards re-entered for taxation; and the taxes becoming in arrears, were afterwards sold by Draffin, agent of the state, and at this sale purchased by Richard H. Hoomes.

It appears very distinctly from the report of the decision and Draffin's deed, and this deposition of the auditor, that the same tract that was divided was afterwards sold for the taxes and bought by R. H. Hoomes.

The discrepancy in the quantity exists only in appearance; for when the portion allotted to Williamson Tally, for his serv-

ices in having the decision made, is subtracted, the balance amounts so nearly to the number of acres conveyed by Draffin to R. H. Hoomes, as to shew that they must be the same tract, and that the slight difference in number of acres is to be traced to different surveys &c. The appellant has fallen into the mistake as to the identity, from not understanding the facts. It appears from the record that in May 1833, the only tract of land in Kentucky that had belonged to Col. John Hoomes, then remaining, was laid off by commissioners, and after deducting the large portion that went to Tally for his services, the remainder was divided among the children of Richard Hoomes, the assignee of Armistead Hoomes and Wilson Allen. No change was made in the names on the non-resident books in the second auditor's office; and when this tract was afterwards forfeited for non-payment of taxes, Tally, being a resident of Kentucky, had taken care that his portion should not be included in the forfeiture. The number of acres was thus reduced, and was sold by John Draffin as being in the name of John Hoomes, and bought by

Richard H. Hoomes, who thus took
371 his *title directly from the State of Kentucky; and afterwards, ex gratia, as a gratuity on his part, allowed the others who had been mentioned in the division made some twelve years before, to purchase from him, by the payment of their proportionate shares of the purchase money paid by him, the tracts that had been originally assigned to them.

The land stood on the land books of Kentucky, so far as we know or have any reason to believe, in the name of John Hoomes. Richard did not there appear ever to have had any title even, much less possession, and unless the common law doctrine, that "non jus sed seisinā stipitem facit," was changed in Kentucky by a statute, they would not have taken any land as heirs of Richard Hoomes, but as heirs of their grandfather John Hoomes. Brown's Legal Maxims 227. And if any such change has been made in the law of Kentucky, it was the duty of the appellant to shew the change, which he has not attempted to shew. So that as appears by this record the appellees were right in saying that they took from their grandfather, and not from their father. Indeed, however this point might be decided, they took a large portion of that assigned to them directly from their grandfather's will, precisely as they took the land in controversy in this case, in this state; for John Hoomes, and it is believed William Hoomes also, survived Richard and died childless and unmarried.

It being shewn, then, that this is the same tract divided in 1833, sold to Richard H. Hoomes in 1835, and from whom the other appellees derived their title, and that this is the only tract of land in Kentucky that has ever or could ever come to our possession, we submit, that as our only beneficial title was obtained from the State

of Kentucky, that there is no foundation to charge us with the value of these
372 lands, even were the *original title, which was lost, derived from Richard Hoomes.

For the appellees we contend, therefore, that the decree of the Court below should be affirmed:

1. Because the covenant of Richard Hoomes has not been broken.

2. Because, if broken, the right of action did not pass to the assignee Dickinson.

3. Because lands descended in Kentucky are not assets in Virginia, and could not in any case be so claimed, whether in a Court of law or equity, without shewing that they would be assets in Kentucky; which has not been done.

4. Because we have inherited no lands, in Kentucky or elsewhere, from Richard Hoomes, but derived a title from John Hoomes, and have derived our possession and only beneficial title directly from the State of Kentucky.

Bouldin, for the appellant, in reply.

I shall consider first the extent and effect of the covenant of Richard Hoomes. What was its object and what its effect? Before entering upon these enquiries, however, it may be well to state some general rules of construction, by which the meaning of the covenant may be ascertained.

1. "Covenants are to be construed according to the obvious intention of the parties as collected from the whole context of the instrument, ex antecedentibus et consequentibus, and according to the reasonable sense of the words."

2. "If there be any ambiguity, then such construction shall be made as is most strong against the covenantor; for he might have expressed himself more clearly." 1 Wheaton's Selwyn 376; 2 Lomax Dig. 251; Platt on Covenants, 3 Law Libr. 61, 63.

373 *With these principles in view, let us return to the question, What is the object and effect of Richard Hoomes's covenant? To aid in ascertaining its object we may refer to the situation of the parties, to their relation to the property, and to the business they were transacting, when the covenant was made. John Hoomes was in possession of and held in the property a base or qualified fee. Richard Hoomes held a contingent interest therein under the will of Col. John Hoomes, dependent on the death of John Hoomes without children living at his death. The children of Richard Hoomes also held a contingent interest in the same property under the will of Col. John Hoomes, depending on the death of John Hoomes without issue, and of their father Richard, in the lifetime of John. Such was the state of things when John Hoomes sold and conveyed the property to Apperson.

Now what, according to the dictates of common sense, and from our knowledge of the motives and conduct of men, would be a leading object with parties thus situated? Obviously it would be the first wish of

Apperson the purchaser to secure a good title to the property freed from the contingent interest of Richard Hoomes and his children; and it would as clearly be to the interest of John Hoomes the vendor, if possible, to secure him such a title. This I insist would naturally be the object of parties thus situated: and that such was in fact their intention, is plainly to be gathered from the terms of the covenant, construed "according to the reasonable sense of the words" used. (Mr. B. here read the covenant and commented on its terms.) He insisted that there was nothing in the narrow and hypercritical construction placed on the words of the covenant, by the learned counsel for the appellees, to prevent the Court from carrying into effect the obvious intent of the parties. That a covenant could not well be drawn
 374 more clearly indicating a purpose *to guard against the very contingency that has happened, than the one under consideration, viz., to protect the purchaser not only against the claim of Richard Hoomes himself, but also against the claim of his children or "heirs," not as heirs, but "as contingent devisees or legatees under the will of Col. John Hoomes," claiming the property "in virtue of the will aforesaid," and connecting themselves with the testator through the said Richard Hoomes. He insisted that it was the obvious purpose and effect of this covenant to extinguish the entire contingent interest of Richard Hoomes himself, and to guard against the contingent interest of his children claiming through him "in virtue of the will aforesaid." And that such was the understanding of the parties is manifest from the clause of confirmation which follows immediately after the covenant.

If however the terms of the covenant are ambiguous, which I submit is the most that can be said of them, then they must be construed most favourably to the covenantee, and most strongly against the covenantor, for it was his duty to "have expressed himself more clearly," and this would lead us to the same result. Quacunque via, then, the appellees are bound by the covenant of their ancestor to indemnify the plaintiff against this demand to the extent of the real assets descended to them, provided this is a covenant which runs with the land. And this brings us to the next question.

2. Does this covenant run with the land and pass to the appellant?

Gentlemen say not; because, say they, Richard Hoomes conveyed nothing by the deed containing the covenant, and only covenanted against a possibility. That possibility, however, that contingent interest, I insist, is in fact, and in contemplation of law, both an interest and an estate; an interest and estate, appreciable, valuable, and transmissible by deed,
 375 devise or *descent: and the extinction of which was most beneficial to the holder of the land. 1 Lomax Dig. 467; 3

Id. 323-4; and the cases there cited. And this brings the covenant directly within the influence of the principle quoted by the gentlemen on the other side from the American notes to Spencer's Case, 1 Smith's Leading Cases 75, 107, that a covenant affects and runs with the land, "although not to be directly performed upon it, provided it tend to diminish or increase its value in the hands of the holder;" and this too when there is no tenure or privity of estate between the covenantor and the covenantee. In such case, however, it runs with the land for its benefit; but not to charge it. To do the latter there must be tenure or privity. 1 Smith's Leading Cases 107-8; Plymouth v. Carver, 16 Pick. R. 183. It might in this case, if necessary, be insisted that there was privity between the covenantor and covenantee—privity of estate to support a charge. But it is not necessary to contend for that proposition, as this covenant is clearly beneficial to the estate and not a charge upon it. It increased the value of the estate in the hands of the holder, and therefore affected and run with the land.

But the objection urged on the other side is not tenable for another reason. An estate of freehold was created by the deed in which the covenant is contained; and that estate continued and was not defeated until after the land came to the hands of the appellant. Here then is a case in which an estate of freehold was created in the covenantee by the deed containing the covenant, and the covenantee put in possession of the land; and in which, as is apparent to all, the land was made more valuable in his hands by the covenant: and this land, by a regular and unbroken chain of conveyance, has come to the possession of the appellant.

The principle established by the cases commented on by the learned gentlemen on the other side, has no application
 376 *to such a case. It is an error to suppose that they shew that the covenantor must grant to, or create an estate in, the covenantee. They only shew that the covenantee must have an assignable estate to support the covenant, either pre-existing or created by the instrument containing the covenant. The existence of an estate in the covenantee, to which the covenant may attach, is the important requisite. It is wholly unimportant how or from whom he may have derived it. An examination of the cases cited on the other side will shew that they were all cases, in which there was no pre-existing estate in the covenantee, and none created by the instrument containing the covenant. The first is a leading case on the question. Awder v. Noke, Cro. Eliz. 373, 436-7, 1 Smith's Leading Cases 99. In this case there was no estate in the first grantor, and of course no estate created in or passing to the first grantee. There being then no estate pre-existing or created in the grantee, there was of course nothing upon which the assignment by the grantee could operate, and

nothing to which the covenant could attach: and it was so decided.

The next case is *Andrew v. Pearce*, 4 Bos. & Pul. 158, 1 Smith's Lead. Cas. 99. There the estate, which was a term of years carved out of an estate tail, was avoided by the death of the tenant in tail. After the death of the tenant in tail, the assignee of the term, when it had ceased to exist, assigned over. Held, that a naked covenant could not pass as incident to a term of years which had ceased to exist; and therefore did not pass by the assignment. This is the same principle with *Awder v. Noke*.

And so with *Nesbit v. Montgomery*, 1 Taylor 84, 1 Smith's Lead. Cas. 99. The declaration stated want of title at the date of the original demise, and of course the grantee acquired nothing and could assign nothing.

377 *All then that these cases require, is an estate in the covenantee, to which the covenant may attach, created or existing at the date of the covenant, and continuing at the time of the assignment: and our case comes fully up to these requisitions.

In New York it has been decided, and it is submitted with good sense, that whenever possession accompanies a grant or conveyance, the covenants do pass with the land to the grantee and his assignees, notwithstanding no actual title was created. *Beddoe v. Wadsworth*, 21 Wend. R. 120. This, I submit, is a rational decision, for it makes a covenant answer the purpose for which it was designed, namely, to support a defective title.

The only Virginia cases commented on by the counsel on the other side are, *Randolph v. Kinney*, 3 Rand. 394; and *Urquhart v. Clarke*, 2 Rand. 549. *Randolph v. Kinney* is precisely the same in principle with the cases of *Awder v. Noke*, and *Nesbit v. Montgomery*. There was no estate pre-existing in, or passing by, the original deed to the first grantee, and of course nothing passed by the grant of the latter to which the covenant could attach itself. When however such an estate does exist in or pass to the grantee, then a covenant may be made with him, to run with the land, even by a stranger to the title and the original deed. 2 Thomas's Coke 362; *Spencer's Case*, Smith's Lead. Cases, p. 82, 83; 2 Lomax Dig. 260. The case of *Urquhart v. Clarke* has no application to this case: The question under consideration did not arise.

But if the covenant did not run with the land, and an action at law could not be maintained by the appellant, still a Court of equity ought to give relief. *Nesbit v. Brown*, 1 Dev. Equ. R. 30.

It is unnecessary however to press this latter view, as the covenant unquestionably runs with the land. *To shew this more conclusively, let us ask whether an action of covenant could not be maintained by the appellant against the principal grantor John Hoomes, or his

heirs, on his covenant for title. That it could will not be denied. But the covenant of John and Richard Hoomes is a joint covenant, in the same deed, couched in the same words, and precisely for the same thing. Now if it runs with the land against John, the same covenant being Richard's too, must also run with the land as to him. It would be strange that under such circumstances the covenant should run with the land as to one co-covenantor, and be in gross as to the other.

3. But it is objected in the third place, that a part of the land has been aliened, and that covenant will not lie for an assignee of a part of the subject, because the covenant is an entire thing, and the remedy on it cannot be apportioned. For this proposition, the only authority cited is a remark of Mr. Preston, quoted in a note to 2 Lom. Dig., p. 263. On this subject it is enough to say, that Mr. Preston, in this remark, if it is properly construed on the other side, contradicts himself, (see the first part of the remark quoted,) and is contradicted by authority. 2 Thomas's Coke 362; *Platt on Covenants* 495; *Stevenson v. Lambard*, 2 East's R. 575.

We have thus ascertained, 1. That the covenant bound the heirs of the covenantors to protect Apperson and his assignees against the claim of the appellees. 2. That this covenant runs with the land. 3. That it is not extinguished by the alienation of part of the land.

4. Let us enquire in the fourth place, whether this Court can hold the appellees responsible for the real assets descended to them in the State of Kentucky, by repelling to the extent of those assets their demand in this case?

We say the jurisdiction unquestionably exists; and *it would be difficult to find a case demonstrating more forcibly than this, the necessity of its existence and the propriety of its exercise.

I shall not deny that real estate always, (and even personal estate to the extent stated by the opposite counsel,) must be governed by the *lex rei sitæ*. Nor will I deny that, in the exercise of the jurisdiction now claimed for this Court, it must, to some extent, enquire into the laws of other countries. But do these admissions concede inconveniences and difficulties of a character to prevent the exercise of the jurisdiction invoked?

Before considering the question, let us look a little to the facts of the case, and the relative position of the home and foreign jurisdiction.

Here was the domicile through life of the original testator Col. John Hoomes. Here was the domicile of Richard Hoomes the ancestor of the appellees. Here is the domicile of the appellant; of the appellees; of the administrator, and of all the creditors of Richard Hoomes, of whom we have any knowledge. In this Court and in this suit, can they all be convened. In addition to all this, the appellees who have converted the foreign assets are irresponsible. The

real assets alone are beyond the jurisdiction of this Court, and subject to a foreign jurisdiction: And the question is, where, under such circumstances, can justice and equity be most safely and conveniently administered? In Kentucky where the real assets alone are, or here where all the parties are; where all the important evidence is; where the creditors are; and where all the decedents lived and died? The answer can only be in favour of the jurisdiction of this Court.

Is there any thing, then, to prevent the exercise of this obviously wholesome jurisdiction? It has been suggested from the bench that there is: that the foreign assets may have been subjected, under the
380 foreign *jurisdiction, or may now be subject, to the claims of creditors of Richard Hoomes; and thus the appellees would be made to lose their father's lands in Kentucky and their own land here.

The difficulty is, in this case at least, merely an abstract one; for Richard Hoomes has been dead for nearly thirty years; and no claim has been presented against the land or the heirs in Kentucky. But the difficulty is in fact more specious than real. It would apply with precisely the same force were the lands in Virginia and not in Kentucky; and in each case the protection against it, is alike simple and the same. It is simply to plead and prove the fact, that the lands descended have been subjected, or are subject, to claims against the ancestor, having precedence over the claim asserted. A failure to plead and prove it, were the whole of the Kentucky lands now in Virginia, would subject the appellees in this very cause to all the evils suggested; whilst on the other hand, the appellees may, in this same cause, secure to themselves complete protection from the claim of the appellant, by proving the fact suggested, if it exists. I see therefore no difficulty in the suggestion. 1 Wheaton's Selwyn 490, 492; 2 Tuck. Com. 112; 3 Tuck. Black. 421, in notes. It is true, that in an action at law against an heir on the bond of his ancestor, the Court cannot notice lands descended in a foreign state. The reason is, that on admission by the heir of lands by descent, the judgment and execution at law is against the lands, and not against the heir personally; and the lands will be extended. But as legal process cannot run into a foreign jurisdiction, proof of lands there would be unavailing. But a Court of equity, acting on the person, may compel the heir to convey land in a foreign country, or if already conveyed, may require him, as a condition upon which the aid of the Court will be extended to him,

381 to account for the proceeds: And this is what we ask. *The creditors, if any, being made parties, all equities would be settled in one suit, by a Court of competent jurisdiction; and the decree could be pleaded in Kentucky against any creditor renewing his claim against the heir in that state. And this Court would enjoin the proceeding, if the creditor should

be within its jurisdiction. Wedderburn v. Wedderburn, 17 Cond. Eng. Ch. R. 208; affirmed on appeal; 18 Id. 585. There could not well be a stronger case of the exercise of the power under consideration than the case cited. So, too, a proceeding by a creditor in Kentucky might be arrested there, at the instance of the heir, on his shewing to the Court that the matter was "res adjudicata" in Virginia. Booth v. Leycester, 15 Cond. Eng. Ch. R. 580; and cases cited in the note to that case.

The general doctrine of equity on this subject is "that the Court of chancery, having authority to act upon the person, may indirectly act upon real estate, situate in a foreign country, through the instrumentality of this authority over the person; and that it may compel him to give effect to its decree respecting such property, whether it goes to the entire disposition of it or only to affect it with liens or burthens." Story on Conf. of Laws, § 544, 545; Brodie v. Barry, 2 Ves. & Beame 127; Massie v. Watts, 5 Cranch's R. 148; Farley v. Shippen, Wythe's Rep.; Guerrant v. Fowler, 1 Hen. & Munf. 5.

Now we do not ask this Court to act directly on the Kentucky lands; all that we ask is, that the appellees, who are seeking the aid of this Court, shall be compelled to perform the covenant of their ancestor, to the extent of the value of the lands received by descent from him in the foreign jurisdiction. And we do this with the greater confidence in this case, because there is in truth no conflict of law in relation to these

382 Kentucky lands. The Kentucky law of descents and our *own is the same; and in administering the foreign law in this case, we are but administering our own.

But it is objected, by Mr. Barton, that parol proof of a written or statute law is inadmissible. The objection comes too late. It was not made in the Court below by exception, and cannot be made in argument here. But if in time, the objection is untenable. The laws of a foreign country, written or unwritten, may be proved by an expert, as a fact. Baron De Rhodes' Case, 55 Eng. C. L. R. 246 to 254; Cocks v. Purday, 61 Id. 269.

5. And lastly, as to the fact of lands in Kentucky by descent from Richard Hoomes.

It will be observed that the appellees had no claim to the Kentucky lands under their grandfather Col. John Hoomes. He died testate, and in the events which have occurred, these Kentucky lands vested absolutely in Richard Hoomes, as he complied with the conditions of the devise, by leaving children. His title to the lands being thus consummate, he had constructive seisin thereof, (if seisin were necessary,) without actual *pedis positio*. Green v. Liter, 8 Cranch's R. 228, 248-9. And by his death intestate, the law cast the seisin on his heirs, (the appellees,) and they became at once constructively seised of all the lands then unsold. (Same case.)

But neither actual nor constructive seisin

is necessary to support a descent. The rule "seisina facit stipitem" has been abolished both in this state and in Kentucky; not as contended by Mr. Morson, by reason of the statutory provision in relation to writs of right; 1 Rev. Code, ch. 128, § 90, p. 510; but as a rule of descent, by the first section of the act of descents. 1 Rev. Code 355, ch. 96, § 1; 1 Lomax Dig. 594; 2 Tuck. Com. 189. And the Kentucky statute in relation to this matter, is proved to be a literal transcript of our own.

The idea that the heirs, by suffering
383 their own lands *to be sold for taxes and themselves becoming the purchasers, could thereby break the descent and cease to be heirs, does not seem to require a grave refutation at our hands. I submit that the decree is erroneous and should be reversed.

MONCURE, J., after stating the case proceeded:

This case has been argued in this Court with great ability by the counsel on both sides. Various questions of law and fact were raised and discussed in the case, as

1st. Whether the covenant of Richard Hoomes had been broken? And if broken,

2d. Whether the right of action therefor passed to the assignee Dickinson? If so,

3d. Whether lands descended in Kentucky could be regarded as assets by descent in any proceeding in Virginia? And if so,

4th. Whether in fact any lands in Kentucky descended from Richard Hoomes to his children; and if they did, whether they were not forfeited for non-payment of taxes, and whether such of them as were held by the children were held by them as purchasers from the State of Kentucky, and not as heirs of their father.

I will now proceed to consider the question first above stated: that is, whether the covenant of Richard Hoomes has been broken? The only ground on which it is contended to have been broken is, that his children have recovered as purchasers under the will of John Hoomes the elder, one fourth of the land claimed by Dickinson to have been derived under the deed from John Hoomes the younger to Apperson, in which the said covenant is contained. And whether broken or not, depends upon the proper construction of the covenant. If it be a covenant of general warranty, or a covenant of special warranty against the claims of the said children,

then it has been broken. But if it be
384 a *covenant of special warranty only against the claims of the covenantor and his heirs, (technically and properly speaking,) and all persons claiming by, from or under them, then it has not been broken. Let us now see what is its proper construction.

The covenant is in these words: "And the said John Hoomes, for himself and his heirs, and said William Hoomes, Richard Hoomes, Armistead Hoomes, and Wilson Allen and Sophia his wife, for themselves and their heirs, as contingent devisees or

legatees under the will of Col. John Hoomes, late of the Bowling Green, deceased, by whom said land was devised to John Hoomes, do hereby covenant and agree to and with the said Samuel A. Apperson, that they will warrant and defend the fee simple estate and full and complete right and title to said two tracts of land, to him and his heirs and assigns forever, against themselves and their heirs, and against the claim and demand of any person or persons claiming by, from, or under them, in virtue of the will aforesaid, and do relinquish and fully confirm to said S. A. Apperson all the right they or their heirs now have, or might or may hereafter have, to said land or any part thereof, to him and his heirs and assigns forever, free from them, said John Hoomes, William Hoomes, Richard Hoomes, Armistead Hoomes, and Wilson Allen and Sophia his wife, late Sophia Hoomes, and their heirs, and of all other persons in the world."

If the latter branch of the clause, commencing at the words, "And do relinquish and fully confirm," had been omitted in the deed, there would have been no ground whatever for contending that there was any covenant of general warranty on the part of Richard Hoomes. The only question then would have been, whether the covenant of special warranty contained in the former branch of the clause was confined to the claims of the covenantor and those claiming under him, or extended to

the claims of his children, whether
385 *claiming under him or otherwise.

Let us first consider the former branch of the clause separately and ascertain the nature and extent of the covenant therein contained. There is nothing peculiar in that branch of the clause, but the words "as contingent devisees or legatees under the will of Col. John Hoomes;" and the words, "in virtue of the will aforesaid." Strike out those words, and the covenant is clearly confined to the claims of the covenantor and those claiming under him. The remaining words are precisely those which are generally used to express such a covenant of special warranty: "And the said Richard Hoomes, &c., for themselves and their heirs, covenant with the said Apperson that, they will warrant and defend the estate to him, and his heirs and assigns forever, against themselves and their heirs, and against the claim and demand of any person claiming by, from or under them." These in substance are the remaining words used, and by no other words or form of expression could such a covenant of special warranty be more plainly or appropriately expressed. In this construction every word has its proper signification. The covenantors intended to bind their heirs, and therefore covenanted for themselves "and their heirs;" and they covenanted to warrant the estate against the claims of "their heirs," not as purchasers from John Hoomes the elder, but in the technical and proper sense of the word as persons claiming by

descent from them. Greenleaf in his treatise on evidence, vol. 1, § 287, note 3, properly says that "the rules of interpretation of wills, laid down by Mr. Wigram in his admirable treatise on that subject, may be safely applied, mutato nomine, to all other private instruments." They are contained in seven propositions as the result both of principle and authority, of which the two first are as follows:

"I. A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed.

"II. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself, in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered."

The word "heirs," in its strict and primary sense is a word of limitation; and although it may be capable of some popular or secondary interpretation, yet, being in this case sensible with reference to extrinsic circumstances, it must, according to the foregoing rules, be construed in its strict and primary sense, unless from the context of the instrument, it appears to have been used in a different sense. Does it appear, from the context, to have been used in a different sense? I am now confining my remarks to the former branch of the clause aforesaid. We have seen that the only peculiarity therein consists in the words, "as contingent devisees or legatees under the will of Col. John Hoomes," and the words "in the will aforesaid." Do these words take from the word "heirs" in the context, its strict and primary meaning, and give it a popular and secondary signification? The covenant with the addition of these words is in substance as follows: "And the said Richard Hoomes &c., for themselves and their heirs, as contingent devisees or legatees under the will of Col. John Hoomes, covenant with the said Apperson, that they will warrant and defend the estate to him and his heirs and assigns forever, against themselves and their heirs, and against the claim and demand of any person claiming by, from or under him, in virtue of the will aforesaid." I do not think the additional words were intended to enlarge the covenant, or to extend it to persons not claiming by, through or under the covenantors. I rather think

if they were intended to have any effect at all on the covenant, they were intended to restrict it to persons claiming as contingent devisees, or in virtue of the will, and by, through or under the covenantors. So that a claim of the covenantors or their heirs in any other right than in virtue of the will would not come within the scope of the covenant. The chief object in using these words doubtless was to shew the interest of Richard Hoomes and others in the subject, and their reason for uniting in the execution of the deed. The land had been devised to John Hoomes the younger in fee; and he had sold and conveyed it to Apperson, and received the purchase money. But Richard Hoomes and others were devisees in remainder on the contingency of their surviving John Hoomes the younger, and of his dying without issue: And they were willing to relinquish to the purchaser their contingent rights, and to warrant the title against all persons claiming under them in virtue of those rights. They therefore covenant "as contingent devisees," and against claims under them "in virtue of the will." To give to these additional words the effect of extending the covenant to persons not "claiming by, through or under" the covenantors, would be to render inoperative the words, "by, through or under." And thus words which are plain, usual, and well understood, would be rendered ineffectual by a strained construction of words which are at least very equivocal.

Now it is a settled rule of construction, that effect should be given, if possible, to every word contained in the instrument: and especially that words of common and settled signification should have their full force and effect.

I will present another view of this part of the subject. The covenant can be extended to the claims of the children as purchasers under the will of John Hoomes the elder, only, I presume, by construing the word "heirs" as "children." The word "heirs" as referring to Richard Hoomes &c., occurs twice in that part of the covenant now under consideration. Where it first occurs, it clearly is used in its strict and primary sense, and does not mean "children." The covenantors bind themselves and their "heirs." If the word in this connection be not construed in its strict and primary sense, then there is nothing in the covenant to bind the heirs, whether they have assets by descent or not. The same word where it again occurs in the same sentence ought to receive the same construction; at least without very strong reasons for giving it a different one; and none such appear in this case.

I think therefore it may fairly be concluded that the former branch of the clause before quoted, construed by itself, contains no more than a covenant of special warranty against the claims of persons claiming under the covenantors. Let us now see whether it contains any thing more when construed in connection with the latter branch of the clause. That branch is sepa-

rated from the former only by a comma, and is in these words:

"And do relinquish and fully confirm to said S. A. Apperson all the right they or their heirs now have, or might or may hereafter have, to said land or any part thereof, to him and his heirs and assigns forever, free from the said John Hoomes &c. and their heirs and of all other persons in the world."

If the words of this latter branch of the covenant were such as (taken alone) 389 would be construed to *import a covenant of general warranty, they would not be so construed, taken in connection with the former branch of the covenant. Otherwise the two branches of the clause would be inconsistent with each other, and the former would contain a covenant of special, and the latter a covenant of general warranty. A deed should be construed according to the intention of the parties, as the same may be gathered from the whole instrument. It would be absurd to suppose that the covenantors intended to give a general warranty against all the world, after carefully giving a special warranty only against persons claiming under them in virtue of the will. All covenants of warranty have the same object, but to a greater or less extent; and the rule as laid down by Sugden in his *Law of Vendors*, vol. 2, p. 94, is that "where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct." This rule is supported by the following authorities. *Nervin v. Munns*, 3 Lev. 46; *Broughton v. Conway*, Dyer's R. 240; *Browning v. Wright*, 2 Bos. & Pul. 13; *Foord v. Wilson*, 4 Eng. C. L. R. 205; *Nind v. Marshall*, 5 Id. 95. In the last cited case some of the covenants were restrictive, but one of them was general against "all persons whatsoever." Dallas, C. J., said, "I think 'all persons whatsoever' must be construed to mean persons of the description in the other covenants; that is persons claiming under the covenantor, or persons claiming under them; and that they are in the nature of sweeping and comprehensive words, introduced to give the largest effect to the special words; reference being had to their special nature, and as such ranging under known rules of construction, and to be explained and applied as I have already stated." The same might be said of the expression "all other persons in the world," if the words of the latter branch of the clause were such as, taken alone, would import a covenant 390 *of general warranty in the broadest sense of the term.

But suppose the latter branch of the clause, taken alone, could be regarded as importing a general warranty, what is the subject to which the warranty refers? Is it the land itself; or is it merely the right of the covenantors thereto? Unquestionably the latter. "And do relinquish and fully confirm to the said Apperson all the right &c. to said land," are the words used.

Richard Hoomes &c. were contingent devisees; they covenanted as contingent devisees; and they relinquished to the purchaser from John Hoomes the younger their right as contingent devisees. And if this relinquishment imports a covenant of general warranty, it is only of their right as contingent devisees. In *Sweet v. Brown*, 12 Metc. R. 175, A conveyed to B all his right, title and interest in and to certain real estate described by metes and bounds, with the usual covenants of seisin and warranty. It was held that the covenants were limited to the estate and interest of A in the granted premises; and were not general covenants extending to the whole parcel described in the deed. In *Allen v. Holton*, 20 Pick. R. 458, a similar decision was made. See also *Blanchard v. Brooks*, 12 Pick. R. 47. If Richard Hoomes only warranted his right as contingent devisee, his warranty was of course not broken by the claim of his children to their rights as contingent devisees and purchasers under the will of their grandfather.

But does the latter branch of the clause import any covenant at all; or at least any covenant as separate and distinct from the covenant of special warranty contained in the former? I rather think not. I think its only office was to shew that the relinquishment and confirmation were intended to be as full and complete as possible.

Whether therefore the two branches of the clause be construed separately or 391 together, I think they import *no more than a covenant of special warranty on the part of Richard Hoomes against the claims of persons claiming under him. This construction, instead of being weakened, will be strengthened and confirmed if we look to the whole deed, to the situation of the parties, and the relation which they respectively bore to the subject of the conveyance. It is not pretended that Richard Hoomes participated in any way whatever in the consideration which was paid for the land. He seems to have had no interest in the sale. He had a contingent interest in the land, which he was willing to relinquish to the purchaser; and he was willing also to warrant the land against all persons claiming under him as contingent devisee. He therefore joined in the execution of a deed, containing such a relinquishment and covenant expressed in words as apt and suitable as any that could have been used to express them. Would it be reasonable to depart from the strict and primary sense of these words and place upon them a strained construction, for the purpose of making him relinquish, not only his own contingent right, but also the contingent rights of others; and covenant, not only against all persons claiming under him, but also against his children claiming as purchasers under their grandfather, and even against the whole world? It was an act of liberality on his part to have relinquished his own right without consideration. While he was willing to do that, he might not have been willing, and probably

was not willing, to relinquish the rights of others or incur a personal liability, on account of rights over which he had no control. An intention to make a relinquishment or incur a liability so extensive should be plainly expressed. If the words used are equivocal, and import, at least as strongly, a more limited and reasonable intention, they should be construed according to such latter intention. In this case we have seen that they import more strongly, if not plainly, an intention

392 on *the part of Richard Hoomes only to relinquish his own rights, and covenant against persons claiming under him.

It is quite probable that when Richard Hoomes executed the deed, he had no idea that his children could have any claim as purchasers under their grandfather's will; but supposed, if he thought at all on the subject, that, in the event which has happened, they could only claim by descent from him. If he had then supposed that they would be entitled as purchasers in the event that has happened; and had intended to relinquish their right, or rather to covenant against it, he would have expressed his intention in plain language, and not in words which import an intention only to relinquish his own right, and to covenant against persons claiming under him. The fact that he has used such words, I think conclusively shews that he intended only to relinquish his own right, and to covenant against persons claiming under him: and that, whether he supposed, or did not suppose, that his children would be entitled as purchasers in the event that has happened. If he so supposed, we have already seen that he would have used different language to have relinquished their right or covenanted against it. If he did not so suppose, then of course he only intended to relinquish his own right, and to covenant against persons claiming under him; for, not being aware of any right of his children, he could not have intended to relinquish or covenant against it. And considering himself the proprietor of the right which this Court has since decided to be theirs, he must have considered the relinquishment of his own right and covenant against persons claiming under him as covering the whole ground.

Supposing that Richard Hoomes when he executed the deed was not aware of the right of his children; whether or not he would have covenanted against it if he had been aware of it, is matter of conjecture merely, *and can have no influence in the decision of the question we are now endeavoring to solve; which is, whether he did actually covenant against it.

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It has been argued with some force that John Hoomes the vendor, having joined in the same covenant with the contingent devisees, it cannot be restricted as to the latter without being also restricted as to the former; which, it is thought, would be unreasonable. It does not, I think, follow as a necessary consequence, that because the covenant of the vendor and contingent

devisees is contained in the same clause, or even in the same words, it must therefore have the same extent as to both. Suppose, for example, that the latter part of the clause before quoted could be considered as importing a general warranty. *Redendo singula singulis*, the vendor having conveyed the estate itself might be considered as intending to warrant the estate itself, while the contingent devisees having only relinquished their right as such, might be considered as intending to warrant only that right. But without deciding whether the covenant of warranty on the part of the vendor was general or special, I do not admit that an intention on his part to give a special covenant only would have been unreasonable; nor, if it would, that that consideration can have much, if any, effect on the construction of the covenant on the part of the contingent devisees. In England the covenants of the vendor are generally of a restricted nature. Lord Eldon, in *Browning v. Wright*, 2 Bos. & Pul. 23, thus describes the common course of business in such a case. "An abstract is laid before the purchaser's counsel; and though to a certain extent he relies on the vendor's covenants, still his chief attention is directed to ascertaining what is the estate, and how far it is supported by the title. The purchaser therefore not being misled by the vendor, makes up his mind whether

he will complete his bargain or not,

394 and if any doubts arise on the *title, it rests with the vendor to determine whether he will satisfy those doubts by covenants more or less extensive. *Prima facie* therefore in the conveyance of an estate, we are led to expect no other covenants than those which guard against the acts of the vendor and his heirs." In Virginia the practice is different; and while, on the one hand, less attention is directed to the title than in England; so, on the other, a covenant of general warranty is usually required and given. Such a covenant seems not to be entitled to the importance which is attached to it by our practice; and it would doubtless be better, as in England, to pay more attention to the title, if not to attach less importance to a general warranty. But why in this case should a covenant of general warranty have been given? It was known both to vendor and vendee that the title of the former was not absolute. The vendor claimed under a will which was exhibited to the vendee, and under which his estate was subject to be defeated by his death without issue. Now, whether he intended to sell precisely such estate as he had, or to sell and warrant a greater estate than he had, was matter of contract between the parties: *Prima facie*, a vendor intends only to sell such estate as he has, where his estate is of a limited nature, or subject to a contingency. In this case the vendee might choose to run the risk of losing the estate in the event of the vendor's dying without issue, receiving of course an equivalent in an abatement of the price; rather than pay the

price of the absolute estate, and rely on the covenant of the vendor for his indemnity. Unless the vendor had other estate than that devised to him by his father, his covenant of general warranty would have afforded little or no indemnity against the claim of the contingent devisees; for the same contingency which would occasion a breach of his covenant would deprive him

of the means of paying damages there-
395 for. The vendee would *place little or no reliance on the covenant of the vendor as a means of indemnity in such a case, and unless the contingent devisees would join in the deed, would of course require an abatement of the price. The contingent devisees did not all join in the deed, and to the extent of the interests of those that did not join, a proportionable abatement was doubtless made. Whether any abatement was made on account of the contingent interest of the children of Richard Hoomes does not appear. Probably not, because probably no such contingent interest was known to exist. But if no such interest was known to exist, it is on that account more probable that the vendee relied on the relinquishment and covenant of Richard Hoomes, than on any covenant of John Hoomes to protect him against an interest which he then supposed to be vested entirely in Richard Hoomes. In this case therefore a special covenant on the part of John Hoomes would at least not have been unreasonable. But even if it would, it certainly would not have been more so than a general covenant on the part of Richard Hoomes.

I am therefore of opinion that the covenant of Richard Hoomes has not been broken; and if the other, or even one of the other, Judges agreed with me in this opinion it would be unnecessary for me to say anything more; but as that is not the case, I must now proceed to examine and consider the other questions.

2d. Did the covenant run with the land; or has Dickinson the assignee of the land a right of action for a breach of the covenant?

It is a general rule of the common law that choses in action are not assignable. But to this general rule there are exceptions, one of which is, that covenants running with land pass with the land to the assignee thereof. Of the covenants usually contained in a conveyance of land, some run with the land and some do not. Those

which are broken, if at all, at the in-
396 stant *of their being made, such as the covenant of seisin, of right to convey, or against incumbrances, do not run with the land; while those which may be broken afterwards, such as the covenant of warranty, for quiet enjoyment, or for further assurance, do run with the land. But even the latter, when broken, cease to run with the land from the time they are broken; for a broken covenant is a mere chose in action, which by the common law is not assignable; being no longer inherent in the land, which alone gives to the cove-

nant its assignable quality. The covenant of Richard Hoomes was a covenant of warranty, and was not broken at the time of the assignment of the land to Dickinson; it therefore passed with the land to him, unless prevented from so passing by the objection that the estate conveyed to him was insufficient to support the covenant, or the objection that no estate at all passed to him from Richard Hoomes the covenantor. Let us first examine the objection, if in fact such an objection can be considered as having been made, that the estate conveyed to Dickinson was insufficient to support the covenant of warranty even on the part of John Hoomes, the grantor of the estate. That it is necessary that some estate should be vested in the covenantee to make a covenant of warranty effectual even between the contracting parties, is undoubtedly true, and results from the very nature of that covenant. The covenants of seisin and of right to convey, are effectual covenants; though no estate be vested in the covenantee; because they are broken, if at all, at the instant of their being made, without any further act or default of the covenantor. But the covenant of warranty and of quiet enjoyment, which are the same in effect, can only be broken by an eviction or ouster by title paramount. They therefore presuppose the possession of the estate by the covenantee, and of course cannot be

effectual where no such possession has
397 passed to him. A deed *purporting to convey land which is in the adverse possession of a third person, will not only not support a covenant of warranty, but is altogether null and void. But if the grantor be in possession of the land at the time of the execution of the deed, his possession and his estate, whatever it may be, will pass to the grantee, and will support a covenant of warranty contained in the deed. This distinction is well illustrated by the case of Slater v. Rawson, 1 Metc. R. 450, and again in 6 Metc. 439. By the deed, in which a covenant of general warranty was contained, in that case a tract of land containing 130 acres was conveyed by metes and bounds. A man named Jacobs had a title paramount to 22 acres of the land, which was therefore yielded up to him by the assignee of the land; who thereupon brought an action on the covenant of warranty. The defendant contended that he was never seised of the land in controversy, and that therefore nothing passed by his deed. A verdict was rendered for the plaintiff on a question reserved by the Judge. The Supreme court awarded a new trial. Dewey, J., in delivering the opinion of the Court, after stating that the defendant at the time of making his conveyance had no legal title to the 22 acres of land, proceeds to enquire whether the defendant was seised in fact, and uses the following language: "The case as stated by the parties, in the report, finds that the premises, which are the subject of this controversy, were a part of a large tract of wood land unclosed by fences, and of which there had

been no actual occupation by any of the parties. Taking these facts to be correctly stated, there was clearly no seisin in fact in the defendant acquired by an entry and adverse possession. The rule as to lands that are vacant and unoccupied, that the legal seisin follows the title, seems to be applicable here; and having ascertained in whom is the legal title, that also determines in whom the seisin is." "The
 398 covenant of warranty *is wholly ineffectual, as no land passed to which it could be annexed; and the result therefore from this view of the case, is that the plaintiff cannot maintain his action." 1 Metc. R. 456-7. On the new trial evidence was offered to prove that the defendant and his father under whom he claimed, had exercised acts of ownership on the land, and that he was in fact seised and possessed thereof at the time of the execution of the deed. A verdict was rendered for the plaintiff as before, subject to the opinion of the Supreme court. That Court rendered judgment on the verdict. Wilde, J., in delivering the opinion of the Court, after reviewing the evidence, says: "It therefore clearly appears by the evidence that the defendant at the time of his conveyance, had the actual possession of the premises, and that he had a valid title against all the world, except the true owner of the Jacobs lot. If any other person had entered on the land in dispute, he might have maintained trespass against him; or if he had been ousted he might have maintained a writ of entry. But the defendant's counsel contend that although he had possession of the land in dispute, yet he had not such a possession as would amount to a disseisin of Jacobs, who afterwards entered on the premises and ousted the plaintiffs; and therefore that the defendant was never actually seised of the land in dispute, and that no title thereto passed by his deed to the grantees; so that the covenant of warranty could not run with the land and pass to their assignees." The learned Judge after making several observations and citing various authorities relating to the legal difference between seisin and possession, further says: "It is not necessary however in the present case to decide the question whether there is any legal distinction between the words seisin and possession; for if the defendant was in possession when he conveyed, &c., claiming to hold the whole land conveyed,
 399 he had a good right to convey his title *whatever it was. His estate passed by his deed to the grantees, and all his covenants were binding." "It is universally true that a party in possession of land, claiming title, may make a legal conveyance, and his title by possession will pass to his grantee. Actual possession of property gives a good title against a stranger having no title."

In *Beddoe v. Wadsworth*, 21 Wend. R. 120, the Supreme court of New York decided that "an assignee of covenants of warranty and for quiet enjoyment may maintain an action on the covenants where possession

is taken under the deed and there is a subsequent eviction, although at the time of the execution of the deed the grantor had no title." To the same effect also is the case of *Fowler v. Poling*, 2 Barb. R. 300, and 6 Barb. R. 165.

If a covenant of warranty contained in a deed executed by a person in possession of land did not run with the land, where there is an outstanding paramount title, the most serious inconveniences would follow. The covenant of warranty is the only covenant inserted in many, if not most, of the deeds that are executed in this country, and according to the general understanding of our people it runs with the land, and may be resorted to for the indemnity of the holder whenever he is evicted by title paramount. As I have already had occasion to remark, more attention is paid to the covenant of warranty and less to the title with us than in England. A purchaser is often satisfied without looking further into title, when he finds that several of the deeds under which he claims contain the covenants of warranty of persons, in the continuance of whose responsibility he has perfect confidence. But of what value would be these covenants if an outstanding paramount title would render them ineffectual? They could only be broken by an eviction or ouster by title paramount;
 400 and yet the very existence of such an outstanding *title would render the covenant ineffectual! So far from

affording any protection to the assignee, they would afford none even to the covenantee. In some cases they might be of benefit, as for instance where an actual disseisin of the rightful owner by the grantor could be proved. But this limitation would so curtail the operation of the covenant, and throw so much doubt and difficulty over it as to render it of little value.

I think therefore that reason and authority unite in shewing that wherever the deed passes the possession the covenant of warranty is effectual and runs with the land.

The case of *Randolph v. Kinney*, 3 Rand. 394, is not in conflict, but in accordance, with the distinction I have referred to. In that case all the parties claimed under Stuart who was the proprietor of 331 acres of land. In 1748 Stuart conveyed 57 acres of the land to James Miller. In 1763 Stuart conveyed the whole 331 acres to John Miller; thus including the 57 acres he had before conveyed to James Miller. In 1784 John Miller conveyed the whole 331 acres to Randolph, who in 1808 conveyed it to Kinney. Judge Carr in his opinion, in which the other Judges concurred, uses the following language: "Those claiming the 57 acre tract under the deed of 1748 from Stuart to James Miller, were in possession by virtue of that conveyance. The subsequent deed therefore from Stuart to John Miller for the whole tract, although it included these 57 acres, could pass neither the possession nor the title; and as Miller had neither possession nor title to these 57

acres, he could convey neither to Randolph, nor Randolph to Kinney. The clauses of general warranty in the deeds from Stuart to John Miller and from Randolph to Kinney, could not operate as real covenants, unless the vendees entered; and could pass to the assignee only along with the land and as *incident to it. But here the land not passing, the warranty could not pass. A disseisor may convey and warrant the land; for there may be a fee simple in a disseisor. But a person against whom there is an adversary possession, cannot make a warranty which will pass to an assignee, because he cannot convey." Thus it is manifest that the opinion of Judge Carr, that the warranty in that case was ineffectual was based entirely on the fact that the possession of the land in controversy at the time of the conveyance, was adversary, and therefore did not pass to the grantee.

If a covenant of warranty contained in a conveyance from a person in possession but without title, is effectual and will run with the land, it would seem, a fortiori, that where the grantor is not only in possession but has a title to the land, though not such a title as is conveyed and warranted to the purchaser; the covenant of warranty will be effectual and will run with the land. On this subject see the notes of the American editor to Smith's Leading Cases, 43 Law Lib., p. 122, citing the case of *Bailey v. Wells*, 3 Wils. P. 36. The case of *Andrew v. Pearce*, 4 Bos. & Pul. 158, might seem at first view to be a contrary decision. But in that case the lease for years by a tenant in tail had become void by the termination of the estate in tail, and after it had thus become void it was assigned to the plaintiff. The land was not conveyed, but the lease was assigned to the assignee. And Sir James Mansfield, Ch. J., said: "The lease is stated to have become absolutely void by the death of Peter Best, without heir male. The lease then having become absolutely void, what could be the operation of the assignment by Bennett to Andrew? He could neither assign the lease nor any interest under it, because the lease was gone. What right of any sort had Bennett? If any thing it could only be a right of action *on the covenant, and that could not be assigned by law" &c. Now in the case under consideration, John Hoomes the younger at the time of his conveyance, was seised of an estate in fee though defeasible; and he conveyed an estate in fee simple with covenant of warranty. So far therefore as John Hoomes the grantor of the estate is concerned, it seems to be as strong a case as well could be to make a covenant of warranty effectual, and run with the land.

But it is objected that the covenant under consideration was made by Richard Hoomes, and that no estate passed from him to the covenantee. Let us now examine this objection, which was chiefly relied on in the argument. It can hardly be said that no estate passed from Richard

Hoomes; or at all events, that he was a stranger to the subject matter of the contract and the conveyance. He had in fact an interest in the subject; an interest which depended on the double contingency of John's dying without issue living at his death, and of Richard's surviving him. The parties doubtless supposed that his interest was even greater than it was, and that it depended on the single contingency of John's dying without issue living at his death. This Court however has decided that his interest depended on the double contingency aforesaid. 1 Gratt. p. 302. If that double contingency had occurred, the deed would have operated, at least by estoppel, to pass the interest of Richard Hoomes to the purchaser, and the covenant would then undoubtedly have run with the land. But as John was seised of the estate in fee, and conveyed it with covenant of warranty, Richard's joining in the deed was a confirmation of the conveyance, so far as he was concerned; and if it be necessary, to make a covenant run with the land, that some estate should pass from the covenantor to the covenantee, I think it might well be contended that this case comes up to the requisition.

403 *But is it necessary that some estate should pass from the covenantor to the covenantee in order that the covenant may run with the land? I think not. In the notes of the learned English annotator to *Spencer's Case*, 43 Law Lib., p. 99, he says, "where such a covenant, (that is a covenant for something relating to the land,) is made, it seems to be of no consequence whether the covenantor be the person who conveyed the land to the covenantee, or be a mere stranger. Thus in the *Prior's Case* reported in the text, and in *Co. Litt. 384 b*, the Prior was a stranger to the land of the covenantee; and there is a good reason for this assigned in the above passage in *Co. Litt.*, where the law is said to be so, to give damages to the party grieved; in other words, in order that the person who is injured by the non-performance of the covenant, who is always the owner of the land pro tempore, may be also the person entitled to the remedy upon it by action." But while on the one hand it seems that the benefit of a covenant runs with the land, though the covenantor be a stranger to the land; so, on the other, it would seem that the burden of a covenant in no case runs with the land; in no case, I mean, in which the relation of landlord and tenant is not created by the deed. In regard to covenants entered into by the owners of land, the same learned annotator says: "great doubt exists whether these in any case run with the lands so as to bind the assignees of the covenantor. One inconvenience which would be the result of holding them to do so is, that the assignee would frequently find himself liable to contracts of the very existence of which he was ignorant, and which perhaps would have deterred him from accepting a conveyance of the land, if he had known of them;

and the reason assigned in the first Institute for allowing the benefit of a covenant relating to the land to run therewith, viz: to give the remedy to the party grieved, does not apply to the question respecting the *burden thereof." Id. p. 101.

See also the notes of the American annotator. Id. p. 137. The law is laid down to the same effect in 2 Lomax's Dig., p. 260, § 29, 30, 31. The principle thus stated by these profound jurists is opposed by no authority I have met with, and is most consonant with reason and conscience. There may have been good reason under the feudal constitution for requiring that the warranty should accompany the estate and exist only between the donor and donee. But the technical warranty which formerly existed has been altogether disused, if not abolished; and its place is now supplied by covenants, which better suit the present condition of things. I can see no reason why these covenants, if in their nature they are such as can run with the land, should not run with the land as well when they are made by a stranger as when they are made by the donor; but I can see many reasons for the contrary. A person may be willing to purchase land notwithstanding a flaw in the title, if he can fortify it by proper covenants. The owner may not be sufficiently responsible, but may be able to procure the assistance of responsible friends, or creditors, or others may have sufficient interest to join him in the covenants. But what would these covenants be worth if they could not be enforced by an assignee of the land? A covenant of seisin, or of right to convey, would never be given in such a case, because it would be known to the parties that as soon as made it would be ipso facto broken. A covenant of warranty, or for quiet enjoyment, would be the most appropriate covenant for such a case; and yet, to make that covenant effectual, it would be necessary, according to the doctrine contended for, that the covenantee should always retain the property.

I am therefore of opinion that the covenant of Richard Hoomes runs with the land even though he should be considered as a stranger to the land. It is perhaps proper that I should express the opinion I entertain, that *even if the covenant did not run with the land, an assignee would have a right to enforce it for his benefit in the name of the covenantee. "Where the covenants entered into with a purchaser are covenants in gross, and he afterwards sells, the purchaser from him, being entitled to the benefit of the former covenants, can compel him to allow his name to be used for the purpose of enforcing the covenants." This is the language of Sir Edward Sugden, 2 Sug. on Vend. 726; and the authority he cites for it, is Riddell v. Riddell, 10 Cond. Eng. Ch. R. 183. I am also of opinion that if there be an unbroken chain of covenants of the same kind running through all the mesne conveyances, even though they be not cove-

nants running with the land, a Court of equity will give the assignee the benefit of any of the remoter ones. "A Court of equity will make the party immediately liable, who is or may be, at law or in equity, made ultimately liable. Thus, for example, if a chose in action not negotiable at all, or not negotiable by the local law, except to create a legal right of action between the immediate debtor or endorser and his immediate endorser or assignee, should be passed to a remote assignee or endorsee, the latter would be entitled in equity directly to sue the party who was ultimately or circuitously liable for the debt to the antecedent holder or creditor." This is the language of Story, 2 Equ. Jur. § 1250; and the authority he cites in illustration of it, is the case of Riddle v. Mandeville, 5 Cranch's R. 322. See also 43 Law Library, p. 122, and the case there cited of Nesbit v. Brown, 1 Dev. Eq. R. 30. This equitable doctrine is not opposed by the case of Randolph v. Kinney, 3 Rand. 394. In that case there was not an unbroken chain of covenants of the same kind. The only covenant which appears to have been contained in the deed to Randolph, who asserted the equity, was a covenant for quiet enjoyment. And that was never of any effect, because the land in controversy *never came to the possession of Randolph, but remained in the adversary possession of another, in whose possession it was when conveyed to Randolph. There was then no starting point; no foundation for the equity to rest upon.

But it is said that only a portion, though much the greater portion, of the land conveyed by John Hoomes the younger to Apperson, was conveyed by the latter to Dickinson; and one of the learned counsel for the appellees relies on a defence, which he admits to be technical, and for which no authority is to be found except in a word of Preston, viz: that a covenant cannot be apportioned. That writer, who, as the counsel properly says, is a very great authority, does certainly say that "when the property is subdivided by sales it seems to follow from a maxim in law that the purchasers lose the benefit of the former covenants, on the ground that the remedy cannot be apportioned; or, in more correct terms, the covenantor cannot be subjected to several actions. Thus when a man sells two farms to A and covenants with him, his heirs and assigns, and one of these farms is sold by A to B, B can never sue on this covenant, since it would subject the covenantor to several actions." 3 Preston Abstr. 56, 58; 2 Lomax 263, 4, note. But as one of the learned counsel for the appellants properly remarked, Preston seems to contradict this position in another part of his work, when he says that covenants which run with the land are not extinguished by apportionment of the land into parcels among several purchasers and owners. The position is not only unsupported by any other authority than that of Preston, but is opposed by an array of authority no

less imposing than his. Sugden, after quoting the observation of Preston, says: "The better opinion however seems to be, that an alienee of one of the estates could maintain covenant against the covenantor where the covenants run with the land."

It does not seem that any injustice
407 *would arise by suffering several covenants to lie, although it might expose the covenantor to inconvenience; whereas the denial of the right to each assignee might lead to positive injustice, or, if not, to greater inconvenience on their part." 2 Sug. on Vend. 743, pl. 91, 92. See also Kane v. Sanger, 14 John. R. 89, and authorities cited; Van Horne v. Crain, 1 Paige's R. 455; Astor v. Miller, 2 Paige's R. 68. It is true, as a general principle of law, that covenants are not apportionable; and so also is it true, as a general principle of law, that covenants are not assignable. But as covenants which run with land are assignable, because the land itself is assignable, so also, it would seem that covenants which run with land are apportionable because the land itself is apportionable. A covenant running with land would be of very little value if it ceased to run with the land whenever the land was divided, whether by act of law or by the act of the owner. We know that covenants for the payment of rent are apportionable, both by act of law and by the acts of parties. 8 Bac. Abr., Rent. M. And for the same reason why may not other covenants be apportioned? The rule of law that covenants are not apportionable is founded on convenience. But injustice is a greater evil than inconvenience. And wherever justice, or even greater convenience, requires that a covenant should be apportioned, it would seem to be reasonable that the general rule should bend and admit of an exception.

3dly. I come now to the consideration of the question, "whether lands descended in Kentucky could be regarded as assets by descent in any proceeding in Virginia?"

"Freehold land of inheritance, descended to a person's heir at law is, by the common law, assets for the payment of the ancestor's debts by specialty, as by bond or covenant, in which his heirs are bound."

Ram on Assets 214, 8 Law Library
408 144. The common law in *this respect was the law of Virginia, when it embraced the territory which now constitutes the State of Kentucky. It has been the policy of all or nearly all the states of the Union to extend, and not to restrict, the liability of land for the payment of debts. While in our own state that policy has not progressed so rapidly as in some of the other, and especially in most of the western states, it has at length reached the point of subjecting an intestate's land to the payment of all his debts. In the absence therefore of all evidence on the subject it would be presumable, that in Kentucky land is liable for the payment of debts, at least to the extent to which it is liable at the common law; especially if that

liability sought to be enforced by the bill should not be denied by the answer. But in this case it is proved affirmatively by John C. Herndon, a lawyer of that state, that by the law of that state, which existed in 1823 when Richard Hoomes died, and has ever since existed, freehold land of inheritance descending from an intestate "can be subjected to the payment of the intestate's debts either by proceedings in law or chancery." It is also proved by him that as early as 1798 an act was passed, which is still in force in that state, containing a provision similar to 1 Rev. Code, ch. 99, § 21, that "if the deed of the alienor doth mention that he and his heirs be bound to warranty, and if any heritage descend to the demandant of the side of the alienor, then he shall be bound for the value of the heritage that is to him descended" &c. This last provision having been the law of Virginia when Kentucky was organized as an independent state, the probability is that it never ceased for a moment to be the law of the latter state, and that the said act of 1798 was merely a continuation or re-enactment of an existing law. Without any proof of such re-enactment it would have been fair to presume that the provision continued to exist as a part of the Kentucky law. It is contended by one

409 *of the counsel for the appellees, that the Kentucky laws in question being statute laws, the evidence of Herndon is inadmissible; no foundation having been laid for its introduction as secondary evidence, by proof of inability to obtain copies of the statutes. The citation from Story's Conflict of Laws, § 637, 641, certainly gives support to the position that as a general rule a foreign statute law must be proved by an authentic copy if to be had. The Courts of some of the states, and the Supreme court of the United States, are of opinion, "that the connexion, intercourse and constitutional ties which bind together these several states, require some relaxation of the strictness of this rule," and "have accordingly held that a printed volume purporting on the face of it to contain the laws of a sister state is admissible as prima facie evidence, to prove the statute laws of that state." 1 Greenl. Ev. § 489, and cases cited in note 2, among which is the case of Taylor v. Bank of Alexandria, 5 Leigh 471. But I incline to think that the doctrine of primary and secondary evidence does not apply to the case, and that a foreign law, whether written or unwritten, may be proved by a person who is learned in that law, without laying any foundation for the introduction of secondary evidence. This is the principle of a late decision of the Court of Queen's Bench, cited by one of the counsel for the appellants from 55 Eng. C. L. R. 250, 267. As was said by one of the Judges in that case, "the general principle does not seem to apply to the case. What, in truth, is it that we ask the witness? Not to tell us what the written law states; but, generally, what the law is. The question is not as to the language

of the written law: For when that language is before us we have no means by which we are to construe it." "How many errors might result if a foreign Court attempted to collect the law from the language of some of our statutes which declare instruments in particular cases to be
410 null *and void to all intents and purposes, while an English lawyer would state that they are good against the grantor, and that the Courts have so expounded the statutes! It is no answer to say that other evidence by word of mouth may be added for the purpose of giving the interpretation of the written law. I am merely shewing that our Courts require, not the actual written words of a foreign law, but the law itself; for which purpose a professional witness is required to expound it." But the evidence of Herndon not having been objected to in the court below, (in which case authenticated copies of the statute might have been exhibited,) it would seem to be too late to make the objection in this Court.

Whether therefore we look to the evidence of Herndon or not, I think it must be regarded as the law of Kentucky, that any land in that state which may have descended from Richard Hoomes to his heirs at law, is assets for the payment of what may be due upon his covenant of warranty in this case; and that if the land to which the covenant is annexed were situate in the State of Kentucky, the heirs of the covenantor, in an action brought by them to recover that land, would be barred for the value of the land to them descended.

But the land to which the covenant is annexed being situate, and the suit for its recovery by the heirs of the covenantor being brought, in Virginia; the question is, whether the land descended to them in Kentucky is assets, and whether they ought to be bound for the value of the said land descended to them, at least to the extent to which it has actually come to their hands.

I think this question should be answered in the affirmative. It is undoubtedly true that real estate, or immovable property, is exclusively subject to the laws of the government within whose territory it is situate; and that no writ of sequestration or execution, or any order, judgment or decree of a foreign Court, can be enforced
411 *against it. But I think it is no less true "that equity, as, it acts primarily in personam, and not merely in rem, may, where a person against whom relief is sought is within the jurisdiction, make a decree upon the ground of a contract, or any equity subsisting between the parties respecting property situated out of the jurisdiction. In this very language the principle is stated by White and Tudor in their notes to leading equity cases, Law Library, May 1851, p. 319; and the authorities to which they and the American editors refer, seem fully to sustain the principle.

In the case of *Massie v. Watts*, 6 Cranch's R. 148, Marshall, Ch. J., reviews the princi-

pal cases, commencing with the celebrated case of *Penn v. Lord Baltimore*, 1 Ves. sr. 444; and concludes, "upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, that in a case of fraud, of trust, or of contract, the jurisdiction of a Court of chancery is sustainable wherever the person may be found, although lands not within the jurisdiction of that Court may be affected by the decree." "The circumstance," to use his language in another part of the case, "that a question of title may be involved in the enquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction." In the case of *Mitchell v. Burch*, 2 Paige's R. 615, the Chancellor says: "Although the property of a defendant is beyond the reach of the Court, so that it can neither be sequestered nor taken in execution, the Court does not lose its jurisdiction in relation to that property, provided the person of the defendant is within the jurisdiction. By the ordinary course of proceeding, the defendant may be compelled either to bring the property in dispute, or to which the complainant claims an equitable title, within the jurisdiction of the Court; or to execute such a conveyance or transfer thereof as
412 *title, as well as the possession of the property, according to the *lex loci rei sitæ*. See also *Mead v. Meritt*, Id. 404. These principles have been recognized in Virginia, so far as we have had any adjudications on the subject. In the case of *Farley v. Shippen*, Wythe's R. 135, Chancellor Wythe decreed that the defendants who resided in Virginia, were trustees for the benefit of the plaintiffs of certain lands in North Carolina, and should convey the same to them. "If," said the Chancellor in that case, "an act performed by a party in Virginia, who ought to perform it, will be effectual to convey land in North Carolina, why may not a Court of equity in Virginia decree that party, regularly brought before that tribunal to perform the act? Some of the defendant's counsel supposed that such a decree would be deemed by our brethren of North Carolina an invasion of their sovereignty. To this shall be allowed the force of a good objection, if those who urge it will prove that the sovereignty of that state will be violated by the Virginia Court of equity decreeing a party within its jurisdiction to perform an act there, which act voluntarily performed any where, would not be such a violation. The defendant's counsel objected also, that the Court cannot, in execution of its decree, award a writ of sequestration against the lands in North Carolina, because its precepts are not authorities there. But this, which is admitted to be true, doth not prove that the Court cannot make the decree; because, although it cannot award such a writ of sequestration, it hath power confessedly to award an attachment for contempt in refusing to perform the decree."

In *Guerrant v. Fowler*, 1 Hen. & Munf. 5, Chancellor Taylor approved the principles of the case of *Farley v. Shippen*, and decreed accordingly.

Immovable property being subject to the laws of the government within whose territories it is situate, the question whether and to what extent it is liable to the
413 *claims of a plaintiff must of course be determined according to those laws. Therefore, where the suit is brought in a country different from that in which the property is situate, the Court in giving relief, must to that extent administer foreign law. This may be an inconvenience, but it is no objection to the jurisdiction of the Court, and is preferable to that failure of justice which would arise from a refusal to interfere in such cases. Courts, in the administration of justice, are in many cases, bound to execute foreign laws. Where a suit is brought in one country on a contract made in another, the *lex loci contractus* governs the case. Where a citizen of one country dies leaving personal property in another, the *lex domicilii* governs the succession and distribution of the property. In the latter case the domiciliary administrator cannot recover property situated out of the limits of the jurisdiction from which he derived his appointment. An auxiliary administrator must be appointed by the jurisdiction in whose limits the property is situate; and he is responsible for the property, not to the domiciliary administrator, but directly to creditors, legatees and distributees. In a suit brought by legatees or distributees to enforce that responsibility, the *lex domicilii* must be ascertained and administered by the Court. *Harvey v. Richards*, 1 Mason's R. 381, was such a suit, and in it the law of Bengal, which was the place of the domicil, was ascertained and administered.

An heir who has assets by descent, which are liable by the *lex loci*, to the payment of the ancestor's debts, may be considered to the extent of the assets, as a debtor by contract to the creditors, and also as a trustee of the subject for their benefit. His case therefore, as well upon the ground of trust as of contract, seems to be embraced by the principle as laid down by the Chief Justice in *Massie v. Watts*, "that in a case of
414 jurisdiction of a Court of chancery *is fraud, of trust, or of contract, the sustainable wherever the person may be found, although lands not within the jurisdiction of that Court, may be affected by the decree." It is true the creditors have no lien upon the land descended; and a bona fide purchaser of it from the heir is entitled to hold it against the claims of creditors. But the heir was always bound in equity, and for a long time has been bound at law, to the extent of the purchase money. An heir in regard to the assets descended is as much a debtor by contract and a trustee for the benefit of the creditors whose claims bind the heirs, as an executor is in regard to the assets in his hands. In the case of *Tunstall v. Pollard*,

11 Leigh 1, it was decided by this Court that an executor having taken probat of the testator's will and letters testamentary in England, and collected the assets of the testator's estate there, and brought them with him to Virginia, but having never qualified as executor in Virginia, is liable to be sued by the legatees in the Court of chancery of Virginia for an account of his administration, and for the legacies that remain unpaid. There would seem to be less difficulty in maintaining a suit against an heir in respect of foreign assets, than a suit against a foreign executor, even in respect of assets brought with him to the country in which the suit is brought. An heir is a quasi personal debtor, liable to be sued in the debt and detinet. His obligation attaches to his person and follows him wherever he goes. The only difference between him and an ordinary debtor, is the extent of his responsibility, which is limited not only by the nominal amount of the contract, but also by the value of the assets descended. He holds the assets in his own right, and as his own property. An executor on the other hand, acts under a commission, and is accountable to the jurisdiction from which he received it. It was contended with very great force in the case of *Tunstall v. Pol-*

lard, that the executor is accountable
415 exclusively to the jurisdiction *from which he receives his commission. But the Court overruled the objection. President Tucker in delivering an opinion in which a majority of the Court concurred, after admitting that the administration of the assets must be governed by foreign law, and repelling the objection arising from the difficulty of ascertaining that law, remarks: "Whatever of difficulty or inconvenience may be fancied to exist in the execution of this duty, it weighs little in the balance in comparison with the burden which would be imposed upon creditors and distributees by refusing cognizance of their cases here, though the person and the property are both in our power, and sending them to sue in a foreign country from which the executor has absconded with the whole of the assets in his pocket. How shall they sue him there when he is not within the jurisdiction? How shall they reach the assets there when he has eloiigned them?" p. 29. "Upon the whole then it appears that in subjecting the executor to suit, who has brought the assets into this jurisdiction, no mischief will arise; while the contrary doctrine will protect an executor (who quits the country where he administered and comes over to this country with the assets), from all claim whatsoever. If he cannot be sued here he can be sued nowhere; since the foreign Court can have no longer power over him when his person and his effects are both beyond its reach."

An heir cannot be sued at law in respect of foreign assets, because the writ of *extendi facias*, which is the only execution against the heir on a judgment at law, cannot be enforced *extra territorium*. But Courts of law and equity have concurrent

jurisdiction of suits against heirs. And though some of the modern means, whereby a decree of a Court of equity may be enforced, can have no operation extra territorium, yet the ancient process of attachment may still be resorted to for the purpose

of enforcing the performance of a decree; and will generally *be found

effectual whenever the person who is to perform the decree is within the jurisdiction of the Court. The Court will give to the suitor all the redress within its power, and will not be deterred from doing so by the consideration that it cannot act in rem as well as in personam. I think therefore a suit in equity may be maintained against the heir whenever his person is within the jurisdiction of the Court. Ordinarily, the Court in whose jurisdiction the defendant resides would be the most convenient Court for him; for, in the language of Chancellor Wythe in *Farley v. Shippen*, "a case can rarely if ever occur, the discussion of which can be so convenient to the defendant in any other, as in his own country." But cases may sometimes occur in which, all things considered, it may be more convenient to turn over the parties to a foreign jurisdiction. The ancestor may reside and die abroad leaving all his family and estate in the place of his domicil. One of his heirs may remove to this country or be casually here, and be sued here for a debt binding the heirs. In such a case justice as well as convenience would require that the suit should be brought where most of the heirs reside, where the executor resides, where the property is situate, and where therefore the accounts can more conveniently be settled, the law which governs the case be better ascertained, and the decree be more effectually enforced. "It may be admitted," says Story, Justice, in the case of *Harvey v. Richards*, 1 Mason's R. 381, 409, "that a Court of equity ought not to be the instrument of injustice, and that if, in the given case, such would be the effect of its interposition, it ought to withhold its arm. This however would be an objection, not to the general authority, but to the exercise of it under particular circumstances." Under such circumstances the Court in the exercise of a sound discretion should dismiss a creditor's bill against the

heir without prejudice to any suit he may bring in the *place of the domicil. But on the other hand cases may occur in which justice as well as convenience would require the suit to be brought in the country in which the heirs reside; though the land sought to be affected is situated in another country. Nay, cases may occur in which there would be an absolute failure of justice if the suit were not so brought. Suppose the ancestor lives and dies in Virginia leaving all his heirs here, and all his creditors here, and all his estate here except some wild lands in another state, and suppose the heirs sell these lands, receive the proceeds and bring them to Virginia, could not a suit in equity be maintained in Virginia by the creditors against

the heirs? In the language of Story, J., in the case of *Harvey v. Richards*, "The property is here, the parties are here, and the rule of distribution is fixed. What reason then exists, why the Court should not proceed to decree according to the rights of the parties? Why should it send our own citizens to a foreign tribunal to seek that justice which it is in its own power to administer without injustice to any other person." Indeed it may be said in language similar to that of Tucker, President, in *Tunstall v. Pollard*, "If the heir in the case supposed cannot be sued here, they can be sued nowhere; since the foreign Court can have no longer power over them when their persons and effects are both beyond its reach." But suppose further that the heirs, having sold the lands and brought the proceeds here, bring a suit in equity in this state to recover land conveyed by their ancestor with covenant of warranty binding the heirs, could not the defendant in that suit defend himself by averring and shewing that the value of the land was already in the hands of the heirs in the form of money arising from the sale of lands in a another state descended to them from the same ancestor and liable by the laws of that state for the payment of the ancestor's

debts? It may be said that the cases supposed are extreme cases. *And yet they are very much like the case under consideration, if lands in Kentucky in fact descended from Richard Hoomes to his heirs at law; a question which will be presently considered. To say that because in some cases it might be inconvenient to exercise such a jurisdiction, it should therefore be exercised in no case whatever, would be to say that positive and certain injustice should be permitted to be done for the purpose of avoiding a possible inconvenience. The question whether the Court will give relief in any given case, is, in the language of Story, J., in *Harvey v. Richards*, "a matter, not of jurisdiction but of judicial discretion, depending upon the particular circumstances of each case."

The exercise of such a jurisdiction would be no invasion of the sovereignty in whose jurisdiction the property is situate, and no violation or obstruction of its laws. On the contrary it would rather tend to execute and enforce those laws. Its object is to enforce a contract, or trust, or liability, created, or recognized, or permitted by those laws, against persons who are out of the limits of the jurisdiction where the property is situate. It supplies a remedy when otherwise there might be none, and is auxiliary, instead of adversary, to the foreign jurisdiction. No sovereignty would object to the exercise of such a jurisdiction. The citizens of that sovereignty might be deeply interested in its exercise. Suppose the ancestor dies in another state leaving his land, his heir and his creditors there; and that the heir sells the land, receives the money and comes to our state to reside. Would our Court of equity deny relief to the creditors in such a case? Would not

national comity as well as justice require it to give such relief? And yet the motives and reasons for giving relief would be much stronger in a case in which the ancestor, heir and creditors all resided in our own country. If the sovereignty of the situs would not, as it could not, object to the exercise of jurisdiction by our Court in the former case, it certainly would not in the latter.

419 *Nor would the exercise of such a jurisdiction be apt to produce any conflict of authority between the tribunals of different states; or to expose the defendant to a multiplicity of suits, or a double liability. As was well said by one of the counsel for the appellant, the heir may protect himself by his pleas, whether the land lies in Virginia or elsewhere; and where the land lies elsewhere a Court of equity will take especial care that he be not subjected to a double charge. That Court is armed with power, and it is its duty, to direct all proper accounts and enquiries, and use all precautions which may be necessary for the attainment of complete justice to all the parties. It professes in such a case, in good faith to administer the law of the situs. And the sovereignty of the situs will give full faith and credit to its judgments. In the case of *Tunstall v. Pollard*, the same objection of conflict of jurisdiction was made. But it was answered by the President in this way. "It is said indeed that peradventure there might be a conflict between the decisions of the foreign Court and ours, and that between the two the executor might suffer. I think not. While this Court would be bound in its decision to conform to the law of the forum which granted administration, the foreign Court on its part would consider the party protected for what he is compelled to do by us. No Court it must be presumed, could ever charge an executor with a devastavit, because he has paid a debt decreed in invitum, by a foreign tribunal, although the domestic forum may consider the decree erroneous." He then proceeds to shew by authority that this is the established principle of public law as recognized both in England and the United States. An heir who pays the debt of the ancestor binding the heir, is protected to the extent of such payment, and may plead it for his protection in any suit brought against him by another creditor of the ancestor. This he may do, even though

420 the payment be *voluntary; and, a fortiori, he may do it if the payment be made by compulsion. If the heir reside here the suit must be brought here, in which case, of course, our Courts would give the heir the benefit of his payment. But if the suit could be brought in a Court of the situs, such Court would give at least as much effect to a payment by compulsion as to a voluntary payment, and this would be sufficient for the protection of the heir.

There is then no danger in any case of any injury to the heir arising from a conflict of jurisdiction. But if there were any

danger in any case, there can certainly be none in this, in which the ancestor and all the heirs always resided in Virginia; in which the ancestor has been dead nearly thirty years; and in which it is not pretended in the answer of the heirs, that any suit has ever been brought in Kentucky to subject the assets descended from the ancestor to the payment of his debts; or that any creditor of the ancestor ever existed in that state. If it be said that there is a possibility of the existence of such a creditor, or the institution of such a suit, it is so bare and remote as not to be a feather in the scale against that positive injustice which would be inflicted on the appellant by compelling him to surrender land warranted to him by the ancestor, to heirs who are in possession of assets by descent from the same ancestor; and to turn him over to the possibility of obtaining relief in Kentucky, where none of the heirs reside, and where now there may be no remaining assets.

The comity which authorizes, if not the necessity which requires, the exercise of such a jurisdiction in countries generally, applies with greatly increased force to the United States as among themselves. Their close political union; their local proximity to each other, and the frequent social and commercial intercourse of their inhabitants,

render it absolutely necessary that 421 the principles *of comity among themselves should be carried to the fullest extent; while the similarity of their institutions and laws render it comparatively convenient and easy to enforce in one state a contract or trust governed by the laws of another. It may be said that, in some of the states, and especially of the new states, land has been made assets for the payment of all the debts of a decedent, and is subject to sale for that purpose by his personal representative, though the descent is not broken. This, so far from diminishing, increases the propriety of affording equitable relief in other states, where the heir may be found by the creditors with the proceeds of the land in his pocket. The giving of such relief may involve the necessity of taking an account of the assets real and personal, and of the administration thereof by the foreign representative: but it no more involves that necessity where the real estate is placed on the footing of personal assets by the local law, than where it is liable as at common law: for the personal, being the primary fund for the payment of debts at common law, must be exhausted before the real estate can be taken for that purpose: so that an account of the personal estate must generally be taken before the common law liability of the real estate can be enforced. Indeed, where the real estate is placed entirely on the footing of personal assets, and subjected to primary liability, the necessity for the settlement of an account of the personal estate before the real can be taken, would seem to be thereby obviated. But the necessity for such a settlement where

it exists, is no objection to the jurisdiction, but addresses itself entirely to the judicial discretion of the Court. It may be a reason for "declining to exercise the jurisdiction in particular cases," but is no reason "against the existence of the jurisdiction itself." 1 Mason's R. 414 and 15. As was said by the learned Judge in that case, in

speaking of a kindred subject, whether
422 the Court will *give relief or not,

"must depend on the circumstances of each case;" and it is incumbent on those who resist the giving of relief, "to establish in the given case that it may work injustice or public mischief." Id. 430. But, reverting to the policy which has prevailed in most if not all of the states to increase and facilitate the liability of real estate for the payment of debts, it would be strange indeed if it should be a fruit of that policy to discharge the heir from all liability for the ancestor's debt, in a case in which the plainest equity requires that he should be made liable, and in which he might be made liable without the least injustice or the slightest inconvenience to any body in the world. I imagine that in no state of the Union is the estate of a decedent discharged from liability, merely because it has passed from the hands of the personal representative and reached the hands of heirs or distributees. I imagine that in every state, as at common law, the claims of creditors attach to the estate as a trust subject, and (though from necessity bona fide purchasers must acquire a good title), follow it into the hands of heirs and distributees, and may be enforced wherever their persons are to be found, and the doctrines of the English chancery prevail.

Reason and authority are alike in favour of the jurisdiction of a Court of equity in such cases. While the general principle that that Court has jurisdiction over the person, wherever it may be found, to enforce a contract or a trust, though land in a foreign country may be affected thereby, is sustained by many cases, and is now a well settled doctrine of equity; and while the case of an heir having in his hands foreign assets by descent, whether in the form of land or money, which by the contract of the ancestor and the law of the situs, are bound for the debts of the ancestor, is clearly within the reason of those cases and of that doctrine. I have yet seen

no case ancient or modern, in which
423 it *was decided that a Court of equity,

having jurisdiction over the person of the heir, had no power to enforce such a liability. In the earlier ages of English equity law, before it was well defined and established on the broad basis of justice on which it now stands, there was a struggle between the common law lawyers and the equity lawyers, not on the particular question of the liability of an heir for foreign assets by descent; but on the general question of the jurisdiction of a Court of equity in personam, though the decree might indirectly affect land situated in a foreign country. The case of *Arglasse v. Mus-*

champ, 1 Vern. R. 75, decided in 1682, was a suit in equity to be relieved against a fraudulent conveyance of lands in Ireland. The defendant pleaded to the jurisdiction. The Lord Chancellor after saying, "This is surely only a jest put upon the jurisdiction of this Court by the common lawyers; for when you go about to bind the lands, and grant a sequestration to execute a decree, then they readily tell you that the authority of this Court is only to regulate a man's conscience, and ought not to affect the estate, but that this Court must agree in personam only; and when, as in this case, you prosecute the person for a fraud, they tell you, you must not intermeddle here, because the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local; and so would wholly elude the jurisdiction of this Court;" overruled the plea, and ordered the defendant to pay costs "for endeavouring to oust the Court of its jurisdiction." The case of the *Earl of Kildare v. Sir Morrice Eustace*, Id. 419, cited by Mr. Barton, was a suit in equity to enforce a trust of lands in Ireland. Sir John Holt, the counsel for the plaintiff, maintained the jurisdiction of the Court. The defendant's counsel "in a manner waived," and thus conceded, "the preliminary point" of jurisdiction, "and would not enter into the de-

bate whether the Court might not
424 decree *the trust of lands in Ireland, the trustee being in England." But

they insisted that it was certainly a matter discretionary in the Court, whether they would do it or not; and that as this case was circumstanced, they apprehended the Court would not interpose. And among the reasons assigned for not interposing in the case, were the following: "1st. That in this case there had been no less than two judgments in the Courts of law in Ireland, and no less than three bills in equity;" and "2dly. That Sir Morrice Eustace the trustee, did not live in England, but came here occasionally upon other business; and that it would be unreasonable to keep him from his own country and from all his other concerns, to attend this suit." But the Court, consisting of the Lord Chancellor and the Judges, overruled the objection, and decided not only that the Court had jurisdiction of the case, but that it was a proper one for the exercise of its judicial discretion. It is true, as stated by Mr. Barton, that Sir John Holt, in arguing the case, said "it was resolved in *Evans & Ascough's Case*, Latch, fol. 234, and *Dowdale's Case*, in 6 Coke's R. 348, that lands in Ireland shall be assets to satisfy a bond debt here, but otherwise of lands in Scotland;" and it is also true that in 3 Vin. Abr. 141, also cited by Mr. Barton, the following passage appears: "Lands in Ireland are assets to satisfy a bond debt in England, but it is otherwise of lands in Scotland;" to which passage is appended as the only authority on which it rests a reference to the argument of Sir John Holt, in 1 Vern. 419, "citing it as resolved in

Evans & Ascough's, Latch 233, and Dowdale's Case, 6 Coke's R. 348." The only authorities for the passage then, are the cases cited from Latch and Coke. These were both common law cases—the former being an action of trespass in the Court of King's Bench, and the latter of debt in the Court of common pleas: and nothing which could have been said in them, 425 however plainly expressed, *would have been regarded as authority on the question of the jurisdiction of a Court of chancery in personam. The case in Latch was decided in the reign of James the first; and the only edition of the report I have seen, is the original one by Walpole, written in Norman French, which I do not understand. I cannot therefore undertake to say, what was said in the case in relation to assets by descent, or in what connection it was said. The case in 6 Coke 348, Dowdale's Case, was decided in the same reign. But nothing was said in it about assets by descent in a foreign country. It was an action of debt against an executor, who plead plene administravit. The jury found that there were assets, but that they were beyond sea or in Ireland. It was resolved, "that the jurors have found the substance of the issue, that is to say, assets; and the finding that they are beyond sea is surplusage. For if the executors have goods of the testator's in any part of the world, they shall be charged in respect of them, for many merchants and other men, who have stocks and goods to a great value beyond sea, are indebted here in England; and God forbid that those goods should not be liable to their debts, for otherwise there would be a great defect in the law." In Dowdale's Case the question was as to the difference between local and transitory actions, and whether a jury could find transitory things in another country. It was necessary for the parties in pleading to name a certain place for a venue, and the question in the case was whether the evidence of the parties and finding of the jury must be literally confined to the place named in the issue, or might be applied to any other place. It was in reference to that question that it was said by counsel in argument, to have been decided in an action of debt against an heir on the bond of his ancestor in which the defendant pleaded "nothing by descent," and the plaintiff averred assets by descent in London, 426 and gave in evidence assets in *Cornwall, that the jury could not find this local matter in a foreign country. But the Court, in answer to this argument, said: "God forbid but that the jury may find assets by descent in any other country within England; for the law is that the plaintiff in such case shall have in execution all the lands which the heir has, and perhaps he has lands in divers countries; and therefore, although one place be named for necessity, yet the jury may find all that which by law shall be chargeable in such case, in what town or county soever it lies."

The distinction between Ireland and Scotland referred to arguendo, by Sir John Holt, was founded on the idea that seems at that time to have existed, that Ireland being a "conquered kingdom" the judgments and decrees of the English Superior courts could be enforced by them in that country. And therefore Lord Holt said, "That Ireland hath its Courts of its own by grant from the King; but not exclusive of the King's Courts here, for Ireland is a conquered kingdom; and a decree of this Court may as well bind land in Ireland, as by every day's practice it doth lands that lie in foreign plantations: and for precedents cited the case of a scire facias brought in the chancery here to repeal a patent of lands in Ireland. If a man that is beneficed here is made a bishop in Ireland, that comes within the statute of H. 8, against pluralities, and shall make void his living here in Ireland; and it was resolved in Evans & Ascough's Case, Latch, fol. 233, and Dowdale's Case, 6 Coke's R. 348, that lands in Ireland shall be assets to satisfy a bond debt here, but otherwise of lands in Scotland." And in the case of Sir John Fryer v. Bernard, 2 P. Wms. 261, referred to in Raithby's note to 1 Vernon 76, it seems that a sequestration was awarded by the English Court of chancery against defendant's real and personal estate in Ireland, a sequestration having been first taken out in England and returned nulla bona.

427 *Now it is not pretended by any that the Courts of one state can enforce their judgments in another; and therefore in a suit at law against an heir, land descended to him in another state cannot be regarded as assets by descent, because the writ of extendi facias cannot be enforced against it. But the question in this case is not whether land descended in another state can be regarded as "assets by descent," technically speaking, here, for what is to be regarded as "assets by descent," in a technical sense, must be only such as are made so by our own law, and as are within the reach of our own Courts. The question is whether a trust created by or under the laws of another state can be enforced against a trustee residing here? And I think it clearly can. It matters not whether the trust be created by the act of the parties, or by the local law. In either case the lex loci is administered. Nor does it matter that the trust relates to an immovable subject in another state, provided the decree does not invade the jurisdiction or the sovereignty of that state. And there can be no invasion of that jurisdiction or sovereignty where we only require our own resident citizens to do that which if voluntarily done would be valid in that state. A fortiori, there can be none where the subject has been sold and the money is in their hands.

As to the statutes of 5 George II, ch. 7, and 9 George IV, ch. 33, mentioned in Ramon Assets, 8 Law Lib. 158, referred to by Mr. Morson; they were not passed because they were considered necessary to

enable an English Court of chancery to enforce, against a trustee residing in its jurisdiction, the execution of a trust concerning foreign land; nor for the purpose of giving that Court any jurisdiction in regard to such land descending to a person residing in its limits. Those statutes merely make real estate in certain colonies and provinces of England assets by descent for the payment of debts generally;

428 instead of certain specialty debts *only as at common law; and provide remedies against those assets, to be had in the colonial and provincial Courts, and not the Courts of England. This was a mere exercise of legislative power over a part of the British dominions, and I do not see how it can affect the question under consideration.

I will now proceed to consider the last question arising in the case; and that is,

4thly. Whether, in fact, any lands in Kentucky descended from Richard Hoomes to his children; and if they did, whether they were not forfeited for non-payment of taxes; and whether such of them as were held by the children were held by them as purchasers from the State of Kentucky, and not as heirs of their father?

When John Hoomes the elder died in 1805, he appears to have been entitled to 18 or 20,000 acres of land in Kentucky, which, as a part of the residuum of his estate, he charged by his will with the payment of his debts; and the surplus of which he devised to his five children, John, William, Richard, Armistead and Sophia, "to hold the same in fee simple subject to the condition or contingency to which their other property was subject." So that to one undivided fifth of these lands, subject to the charge aforesaid, Richard Hoomes became entitled as devisee of John Hoomes the elder. These lands, or the greater part of them, seem to have remained undisposed of at the death of Richard Hoomes in 1823; eighteen years after the death of his father John Hoomes. The appellant contends that the portion of these lands to which Richard was entitled at the time of his death descended to his children, and became assets by descent liable for his debts by the law of Kentucky. To this claim several objections are made by the appellees.

1st. They insist that Richard had never any actual seisin of the Kentucky 429 lands. That by the common *law he could not be the stock of the descent of any portion of the said lands to his children, who must claim, if at all, under the ancestor last actually seised, according to the maxim, non jus, sed seisin facit stipitem: and that this rule of the common law, so far as appears from the record, is still the law of Kentucky.

I do not think this objection is well founded, for several reasons. 1st. I think, as was said by the Supreme court of the United States, in the case of Green v. Litter, 8 Cranch's R. 229, "that even if, at common law, an actual pedis positio, followed up by an actual perception of the profits, were

necessary to maintain a writ of right, (or, in this case, to constitute a stock of descent,) which we do not admit, the doctrine would be inapplicable to the waste and vacant lands of our country, (such as were the lands in Kentucky owned by John Hoomes the elder at his death). The common law itself in many cases dispenses with such a rule; and the reason of the rule itself ceases when applied to a mere wilderness." And I therefore think that if John Hoomes the elder was seised of these lands at the time of his death, and they were not in the adverse possession of others at the time of Richard Hoomes's death, he was sufficiently seised of his portion of them to make him a stock of descent on common law principles as modified by the condition of the country. 2dly. If John Hoomes the elder was seised of them at the time of his death, which is not denied, he had a right to devise them even according to the English statute of wills, and his devisees became by the devise seised in deed without any actual pedis positio, or taking of the esplees. The maxim seisin facit stipitem is inapplicable to such a case. The children of Richard Hoomes must take his portion of the lands as his heirs, or not at all. They cannot take it as heirs at law of John Hoomes the elder, because it was effectually

430 devised by him to Richard. The devise *broke the descent. Suppose the devise had been to a stranger instead of a son, the heirs of the stranger could not claim under the testator as a stock of descent, and could only claim by inheritance from their father. The law having authorized the devise, the estate thereby conferred was as perfect as if it had been conferred by the common law feoffment with livery of seisin. The will operates like a deed of bargain and sale or other conveyance under the statute of uses, by virtue of which the bargainee has a complete seisin in deed, without actual entry or livery of seisin. 3dly. It is proved by Herndon, and would have been presumable if not proved, for reasons which I have before stated, that the statute of descents of Kentucky is similar to the statute of descents of Virginia, in declaring "that henceforth when any person having a title to any real estate of inheritance, shall die intestate as to such estate, it shall descend," &c. I think that "the common law rule, seisin facit stipitem, may now therefore be regarded as abrogated in" Kentucky as well as "in Virginia;" and that there as well as here, "having title to any real estate, is alone sufficient to make the intestate the root of the inheritance." 1 Lomax's Dig. 594, § 2.

2dly. They insist that none of these lands have come to their hands, except 635 acres, which they contend was afterwards forfeited for non-payment of taxes and sold and conveyed by the agent of the state to Richard H. Hoomes, one of the heirs of Richard Hoomes, who thereby acquired "a title in the said lands by purchase from the state, and not by descent from his ancestor."

The answer of the appellees, the heirs of Richard Hoomes, to the supplemental bill of the appellant, expressly admits, that on the 6th of May 1833, 2726 acres of these Kentucky lands were divided among the parties entitled thereto by commissioners appointed for the purpose; and that 431 635 acres thereof were allotted to *the said heirs of Richard Hoomes, of which 75 acres were apportioned to Williamson Tally as compensation for his services in procuring the same to be divided and allotted. They further say that from the best information they have been able to obtain, the land allotted to them did not exceed the value of 1 dollar 25 cents per acre; and that they did not realize from their sale a greater sum. They further say they have good reason to believe that other lands in the State of Kentucky were in the seisin and possession of their grandfather John Hoomes, but such have never come to their possession.

Now here is a solemn admission, that 635, minus 75, acres of these lands have not only come to their hands, but been by them converted into money. To be sure, they "insist that these lands were derived by them under the will of their grandfather, and were not inherited from their father." But this is a question of law about which I think, and have endeavoured to shew, they are mistaken; at least as to so much of the land as their father was entitled to at the time of his death; for they were themselves entitled to a portion of it as contingent devisees of their grandfather, according to the decision of this Court in the case reported in 1 Grattan.

How is the force of this admission to be avoided, if I am right on the question of law aforesaid?

After the answer had been written and signed, an addition was made thereto to the following effect: "Your respondents beg leave further to state to your honour, a fact omitted to be stated in the body of their answer; that is to say, that on the

day of 1842, a certain tract of land containing 2086 acres, and situated in the county of Anderson and State of Kentucky, and entered for taxation in the name of John Hoomes, was struck off to the State of Kentucky for the non-payment of the tax due thereon; which said land was

432 afterwards, *to wit, on the 21st of May 1845, sold and conveyed by John Draffin, agent for the commonwealth, to your respondent Richard H. Hoomes, by the name of Richard Hoomes, for the sum of 80 dollars 71 cents, by reason whereof the title to the said land became vested in him as purchaser from the State of Kentucky. Your respondents believe, and therefore aver and charge, that the said 2086 acres are the same lands, or parcel of the same lands, mentioned in the report of commissioners McBrayer and Herndon mentioned in this answer; all which will more fully and at large appear by reference to an attested copy of the said report, and a like copy of the said deed filed with this

answer and prayed to be taken as part thereof."

The Circuit court was of opinion, and the appellees' counsel contend, that the 2086 acres above mentioned were in fact, as believed by the said respondents, to be parcel of the 2726 acres which were divided as aforesaid—while, on the other hand, the counsel for the appellant contend that they are different lands. The respondents were not themselves certain that they are the same lands, but only believed so; and on that account, as well as on account of the doubt in which the evidence leaves the question, it would have been proper, I think, to have referred it to a commissioner, even if the right of the appellant to relief had depended upon it.

But does the right of the appellant to relief depend upon the question whether they are the same or different lands. Suppose they are the same lands; what effect can that fact have on the rights of the parties? None, I conceive; unless it be to make the land which was allotted to the heirs of Richard Hoomes as aforesaid, chargeable with a due proportion of the 80 dollars and 71 cents, paid by Richard H. Hoomes in discharge of the arrears of tax due upon the 2086 acres sold and conveyed by the agent of the State of Kentucky for the non-payment of the tax due thereon as

433 *aforesaid. The 2726 acres of land aforesaid had come to the hands of the parties, and been divided. Arrears of taxes are suffered to accrue thereon; and in 1842, nine years after the division, they are struck off to the state for non-payment of the taxes. In 1845, twelve years after the division, they are sold and conveyed by the agent of the state, for the "amount of tax, interest and charges due thereon, to Richard H. Hoomes one of the heirs of Richard Hoomes. I am now supposing that they are in fact the same lands. Can these heirs now say that their responsibility for these lands as assets by descent was discharged by this forfeiture and sale, and conveyance to one of them? Had that one any right to redeem these lands from forfeiture, or purchase them for his own benefit, in exclusion of his co-parceners? If he had any such right, did he do it? Is there any pretension that they or their assigns have surrendered the land to him; or accounted to him for the proceeds of sale? Or paid to him anything more than their aliquot portions of the said sum of 80 dollars and 71 cents, if even they have paid that? The probability, from the pleadings and the evidence, is that Richard H. Hoomes went out to Kentucky to look after these lands as agent for the heirs of his father or grandfather; and finding that 2086 acres of land standing on the tax book in the name of his grandfather had been struck off to the state, he redeemed or purchased it from the agent of the state by paying the amount of tax &c. due thereon. He and his principals and co-heirs probably doubted whether it was the same land or not, which had been divided between them.

But, whether the same land or not, it was prudent to redeem it, and obtain a conveyance from the state. For if it was the same land, their title to what they had already obtained would be thus confirmed. And if it was different land, they would thus obtain so much more. Whether it was

the same or different land, seems to
434 have been regarded *by the appellees as a question of little importance; for, in the preparation of the body of their answer, they overlooked it altogether, and acknowledged themselves unconditionally to have received 635, minus 75, acres of the land.

Without pursuing this examination any further, I am very decidedly of opinion that the Court below should not have dismissed the appellant's bill for want of proof of assets descended to the appellees from their father in Kentucky; but that, it appearing from the evidence that 18 or 20,000 thousand acres of land in that state actually belonged to John Hoomes the elder at the time of his death; that though much the larger portion of it appears to have been forfeited for non-payment of taxes, yet these taxes all accrued, not only since the death of John Hoomes the elder in 1805, but since the death of Richard Hoomes in 1823; that the heirs of John Hoomes the elder and of Richard Hoomes, have by their agents from time to time looked after these lands, and surveyed, divided and made sales of portions of them; it should have been referred to a commissioner of the Court to enquire, ascertain and report what lands in Kentucky descended from Richard Hoomes to his heirs at law, and came to their possession; and the value and disposition which has been made thereof; and how much has been or is to be, and when, received by them for the said lands, or such part thereof as may have been sold by them, or for the rents and profits of any of the said lands; and what expenses have been necessarily incurred by them in looking after, obtaining possession of, dividing and selling the same and collecting the proceeds of sale; and any other facts which, in the opinion of the Court below, might have been necessary to shew what benefit the heirs of Richard Hoomes have derived from his land in Kentucky. To the extent of that benefit, I think they are, in equity, bound to in-

demnify the appellant against the re-
435 covery from him of *that portion of the land warranted by their father, to which this Court has decided them to be entitled as purchasers under the will of their grandfather, and of the rents and profits thereof. If the amount of that benefit is equal to, or greater than, the value of the said portion, and its rents and profits; then the said recovery should be altogether barred and enjoined. But if the amount of that benefit is less than that value, the portion of the warranted land to which the appellees are entitled should be subject to a charge for the said amount, and if the same be not paid in a reasonable time, should be sold for its payment.

Under the statute of 1798 of Kentucky, which we have seen is similar to 1 Rev. Code, ch. 99, § 21, if the warranted land were situate, and the suit to recover it were pending, in that state, the heirs would be bound for the value of the lands to them descended. So that if at the death of the ancestor the lands descended were of greater value than the land warranted, the title of the warrantee and his assigns would then be good against the heirs of the warrantor, and could not be defeated by the forfeiture of the land descended for non-payment of taxes thereafter accruing, nor by any disparity that might thereafter arise between the relative value of the land descended and the land warranted. It was contended by Mr. Morson that heirs are not bound to pay taxes for the benefit of creditors, and that if by non-payment of taxes the descended land is forfeited the heirs will not thereby become liable to creditors for the value of the land. This may be so, as a general rule at least. But where there are no unsatisfied creditors of the ancestor except the warrantee; and he becomes a creditor by a breach of the warranty occasioned by the recovery of the land from him by the heirs, I think the period of the ancestor's death is that at which the rights of the parties become fixed, and the relative values

of the land descended and warranted
436 *are to be ascertained, under the provisions of the statute above mentioned. It would be too strict however to apply the latter rule to this case. The heirs resided in Virginia, and the lands were wild and uncultivated, and scattered over the State of Kentucky. The quantity and locality of the lands were probably unknown to the heirs, who were infants at their father's death; and cannot properly be considered as in default, by suffering any of the lands to be forfeited for non-payment of taxes, or by not having afterwards redeemed them from forfeiture. The appellant is seeking to enforce an equity against the heirs, and the just measure of that equity cannot exceed the benefit derived by them from the Kentucky land. But while on the one hand the heirs should not be charged with the value of such of the said land as may have been lost by forfeiture; so on the other they should be charged with any rents and profits which may have been received by them on account of the said land. For though, as the law has been settled in Virginia, heirs are not bound for rents and profits accruing before a judgment or decree has been rendered against them, yet as in this case, we are departing from the letter of the Kentucky statute of 1798 for the purpose of doing equity between the parties; and as an account has been decreed against the appellant in the Court below for rents and profits; it would seem to be just and right that a corresponding account of rents and profits received by the heirs should also be taken. Otherwise, if the heirs were entitled to recover, but were not accountable for, rents and profits, they might, by delaying their

suit until the amount of rents and profits of the warranted land was equal to the value of the land descended, recover the whole of the warranted land; whereas, if they had sued immediately after the ancestor's death, they might have been barred of any recovery whatever. If the heirs prefer to account

for the value of all the land descended,
437 *instead of the value of such of it as has come to their hands, with rents and profits actually received, of course they have a right so to account. But I imagine they would greatly prefer to account for the value of the descended land which has come to their hands, with rents and profits actually received, and interest on the price of such as they may have sold. Indeed I doubt whether any rents and profits have been actually received by them. But if any have, it is right they should account for them.

But it is contended by the counsel for the appellees that as the assets of Richard Hoomes were marshalled in a suit in Caroline, which was commenced in 1826 and ended in 1842, the style of which was Collins v. Garrett; and as the creditors in that suit were not entirely satisfied; they, if any creditors of Richard Hoomes, and not the appellant, are entitled to charge the appellees for the value of the Kentucky lands descended to the latter. The answer to this objection is, that a final decree was rendered in that suit in 1842. That the appellant was not a party to that suit, not considering himself a creditor until the decision of the case in 1 Gratt. 302, in 1844, and is therefore not bound by the decree. That by the Kentucky statute of 1798, the heirs are bound for the value of any land descended to them, and if this charge be not in its nature paramount to the claims of all other creditors of the ancestor, it would seem at least to be good against any claims which may not have been asserted before such charge is enforced by judgment or decree. And that at all events the appellant would be entitled to recover out of the Kentucky assets a proportion of his claim equal to that which other creditors of equal degree have recovered of their claims out of the Virginia assets, before they could participate with him in the application of the former; which would doubtless give to him the whole of the Kentucky assets.

438 *I have now considered all the questions presented by the record. My opinion has been protracted, perhaps, to too great length. But the number, novelty, difficulty and importance, of the questions involved, and the fullness and ability with which they were discussed by the counsel on both sides, seemed to render a long opinion necessary.

ALLEN, J. I am of opinion, that the heirs cannot be called to account in a Virginia Court for real estate descended to them in another state, unless it shall appear that the heirs have disposed of the land and received the proceeds. That as to immovable property the *lex rei sitæ* controls, and

if subjected to the debts of the ancestor, it must be by the laws and through the tribunals of the country where it lies. That the mode of proceeding being in rem, to subject the thing itself, the Courts of a foreign jurisdiction can take no cognizance of it; nor would the Courts of the local jurisdiction, in a proceeding by creditors to subject the property itself in the mode prescribed by the local law, pay any respect to a proceeding in a foreign jurisdiction against the heir personally.

I am further of opinion, that it is not incumbent on the heir to redeem for the benefit of creditors waste lands descended to him, and which may have been forfeited for taxes accrued either before or after the death of the ancestor; and that if such forfeited land be thereafter sold for the non-payment of taxes, it is competent for the heir to purchase and hold as any other purchaser.

And being of opinion, that it does not appear that the heirs have received anything from the Kentucky lands descended, except in respect to lands as to which the descent was broken by a sale for taxes, I should on that ground be for affirming the decree.

439 *On the other questions involved, I think the covenants in the deed bound the heirs, and that the recovery referred to constituted a breach, and that the covenants run with the land; and that the assignee, by deed of the whole or a portion thereof, is entitled to the benefit of the covenants, and may recover for the breach.

The decree was as follows:

A majority of the Court is of opinion,

First. That the covenant of Richard Hoomes in the deed to Samuel A. Apperson, in the proceedings mentioned, extends to the claim of the children of said Richard, which was sustained by this Court in the case of Dickinson v. Hoomes, 1 Gratt. 302; and will therefore be broken by an eviction under said claim.

Secondly. That it is a covenant running with the land; and the appellant, as assignee of a portion thereof by a regular chain of conveyances, is entitled to the benefit of the said covenant for his indemnity against the said claim.

Thirdly. That as by the law of Kentucky, as it existed at the death of said Richard Hoomes, and still continues to exist, lands in that state descending from an intestate can be subjected to the payment of his debts, by proceedings either in law or chancery; and "if the deed of an alienor doth mention that he and his heirs be bound to warranty, and if any heritage descend to the demandant of the side of the alienor, then he shall be barred for the value of the heritage that is to him descended;" a Court of equity of this state may compel the children of said Richard Hoomes, residing within its jurisdiction, to account for any lands in Kentucky descended to them as his heirs, as a trust subject for the payment of his debts. And although a Court of equity of one state, in the exercise of a sound judicial

discretion, may in some cases decline
440 to act on *persons residing or found
within its jurisdiction, where the
subject sought to be affected is situated in
another state; yet, in this case, it would
be an exercise of sound judicial discretion
on the part of the Circuit court of Caroline
to compel the said heirs, as a condition of
the relief they are seeking as aforesaid
against the appellant, to account to him,
so far as may be necessary for his indem-
nity against the breach of said covenant,
for any benefit they may have received
from any land in Kentucky descended to
them from the said Richard.

Fourthly. That it appearing to the Court
that John Hoomes the elder, was entitled
at his death to eighteen or twenty thousand
acres of land in Kentucky, to one fifth of
which the said Richard became entitled as
devisee of the said John, and remained so
entitled at the death of him the said Rich-
ard in 1823; the said one fifth descended
from the said Richard to his said children.
And although it further appears to the
Court, that the greater part of these lands
were forfeited to the State of Kentucky for
non-payment of taxes accruing thereon
after the death of said Richard, and so may
be forever lost to the said heirs; and al-
though it would be too strict, under the
circumstances of this case, to hold the said
heirs accountable, as for assets by descent,
for the value of any lands so lost; yet, as
it appears that a portion of said lands has
actually come to the hands of the said heirs,
and been by them converted into money;
and that they may yet be entitled to other
portions of them; the said Circuit court, in-
stead of dismissing the bills of the appel-
lant, should have directed one of its com-
missioners to enquire, ascertain and report
what lands in Kentucky descended from
the said Richard to his heirs, and have
come to their hands or been sold by them,
and the value or amount of sales thereof;
what rents and profits, if any, have been
received by them on account of any of
441 the said lands; when any such *amount
of sales, or rents and profits were so
received; what expenses have been incurred
by them or any of them in redeeming, ob-
taining possession of, surveying, dividing
or selling any of the said lands, or collecting
the rents and profits or proceeds of sale of
any of them; and any other facts which
may, in the opinion of the said Circuit
court, be necessary to ascertain the extent
of any benefit received by the said heirs
from the said lands. And if it should ap-
pear that the amount of said benefit is equal
to, or greater than, the value of the land
which the said heirs are entitled to recover
of the appellant, and the rents and profits
thereof, they should be altogether barred
and enjoined from such recovery. But if
the said amount should be less than the
said value, rents and profits, then the pay-
ment of the same by them to him should be
made a condition of their said recovery;
and unless such payment be made in a rea-
sonable time, the said land, or so much

thereof as may be necessary, should be sold
therefor.

Therefore it is considered, that the said
decree is erroneous; that it be reversed and
annulled with costs: and that the cause be
remanded to be further proceeded in on the
principles above indicated.

442

*Trice v. Cockran.

January Term, 1852, Richmond.

[56 Am. Dec. 151.]

(Absent CABELL, J.)

1. **Pleading and Practice—Sale of Chattels—Breach of Warranty of Soundness—Case.**—Case is a proper remedy for the breach of an express warranty of soundness of a slave or other personal chattel sold.
2. **Same—Same—Same—Scienter.***—In case for the breach of a warranty of soundness of a personal chattel, it is not necessary to allege the defend-ant's knowledge of the unsoundness: And if it is alleged, it is not necessary to prove it.

B. F. Cockran instituted an action upon
the case against George W. Trice in the
Hustings court of the city of Richmond,
and filed a declaration containing two
counts. The first count charged that the
defendant falsely and fraudulently induced
the plaintiff to purchase of him a slave,
"by then and there falsely and fraudulently
warranting the said slave to be sound,"
when in fact the said slave was unsound,

The principal case is cited in *Boyles v. Overby*, 11
Gratt. 205.

***Pleading and Practice—Sale—Action for Breach of Warranty—Scienter.**—In *Shippen v. Bowen*, 7 Sup. Ct. Rep. 1288, 123 U. S. 575, it is said: "In *Schuchardt v. Allens*, 1 Wall. 359, 368, which was an action on the case for a false warranty on the sale of certain goods,—the declaration also containing a count for deceit,—the court said that it was now well settled, both in English and American jurisprudence, that either case or assumpsit would lie for a false warranty, and that, 'whether the declaration be in as-umpsit or tort, it need not aver a scienter; and, if the averment be made, it need not be proved.' It was also said that, 'if the declaration be in tort, counts for deceit may be added to the special counts, and a recovery may be had for the false warranty or for the deceit, according to the proof. Either will sustain the action.' See also, *Dushane v. Benedict*, 120 U. S. 636, ante, 606. In 1 Chit. Pl. 137, the author says that case or assumpsit may be supported for a false warranty on the sale of goods, and that, 'in an action upon the case in tort for a breach of a warranty of goods, the *scienter* need not be laid in the declara-tion, nor, if charged, could it be proved.' In *Lassiter v. Ward*, 11 Ired. 444, RUFFIN, C. J., citing *Stuart v. Wilkins*, 1 Doug. 18, and *Williamson v. Allison*, 2 East 446, said: 'It was accordingly there held that the declaration might be in tort, without alleging a *scienter*, and, if it be alleged in addition to the war-ranty, that it need not be proved. The doctrine of the case is that, when there is a warranty, that is the gist of the action, and that it is only when there is no warranty that a *scienter* need be alleged or proved. It is nearly a half century since the decision, and

and died of the disease then upon him, and that the plaintiff had sustained damage to the amount of 500 dollars, for medical attendance, &c., and concludes with an averment in the following words: "And so the plaintiff saith, that the said defendant falsely and fraudulently deceived him, the said plaintiff, in the sale of the said slave as aforesaid."

The second count charges, that the defendant being possessed of the slave, and well knowing that he was unsound, "did nevertheless falsely, fraudulently and deceitfully, then and there, represent the said last mentioned slave to be sound, and did, then and there, by means of the said false, fraudulent and deceitful representations,

induce the said plaintiff to buy the
443 said "slave of the said defendant."

It then charges the unsoundness of the slave, and his consequent death and damage to the plaintiff.

To this declaration the defendant demurred generally, and pleaded "not guilty," and there was joinder in the demurrer and issue on the plea. The Court overruled the demurrer, and the case was tried upon the plea.

Upon the trial the plaintiff offered evidence of the unsoundness of the slave and his death, and exhibited and proved a bill of sale for him under seal, by the defendant, containing a warranty of the soundness.

The defendant offered evidence to prove that the slave was placed by the defendant in the hands of an auctioneer in Richmond to be sold, and that at the time he so placed him with the auctioneer, the defendant told him that he had been sold before he became the property of the defendant, and was returned by the purchaser because he was believed to be unsound, and that he, the auctioneer, must not sell him to any one without making that fact known to him; that the slave remained for some time at the auction house in Richmond, where he was seen by all the dealers, and among them the plaintiff, and finally he was ex-

posed to public sale, proclamation being made by the auctioneer that a doubt was entertained of his soundness, but he would warrant him sound, and if the purchaser did not like him he might return him; that at this sale (made in the absence of the defendant, who was in the country, the sale being made in Richmond), the plaintiff became the purchaser of him at 470 dollars. This was in July.

The plaintiff, after the purchase and a full statement by the auctioneer of all that the defendant had told him as to the former sale of the slave and the return of him, declined to keep him, and returned him; and the slave remained at the auction house, where the plaintiff frequently saw him,

until the 12th of September, when
444 *the plaintiff proposed to the auctioneer to sell him again, saying, that if he would do so, and warrant him sound, he, the plaintiff, would bid 400 dollars for him; that accordingly the auctioneer did put him up to sale again, and, in the absence of the defendant, warranted him sound, and the plaintiff purchased him at a single bid of 400 dollars, took possession of him, gave a note at ninety days for the purchase money, which he paid at maturity, and shipped the slave to the south.

The bill of sale was partly printed and partly written. The warranty was printed. It was in blank as to the price and name of the purchaser when left with the auctioneer, and he filled up the blanks.

It was also proved by the auctioneer that the slave was sold for less than the price of a sound slave; that if sound he would have commanded at least 550 dollars, which price was offered for him by another purchaser, but was withdrawn when the auctioneer communicated to him what the defendant had directed him to communicate to all purchasers before he sold him.

Upon this proof the defendant by his counsel asked the Court to instruct the jury, "that to entitle the plaintiff to recover, they must be satisfied from the evidence that the slave was unsound at the time of the sale to the plaintiff, and the defendant knew of the unsoundness, and fraudulently concealed it, or falsely and fraudulently represented him to be sound; and the plaintiff is not entitled to recover by the force of the warranty merely, if one was made:" which instruction the Court gave.

The plaintiff then asked the Court to instruct the jury, that he was entitled to recover upon the first count, if he proved to their satisfaction the unsoundness at the time of the sale, and an express warranty; which instruction the Court refused to give.

The plaintiff excepted and spread the whole testimony upon the record.

445 *The jury found for the defendant, and judgment was rendered accordingly. Thereupon the plaintiff applied to the Circuit court for a supersedeas, which was awarded: And when the cause was heard in that Court, the judgment of the Hustings court was reversed, and the cause remanded with instructions, that at any

during that period the point has been considered at rest, and many actions have been brought in tort as well as *ex contractu* on false warranties.' And so in *House v. Fort*, 4 Blackf. 293, 294, it was said that 'the breach of an express warranty is of itself a valid ground of action, whether the suit be founded on tort or on contract; and that, 'in the action on tort, the forms of the declaration are that the defendant falsely and fraudulently warranted, etc., but the words falsely and fraudulently, in such cases, are considered as only matters of form.' But as to the *scienter* the court said, 'that is not necessary to be laid, when there is a warranty, though the action be in tort; or, if the *scienter* be laid, in such a case there is no necessity of proving it.' See also, *Hillman v. Wilcox*, 30 Me. 170; *Osgood v. Lewis*, 2 Har. & G. 495, 520; *Trice v. Cockran*, 8 Gratt. 450; *Gresham v. Postan*, 2 Car. & P. 540."

Instructions.—In *Southern Express Co. v. McVeigh*, 20 Gratt. 293, it is said: "A party moving an instruction ought to lay his finger on the point. BALDWIN, J., in *Trice v. Cockran*, 8 Gratt. 450."

future trial of the cause, in case such question should arise as at the former trial, not to give the instruction it then gave at the instance of the defendant, but to give that which was moved by the plaintiff. To this judgment Trice obtained a supersedeas from this Court.

Lyons, for the appellant.

1st. The action was case for the fraudulent representations charged in the declaration, and the fraud was therefore the gist of the action, without proof of which the plaintiff was not entitled to recover. *Bayard v. Malcolm*, 1 John. R. 452.

The declaration plainly shews this, and the issue found in the cause does also. That issue was upon the plea of not guilty. If the action had been upon the warranty, it would have been assumpsit and not case, and the plea would have been non assumpsit. 1 Chitt. Pl. 106; *Stuart v. Wilkins*, Doug. R. 18; *Saund. Plead. and Evi.* 913; *Langridge v. Levy*, 2 Mees. & Welsb. 519; S. C. 4 Id. 337.

2d. The action could not have been upon the warranty, because the warranty was under seal, and covenant and not case was the proper action upon it. 1 Chitt. Pl. 118. That the auctioneer, if he had authority to warrant, might under his parol authority to warrant, fill up the blanks in the bill of sale, is abundantly proved by the cases of *Texira v. Evans*, cited Anstr. R. 229; *Zouch v. Claye*, 2 Levintz. R. 35; *Speake v. United States*, 9 Cranch's R. 28; *Smith v. Crooker*, 5 Mass. R. 538; *Woolley v. Constant*, 4 John. R. 54; *Knapp v. Maltby*, 13 Wend. R. 587; *Wiley v. Moor*, 17 Serg. & Rawle 438.

446 *3d. Because if the first count in the declaration was to be considered against its frame as a count on the warranty, because the term warrant is used, although it is not charged that the defendant assumed or promised any thing, but only that he made false, fraudulent and deceitful representations and warranty, and so deceived the plaintiff; then there was a misjoinder of actions, because case and assumpsit cannot be joined in the same declaration, and the demurrer to the declaration should have been sustained. 1 Chitt. Pl. 201; *Corbit v. Packington*, 13 Eng. C. L. R. 170; *Wilson v. Marcy*, 1 John. R. 503.

So incompatible are the two forms of action, that in assumpsit upon the warranty, evidence of fraud is not admissible. *Evertson's ex'ors v. Miles*, 6 John. R. 138.

The plaintiff might have sued upon his warranty, or he might sue as he did for the imputed fraud; but he must sue for one or the other, and not for both. If there had been a warranty by parol, assumpsit might have been maintained, but if under seal, as here it was, if there was any, covenant only could be maintained, or case for the deceit, and therefore, in a suit not founded upon the warranty, because not in covenant, it was perfectly right to instruct the jury that the plaintiff must prove the imputed fraud, or fail, and could not recover

on the warranty. To determine otherwise would be to declare that a covenant is evidence in case or assumpsit, and recovery may be had for breach of covenant, by action on the case, and that without averring the existence of any covenant.

But the evidence shews clearly that there was no warranty obligatory upon the appellant, because it was proved distinctly, that he ordered his agent not to sell the slave without making known his defects; that the agent did so, and the purchaser had full notice of every thing in respect to the soundness of the slave prior to 447 *the purchase of him by the appellant,

and the warranty could not properly be held, therefore, to apply to any unsoundness existing prior to that purchase, but must be construed, like a warranty of soundness where there is a visible defect, as not covering that defect. If the slave had been seised with small-pox or measles, or some other disease which impaired his value, so soon after the sale as to shew that he contracted it before the purchase by the appellant, such defect might have been covered by the warranty. *Bayley v. Merrill*, Cro. Jac. 386; *Dyer v. Hargrave*, 10 Ves. R. 507; *Buller*, N. P. 31.

The error of the Circuit court was occasioned by relying upon and misapplying the case in 2 East. That case affirms, that in case on the warranty, the scienter, if laid, need not be proved. Let that be admitted, and yet the authority does not rule this case; for this is not a suit on the warranty, as already shewn. This case is like that of *Dowding v. Mortimer*, decided by Lord Kenyon, and admitted in 2 East to be law. The gravamen is the deceit.

The instruction asked for by the counsel for the appellee shews that the instruction given was correct, for by it he limits his right to recover to the first count, and to the warranty, shewing that unless entitled to recover on the warranty, he could not recover at all; and not being entitled to recover in case upon a warranty in covenant, it followed necessarily that he could not recover at all in this suit.

R. T. Daniel, for the appellee.

The instructions asked and refused were relevant to the evidence which presented to the jury the questions of fact, Was the slave unsound when sold? Had there been a warranty; or had there been a false representation or concealment of that unsoundness if it existed?

448 *The effect of the instruction given was that under the declaration, there could be no recovery unless the plaintiff established a fraud in the sale; that even if he proved an express warranty of soundness, and unsoundness at the date of the warranty, he could not recover.

The declaration is in case, and the first count is in the common form of declaring in case for a breach of warranty, whilst the second count is in the common form of declaring where deceit is alleged, and is expected to be proved, that is, where the

scienter of unsoundness is alleged and expected to be proved. 2 Chitt. Pl. 277, 278. It has been decided long since that case may be maintained upon a warranty; and that it is not necessary to allege the scienter: or if it is alleged it need not be proved. *Williamson v. Allison*, 2 East's R. 446. If therefore the jury were satisfied that there was a warranty of the slave, and that he was unsound, the plaintiff was entitled to recover on the first count of the declaration. But the instruction given by the Hustings court, forbade his recovery in that case.

The question whether the warranty was not by a covenant, was not made in the Hustings court, and therefore cannot be raised or considered here. *Newsum v. Newsum*, 1 Leigh 86; *Barrett v. Wills*, 4 Id. 114. If the defendant below had intended to rely on the ground that the action should have been covenant, he should have moved to exclude the paper when it was offered in evidence to the jury.

But the bill of sale having been in blank when it was left by the appellant with the auctioneer, and having been filled up without the proper legal authority, was of no validity. *United States v. Nelson & Myers*, 2 Brock. R. 64, in which the cases cited on the other side are reviewed; *McKee v. Hicks*, 2 Dev. R. 379; *Davenport v. Sleight*, 2 Dev. & Bat. 381; *Cleaton v. Chambliss*, 6 Rand. 86.

449 *BALDWIN, J., delivered the opinion of the Court.

In this case the instruction given at the trial, on the motion of the defendant, was not in reference to the form of the action or the form of the evidence of warranty. The defendant did not assert or concede that there was a warranty by deed or any warranty at all. On the contrary, his own evidence presented the question, whether the bill of sale for the slave, executed by the defendant, before the sale, and in blank as to the name of the vendee and other particulars, and left with his agent in that condition, to be filled up by the latter after a sale should be made by him for the defendant, and so filled up by the agent, without any authority from the defendant by deed, or any other authority than as above mentioned, was in point of law the deed of the defendant. And also the further question, whether the verbal authority to the agent to fill up the blanks in the bill of sale still existed at the time therein mentioned, or had been exhausted by a prior sale by the agent to the plaintiff, which was rescinded by agreement between them, without consultation with the defendant. And if the bill of sale was not upon either ground the deed of the defendant, or whether it was so or not, still an ulterior question was presented by the evidence, whether the plaintiff could avail himself of a parol warranty of soundness made by the agent at his last sale aforesaid.

The instruction given for the defendant was not upon any of those points. The

Court was not called upon to say to the jury that if they believed the evidence the verbal authority from the defendant to his agent to fill up the blanks in the bill of sale was sufficient in law, or that it was not exhausted by the first sale made by the agent, or that the bill of sale was the deed of the defendant, or that covenant and not case was the plaintiff's only remedy, unless there was actual fraud in the sale of the slave, or that the plaintiff could not
450 *recover upon the parol warranty made by the agent. But the broad instruction given to the jury was in effect that whether the warranty was by deed or by parol, the plaintiff could not recover upon either count of his declaration, without proving moreover, not only that the slave was unsound at the time of the sale, but that the defendant knew of the unsoundness, and fraudulently concealed it, or falsely and fraudulently represented the slave to be sound. This instruction was clearly wrong, in regard to the first count of the declaration, which was not founded upon actual fraud, but upon a mere warranty only.

The action of trespass on the case, is a proper remedy for the breach of an express warranty of soundness of a slave, or other personal chattel sold, as much so as the action of assumpsit, with which it is a concurrent remedy, and the party aggrieved may elect between them. In both forms of action, the gravamen is the breach of the warranty, which in the former is treated as a tort, with the appropriate language in declaring for a tort, but a scienter or knowledge of the defendant of unsoundness is immaterial, and need not be alleged in the declaration, nor if alleged need it be proved. This is the firmly established doctrine of the Courts, both in England and in this country, ever since its adjudication in *Williamson v. Allison*, 2 East's R. 446. It seems however that the directly opposite proposition was asserted by the defendant, and that it was contended on his part at the trial, that in case upon an express warranty actual fraud is the gist of the action, and must be established, though a breach of the warranty be proved.

It is true that upon the second count of the declaration actual fraud, which involved the scienter of the defendant, was essential to the plaintiff's recovery; that count not being founded upon the warranty, but upon

a fraudulent concealment or misrepresentation of unsoundness: *but in

451 the first count a scienter of the unsoundness is not even alleged, and the substantial grievance complained of is, that the plaintiff was deceived and injured by the falseness or wrongfulness of the warranty itself. Upon the second count the plaintiff was entitled to recover on proof of actual fraud, whether the warranty was by deed or by parol: And upon the first count, the defendant seems to have silently waived the question whether the warranty was by deed or by parol. This it was competent for him to do, and if a verdict had been

rendered for the plaintiff on that count and a new trial asked for, it could not have been properly granted on the ground that the warranty was by deed.

This Court cannot undertake to say that the instruction given for the defendant was correct, because the warranty was not by parol but by deed? The bill of exceptions cannot be treated as a demurrer to evidence, and a point raised which was not asserted in the motion for instruction to the jury. There was evidence before the jury tending to prove a warranty by parol as well as by deed, and it would be improper to infer the correctness of the broad proposition as applicable to the sale, that actual fraud was necessary to maintain the action, by inference from a narrower proposition not asserted, that the warranty was by deed and not by parol, and therefore that in the absence of actual fraud the proper remedy was in covenant and not in case. A party moving an instruction ought to lay his finger upon the very point, and not leave the correctness of his proposition upon the silent assumption of another proposition unasserted though presented by the evidence. Such a practice might tend to surprise the Court and mislead the jury. In this case the jury might have inferred, and most probably did infer, from the instruction given, that the only question for their consideration was whether actual fraud was proved by the evidence.

452 *It seems therefore to the Court, that the instruction given to the jury by the Hustings court, was erroneous, and that its judgment was therefore correctly reversed by the Circuit court.

But it further seems to the Court, that the Circuit court erred in its direction that upon the new trial to be had, the instruction moved by the plaintiff and rejected by the Hustings court should be given to the jury, which direction must be treated as part of the judgment of the Circuit court. The instruction so directed, in effect assumes that whether the warranty was by deed or by parol, the plaintiff is entitled to recover without proof of actual fraud on the part of the defendant.

Both judgments reversed with costs, and case remanded for a new trial upon the evidence which may be adduced by the parties; and such proper instructions as the Court may thereupon give to the jury.

Judgment reversed.

453 *Montague's Ex'x v. Turpin's Adm'x & als.

January Term, 1852, Richmond.

(Absent CABELL, P.)

1. Evidence—Judgments—Effect.—A judgment rendered against an administratrix upon the bond of her intestate, is conclusive evidence of the validity of the debt as against the administratrix.

2. Chancery Practice—Suit on Bond—Parties—Personal Representatives of Insolvent Obligor.*—Where two of three obligors in a bond are dead insolvent, and there is no personal representative of either of them, the obligee coming into equity to enforce the payment of the debt against the personal representative of the other obligor, is not bound to have personal representatives of the deceased insolvent obligors appointed, and make them parties. And this especially where the defendant has not, by his answer or in any other mode of pleading, objected to the failure to make them parties.

In December 1841 the executrix of William Montague recovered a judgment against the administratrix of Miles Turpin deceased, in the Circuit court of Henrico county for 920 dollars debt and 280 dollars damages. This judgment was rendered upon a bond executed on the 19th of May 1814 by Benjamin Haley, George Williamson and Miles Turpin to William Montague for the sum of 460 dollars, for the hire of several slaves for the year 1815, and was in the penalty of 920 dollars. An execution was issued upon the judgment and was returned "no effects." The executrix thereupon in 1842, filed her bill in the Circuit court of chancery for the Richmond circuit, against Miles Turpin's administratrix and heirs, and the sureties of the administratrix, in which she charged that the administratrix had wasted the assets of her intestate's estates, and she asked for a settlement of the administration account and satisfaction of her judgment.

454 *Turpin's administratrix in her answer, stated that the bond on which the plaintiff's judgment was founded had been paid as early as 1825 by Benjamin Haley, who she insisted was the principal in the bond, by letting William Montague have a wagon and team of mules: And that she was ignorant of this fact until after the judgment was recovered.

The Court directed an account of the administration on Turpin's estate, and it appeared by the report of the commissioner, that the personal assets in the hands of the administratrix was more than sufficient to satisfy the judgment.

The defendants took the evidence of a witness to prove that Benjamin Haley had let Montague have a wagon and mules in payment of the debt, and the witness swore to the fact. It appeared however that this witness had been examined on the first trial of the action on the bond, when a verdict was rendered for Turpin's administratrix, which was set aside by the Court. On the second trial the witness was not examined, for what reason does not appear, and there was a verdict and judgment for the plaintiff.

In the progress of the cause it was suggested by the counsel of Turpin's administratrix that the representatives of Benjamin Haley and George Williamson should

*See principal case cited in *Bruce v. Bickerton*, 18 W. Va. 358; *Holsberry v. Poling*, 38 W. Va. 123, 18 S. E. Rep. 487; monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

be made parties. It appeared however from the record of a cause between Turpin's adm'r v. Sheppard & als., the same reported 3 Gratt. 373, filed by the administratrix, that she had alleged in her bill in that case, and the allegation was sustained by the proofs, that Benjamin Haley and George Williamson were both dead insolvent, and that there was no representative of either of them.

The cause came on to be heard in March 1846, whereupon the Court being of opinion that whatever relief, if any, the plaintiff was entitled to, it was proper, in order to obtain the same, that she should
455 amend *her bill and make parties to this suit the representatives of Benjamin Haley the principal debtor, and of George Williamson, who was co-surety with Miles Turpin in the bond sought to be enforced by the plaintiff, and also joint trustee with the said Miles Turpin in the trust deed from the said Benjamin Haley, securing, among other debts, the said bond; and leave being then given to the plaintiff as heretofore had been done, to amend her bill, and she by her counsel in Court, declining to do so, the said counsel alleging there were no such representatives in existence, the Court decreed that the bill of the plaintiff should be dismissed with costs. From this decree Montague's executrix applied to this Court for an appeal, which was allowed.

Walter Harrison, for the appellant.

Stanard & Bouldin, and R. T. Daniel for the appellees.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that as it appears that the appellant had obtained a judgment against the appellee F. J. Turpin administratrix of Miles Turpin, upon the joint and several bond executed to the testator of the appellant by the said Miles Turpin, together with Benjamin Haley and George Williamson, the said judgment was conclusive evidence of the validity of the debt as against the personal representative of said Miles Turpin. And it furthermore appearing from the record of the case of Turpin v. Sheppard & others, made an exhibit in this cause, and the exhibits filed in said cause, that said Haley and Williamson who were jointly bound with said Miles Turpin, are both dead insolvent, and have no personal representatives, it was not incumbent on the appellant under such circumstances, to have representatives
456 appointed, and make them parties; more *especially as the appellee, the administratrix of said Miles Turpin, did not by her answer or in any other mode object to the failure to make them parties. The Court is therefore of opinion that the Circuit court erred in dismissing the bill because the appellant declined to amend her bill and make the representatives of said Benjamin Haley and George Williamson parties.

The Court is further of opinion, that the

evidence in the record does not shew that any part of the debt for which the judgment was obtained, was ever paid by the said Benjamin Haley, and as the cause came on for final hearing it would have been proper as the case was presented to proceed to decree in favour of the appellant; but as no decree was rendered upon the merits by the Court below; and a decree by this Court proceeding to pronounce now such a decree as the Court below should have done, might operate as a surprise on the appellees, it is adjudged and ordered that the decree be reversed with costs; and the cause remanded for further proceedings in order to a final decree.

457 *Phippen v. Durham & als.*

January Term, 1852, Richmond.

(Absent CABELL, P.)

1. **Assignments—Acceptance Clause—Release Clause—Validity.**—A deed which conveys all the property of the grantor in trust for the payment of his debts, is valid, though it contains a provision that no creditor shall take any benefit under the deed who does not, within thirty days from its date, signify his acceptance of its terms and conditions; and further agree to release and acquit the grantor from all further claim for the debt acknowledged therein.
2. **Same — Same — Same — Same — Case at Bar.**—The creditors named in such a deed, being dissatisfied with the trusts therein declared, it is agreed between each other and the debtor, that none of them will sign it; and that when the thirty days expires, another deed shall be executed by the debtor with other provisions. The day before the thirty days expires, two of the creditors execute the deed, with the avowed purpose to each other, of securing the benefit of the deed to all the creditors. After the thirty days has expired, one of these signing creditors files a bill against the other and the trustee, to have the trust executed for the exclusive benefit of the two; which the other resists. The other creditors having sued the debtor and obtained judgments by confession, on which the debtor took the oath of an insolvent debtor, filed their bill in the same Court against the debtor and signing creditors, charging that the deed was void as to them, and that the plaintiff in the first suit was guilty of a fraud in signing the deed. On the hearing the first bill should be dismissed with costs; and the deed being in fact valid, the fund should be distributed among all the creditors according to its provisions.

*For monographic note on Jurisdiction, see end of case.

†**Deeds of Assignment—Acceptance Clause—Release Clause—Validity.**—On this subject, see principal case cited in *Dance v. Seaman*, 11 Gratt. 781. See also, *foot-note* to *Evans v. Greenhow*, 15 Gratt. 157; *Wickham v. Lewis Martin*, 18 Gratt. 444, and *note*; *Gordon v. Cannon*, 18 Gratt. 895, 408, 410, 420, and *foot-note*; *foot-note* to *Sipe v. Earman*, 28 Gratt. 563; *Williams v. Lord*, 75 Va. 401; *Young v. Willis*, 82 Va. 299; *Paul v. Baugh*, 85 Va. 981, 9 S. E. Rep. 329; *Long v. Meriden, etc., Co.*, 94 Va. 596, 606, 27 S. E. Rep. 499; *Hurst v. Leckie*, 97 Va. 550, 84 S. E. Rep. 464; *Clarke v. Figgins*, 27 W. Va. 670. See monographic *note* on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409.

On the 12th of May 1837, John Durham, a boot and shoe maker residing in the city of Richmond, having been sued for a debt which he considered he did not owe, and apprehending that a judgment might be recovered against him during the term of the
458 Court which *had then commenced, executed a deed of trust on his property for the benefit of his other creditors by name: providing in the deed, however, that no creditor who should not within thirty days from its date, signify his assent to, and acceptance of, its terms and conditions, and further agree to release and acquit the said Durham from all further claim on account of the debt acknowledged by said deed to be due to such creditor, should take any benefit under the deed; and that the surplus, after paying the debts of the accepting and releasing creditors, should be paid over to the said Durham. This deed appears to have been executed without the knowledge of the creditors for whose benefit it was made, and was never signed by the trustee. On the day after its execution it was acknowledged by Durham in the clerk's office. On the 10th of June 1837, the day before the expiration of the thirty days mentioned in the deed, it was signed and acknowledged by two of the creditors, to wit, Thomas Mieure, and Phippen & Mallory, by B. W. Mallory. It was never signed by any of the other creditors.

On the 17th of June 1837, Mallory & Phippen exhibited their bill in chancery against Durham, Pulliam the trustee, and Mieure; claiming that they and Mieure as the only accepting creditors, were exclusively entitled to the benefit of the deed, and praying for an injunction, that a trustee might be substituted to the place of Pulliam who declined to act, and that the trust might be executed. On the same day the injunction was awarded; and under the order awarding it, the sheriff took possession of the property.

On the 23d of the same month, June 1837, Durham confessed judgments in the clerk's office at the suits of his other creditors, and being prayed in custody took the oath of an insolvent debtor; surrendering in his schedule, (besides some other subjects, apparently of little value,) whatever interest he might have in the property conveyed by said deed of trust.

459 *At July rules thereafter, Stevens and others, the schedule creditors, exhibited their bill in chancery in the same Court, against Mallory & Phippen, Pulliam, Mieure and Durham, and William D. Wren, sergeant of the city of Richmond, charging that after the execution of the deed and before the expiration of the 30 days, it was agreed by all the parties, including Mallory & Phippen, that the recorded deed should not be adopted, but should become inoperative by the expiration of the 30 days, and a new deed should be made and different provisions introduced. That afterwards, to wit, on the 10th of June, the day before the expiration of the 30 days, Mieure, thinking that some benefit might result to Durham and his creditors by a mere formal signature of the deed by one or more of the creditors, proposed to Mallory

to sign the deed, with the understanding that such signature should be for the benefit of all the other creditors, if it should become necessary to avail themselves of the same; with the design, however, that if no judgment should be obtained against Durham, as was apprehended by him, the deed should be cancelled, and another made carrying out the new agreement and understanding between the parties. That Mallory assented to these views of Mieure, and it was understood between them that should a judgment go against Durham at the then term of the Court, all the trust property should be sold and applied to the payment of all the debts mentioned in the deed, as if it had been signed by all the creditors. That with these views and this express understanding, Mieure and Mallory proceeded to the clerk's office to sign the deed; and at or about the time of getting there, Mallory proposed to Mieure to sign the deed and claim the whole amount of proceeds, (as the same would not very much exceed the amount of their respective debts,) in exclusion of all the other creditors: that Mieure indignantly rejected this

460 proposition as a fraud on the other creditors, *and on Durham also, and a plain and flagrant violation of the then subsisting understanding among all the parties; and further admonished Mallory that if he persisted in any such design, he had yet time and would inform Durham and every creditor, so that they might on that and the succeeding day come in and sign the deed and defeat the purposes of Mallory. That finding Mieure inflexible in this respect, Mallory yielded and signed the deed with the distinct agreement and understanding that the acceptance, if operative at all, was to be for the joint benefit of all the creditors: that such was, and is yet, the understanding of Mieure, who has a clear pecuniary interest to take under the deed in exclusion of, and not in participation with, the other creditors; as in the one case he would get all of his debt, and in the other little more than one half of the same, if so much, and that in consequence of this agreement Mieure gave no notice to Durham nor to the other creditors. And they insisted that by reason of the premises the said deed was void as to them, and the said property was vested by law in the said sergeant of Richmond for their benefit; and praying that the said deed might be declared fraudulent and void as to them, and the property sold, and the proceeds applied to the payment of the debts due to them; or that such other or further decree might be made as upon all the facts of the case might seem just and equitable.

At August rules in the same year, 1837, Mieure filed his answer to the bill of Mallory & Phippen, making substantially the same statement as was made in the bill of the schedule creditors, in regard to the agreement of the parties not to accept the deed, and the subsequent execution thereof by himself and Mallory, and the purposes for which it was so executed, and declining to participate in what he considered to be a fraud.

On the 2d of August 1837 there was an or-

der of sale in Mallory & Phippen's suit, and on the 1st of January 1838, the report of sale was returned.

461 *On the 19th of April 1838 the depositions of Mieure and Durham were returned and filed in the suit of the schedule creditors. Mieure proved substantially what he had stated in his answer to Mallory & Phippen's bill. Durham proved that about ten days after the deed had been admitted to record, Mr. James C. Crane, of the firm of James C. Crane & Co., creditors named therein, stated to him that he had examined the said deed, was not satisfied with it, and did not consider it good for anything, or words to that effect, and proposed that another deed with different provisions should be made and executed: that to this deponent consented; and at the instance of said Crane went to see all the creditors named in the deed who resided in Richmond: the first of them he called on was George Phippen, of the firm of Mallory & Phippen, to whom he stated what had occurred between Mr. Crane and himself: that said Phippen declared he thought the arrangement proposed by Mr. Crane the best that could be made; that he was willing to do whatever the other creditors thought most advisable, and would not sign the deed that had been admitted to record. That deponent considered said Phippen as agreeing for Mallory & Phippen not to sign the said deed, but that another deed with different provisions was to be prepared and executed for the benefit of all the creditors named in the deed: that a day or two after the expiration of the said term of 30 days, Mallory called on deponent and informed him he had signed said deed; deponent enquired why he had done so after the agreement and understanding aforesaid. Mallory replied that he had never committed himself in the affair, and had signed the deed with a view to secure himself; and that he had it in contemplation from the first—that is, from the time of the interview between deponent and Mr. Phippen, that if none of the other creditors signed the said deed he would sign it himself and take the benefit thereof

462 to *the exclusion of the other creditors, and thus secure his debt.

Although the bill of the schedule creditors was filed in July 1837, the subpoena issued thereon was returned executed on Mallory & Phippen on the 1st of November 1837, the answer of Mieure to the bill of Mallory & Phippen was filed in August 1837, and the depositions of Mieure and Durham were returned and filed in April 1838; no answer was ever filed by Mallory to the bill of the schedule creditors; and none by Phippen until June 1842—five years after the bill was filed. In his answer he denies that Mallory & Phippen in any manner released or renounced their claim to the benefits of the said deed; or that they ever accepted it on any other terms than those expressed in the deed; or that Mallory accepted and signed it in the manner and upon the terms set forth in the bill; or that Mallory had any right or authority to renounce the said deed for the firm, and to surrender without consideration, val-

uable in law, the rights of the firm under the deed.

The two suits were never formally consolidated; but after 1838 the orders made in them were joint orders—among which was an order of continuance on the motion of Mallory & Phippen, and the affidavit of Phippen made in March 1843. On the 28th of June 1843 they came on to be heard together, and the decree was made from which the appeal was taken. By that decree the bill of Mallory & Phippen was dismissed with costs; the Court being of opinion that the deed was fraudulent and void: and one of its commissioners was ordered to state an account of the claims of all the creditors of Durham in the suit of the schedule creditors, and apportion the fund among them according to the amount of their respective claims, making alternative apportionments, in one of which the debts due to Mallory & Phippen and Mieure shall be embraced, and from the other they shall be excluded, and to report, &c.

463 *On the day after the said decree was rendered, to wit, the 29th of June 1843, the deposition of Mallory was returned and filed in both of the cases. It was taken in Missouri. The deposition, though a short one, was taken in parcels on three different days. On the first day the witness stated, "I recollect that sometime in the year 1837 I did sign a deed executed by John Durham for the benefit of certain creditors named therein, by the signing of which I as one of the firm of Mallory & Phippen, which firm was a creditor of said Durham, agreed to the stipulations therein contained for the benefit of the creditors." On the 2d day he stated, "I recollect that in the month of June 1837, I went in company with Thomas Mieure, from the Bank of Virginia, to the Hustings court office, and then and there each of us, in each other's presence, signed the deed made by Durham as I before referred to; and the said Mieure remarked at the same time, that he should not avail himself of its benefits to the exclusion of other creditors, but merely signed it so as to make the same binding on the said Durham. I did not give my assent to that or any other remark which went to shew that I signed it for the same purpose." And on the 3d day he stated, "I signed the aforementioned deed with the intention of securing whatever advantages the said deed would give. Some time after signing the deed, I was astonished to learn that the aforesaid Mieure said I assented to any thing that would compromise my interest, or deprive me of the full benefit of said deed." The deposition was objected to by the schedule creditors on the ground that Mallory the witness was a party on the record and interested in the subject in contest; and that the same was taken without leave of the Court.

On the next day, June 30th, 1843, a motion was made by Mallory & Phippen to set aside the decree; in support of which motion 464 they offered the said deposition *of Mallory: but the motion was overruled. The Court at the same time certified, that on the calling of the causes, the counsel for Mal-

lory & Phippen moved the Court to continue them, in order that they might have the benefit of the deposition above mentioned, which they were in daily expectation of receiving; but the Court overruled the said motion, and entered the decree aforesaid.

Phippen applied to this Court for an appeal, which was allowed.

Lyons, for the appellant.

Robert G. Scott, for the appellees.

MONCURE, J., after stating the case, proceeded:

If the question were *res integra*, "Whether a deed of trust conveying all the property of a debtor for the benefit of such of his creditors as may within a specified time release him from all further claims; and providing that the surplus of the trust fund after satisfying the accepting creditors should be paid to the debtor, is valid against the creditors who do not accept?" I would be inclined to answer it in the negative. While the many cases on this subject are conflicting, I think the preponderance is against the validity of such a deed. The cases are collected in 1 American Leading Cases, p. 69-85. This Court however has decided in favour of the validity of such a deed; *Skipwith's ex'or v. Cunningham*, 8 Leigh 271; and while I do not approve, I yet bow to the authority of that decision. That case expressly recognizes the distinction taken by Chancellor Kent in *Seaving v Brinkerhoff*, 5 John. Ch. R. 329, that to make such a deed valid it must convey all, and not a part only, of the debtor's property. And as the deed in this case does not profess to convey, and did not in fact convey, all of the debtor's property, it
465 might be contended that the deed *was on that ground invalid. The property however not included in the deed, was probably of small value, consisting, as appears from the schedule, of choses in action to the amount of 131 dollars 65 cents, an interest in lands lying in western Virginia, forfeited for nonpayment of taxes, three old stoves &c., and it would therefore perhaps be proper to say in this case, as was said in the case of *Skipwith's ex'or v. Cunningham*, that "the deed essentially complies with the requirements of the law."

But conceding that such a deed may be valid, it is certainly important to its validity that the creditors who claim the benefit of it should take no unfair advantage of the other creditors. The transaction in its very nature requires the utmost fairness in the dealings of the parties with each other. A debtor in failing circumstances proposes to surrender all his property for the equal benefit of all his creditors who will release him from all further claims; and he executes and puts on record a deed for that purpose. His object is to obtain a release from all his creditors, and to be disembarrassed in his future operations; and he offers, as the price of this relief, to make a full and fair surrender of all his property, and to place his creditors on the footing of equality. It is proper that his

creditors should be notified of his offer a reasonable time before the expiration of the period limited for its acceptance, in order that they may obtain such information as will enable them to exercise their choice with discretion. It is proper that the creditors should have an opportunity of acting in concert; and it is natural and reasonable that they should so act. In this case it was especially so; as, when the deed was executed, it was extremely doubtful whether it would be valid if accepted. The deed bears date the 12th of May 1837. The case of *Skipwith v. Cunningham* was decided at April term 1837. If decided at the date of the deed, the decision was
466 not *then reported, and could only have been known to a very few. At that time many counsel would have advised that such a deed would be invalid; and all would have advised that its validity would at least be extremely doubtful. Whether such a deed would be invalid, or of doubtful validity, it would have been unwise in the creditors to accept it; for by accepting it they would have tied their own hands, and might have defeated the very object they had in view. In this case therefore there was a double motive for concert among the creditors; and accordingly the evidence shews that they did act in concert; at least so far as to determine among themselves that they would not accept the deed. Durham proves that about ten days after the deed was executed, Mr. Crane a creditor, stated that he had examined the deed, was not satisfied with it, and did not consider it good for any thing; and proposed that another deed with different provisions should be executed. To this proposition Durham assented, and at Crane's instance went to see the other creditors. The first he saw was Phippen, who approved the arrangement proposed by Mr. Crane, expressed his willingness to do whatever the other creditors thought most advisable, and declared that he would not sign the deed that had been admitted to record. After this express disclaimer of the deed by Phippen, it may be doubted whether he could retract his disclaimer and accept the deed. But certainly he could not do so without informing the other creditors in time to enable them to accept the deed within the 30 days.

Now if the claim of the schedule creditors stood alone upon the evidence of Durham, supported as it is by corroborating circumstances, I would regard it as not overthrown by the only countervailing evidence in the case, which is to be found in the answer of Phippen. It is contended that that answer is responsive to the bill and can only be overthrown by the evi-
467 dence of *at least two witnesses, or one witness and corroborating circumstances. I do not consider that answer entitled to so much weight. It was not filed until about five years after the bill and the answer of Miere, and four years after the depositions of Durham and Miere were filed. In all of these documents it was ex-

pressly charged or proved that Phippen, or Mallory & Phippen, had consented that the deed should be inoperative, and that they were guilty of a fraud in afterwards accepting the deed or attempting to set it up for their benefit against the other creditors. Such a charge if untrue should be promptly denied; and if the denial be long postponed, it must lose its weight in the same proportion. The answer too is brief and general, though the charge is full and specific. On the other hand the evidence of Durham is corroborated by the circumstance already stated, that what he proves might naturally and reasonably have been expected to occur; and by the further circumstance, that the conduct of the non-accepting creditors is almost inexplicable on any other hypothesis. They probably would not have remained quiet but for an agreement or understanding among all the creditors that the deed would not be accepted. But for such an agreement or understanding, it is hardly credible that (the debtor and creditors residing in Richmond where the deed was recorded), the debtor and non-accepting creditors, or some of them, would not have gone to the clerk's office on the last of the 30 days to see if any of the creditors had signed the deed.

But the claim of the schedule creditors does not stand alone on the evidence of Durham, supported as it is by corroborating circumstances. Mieure proved that some days previous to the last day upon which, according to the terms of the deed, the creditors had a right to sign it, all the creditors therein named, as deponent believed, and certainly Mallory & Phippen, *determined not to accept the deed, but to suffer it to be inoperative by the expiration of the 30 days without signing the same. Deponent was confident that this was the understanding and agreement among all the said creditors.

Now here are two witnesses positively testifying to a fact which is decisive of this case, to wit, the fact that within the 30 days the creditors, and certainly Phippen, agreed not to accept the deed, and if the answer of Phippen had denied this fact in the most positive and explicit terms, and were entitled to all the weight to which an answer can be entitled, it would be insufficient to resist the force of the concurring testimony of these two witnesses.

But Mieure proved another fact which is decisive of this case, to wit, that he and Mallory signed the deed with the express understanding and agreement, that, if carried out by a sale of the property therein mentioned, it should enure to the benefit of every creditor who should think proper to take under the same, in the same manner and to the same extent as though they had also on that day signed said deed. What evidence is there in the case to disprove this decisive fact thus proved by the evidence of Mieure? Not a particle, unless the deposition of Mallory, which will be presently noticed, be considered as evidence in the case. It is true that Phippen

in his answer denies that Mallory accepted and signed the deed in the manner and upon the terms set forth in the bill. But that denial was not made on the personal knowledge of Phippen; and if made on any information at all, such information must have been derived from Mallory. The denial therefore is not evidence; and certainly cannot weigh down the evidence of Mieure.

It will not do for Mallory to say that Phippen could not bind him by agreeing not to accept the deed. Nor for Phippen to say that Mallory had no right "to renounce *the said deed for the firm, and to surrender without consideration valuable in law, the rights of the firm under the deed." If these parties were right in saying that one could not bind the other, yet certainly each could bind himself, and as each did bind himself by agreeing to that which is decisive against the claim of the firm, therefore the firm is as much bound as if they had both expressly agreed not to accept the deed, or to accept it for the benefit of all the creditors. But I apprehend they are not right in so saying; and that the said several agreements of Mallory & Phippen for the firm, are binding on the firm and each member of it.

Durham and Mieure are both competent witnesses. Durham is disinterested; and the interest of Mieure is against his testimony.

But it is contended that the Court below erred in overruling the motion of Mallory & Phippen to continue the case, in order that they might have the benefit of the deposition of Mallory, which they were in daily expectation of receiving, and also in overruling their motion to set aside the decree after said deposition was returned.

The suits were instituted in 1837. The charges made in the bill of the schedule creditors were of such a nature as to render it proper that if they could be disproved by Mallory, his deposition should be taken and filed without any unnecessary delay. He was at that time in Richmond; for in November 1837, the subpoena was returned executed upon him. When he left Richmond or the state, does not appear; nor is there any trace in the record of any effort to take his deposition until March 1843; six years after the filing of the bill; when the suits were continued on the motion of Mallory & Phippen, and on the affidavit of Phippen that he had in the preceding December, sent the necessary papers to St.

Louis, Missouri, for the purpose of taking *Mallory's deposition, but that they had miscarried, and therefore the deposition had not been taken. At the next term, to wit, on the 28th of June 1843, when the suits were again called for hearing, Mallory & Phippen moved for another continuance for the same cause, and the Court overruled the motion. It seems to me that without accounting for the great apparent default which had occurred in not taking the deposition before, Mallory & Phippen had no right to have the

trial of the suits longer delayed on that ground, and that the Court, in its discretion, might properly overrule the motion.

But let us consider the deposition as in the case; and enquire first whether it be competent evidence, and secondly what is its effect, if competent. First, is he a competent witness? He certainly is not, unless he be rendered so by a release or assignment of his interest, and there is no evidence in the record of any such release or assignment, or that his interest which certainly once existed, has ever, in any manner, been extinguished. The only allusion to the subject of his interest is contained in the affidavit of Phippen before referred to, in which he says, "that the said Mallory has now no interest in them (the suits) whatever, his whole interest having been long since transferred to this affiant" &c. But this is certainly not sufficient to disprove his interest. Secondly, suppose that he is a competent witness, what is the effect of his evidence? It might be supposed to be unnecessary to answer this question; supposing the witness to be incompetent, as he undoubtedly is, on the record as it now stands. But it is to be remembered that the deposition of Mallory was not filed, and the exception to the competency of the witness taken, until after the dismissal of the bill of Mallory & Phippen. Mallory may in fact have no interest in the controversy, as is stated in the affidavit of Phippen before mentioned; and the fact that he has none, may have been, or may yet be, proved
471 in the suit of the *schedule creditors, which is still pending in the Court below. In this view of the case it becomes important to answer the question as to the effect of Mallory's evidence, supposing him to be competent; and I will therefore now proceed to do so. He testifies under very unfavorable circumstances. In 1837 when the deed was executed and the transactions connected with it were all fresh, a full and specific detail of them was made in the bill of the schedule creditors, and the answer of Mieure to the bill of Mallory & Phippen, and the conduct of Mallory was thereby deeply implicated. He never answered the charges made against him; and never gave his deposition in the suits until June 1843, six years after the suits were instituted; when his deposition was taken in Missouri. The deposition is equivocal and unsatisfactory; and under the circumstances can have little weight against the testimony of a witness testifying against his interest and at a time when the transactions to which the testimony relates were all fresh in the memory of the witness. But admit the statement of Mallory to be strictly and literally true; and what does it show? "I recollect" says the witness, "that in the month of June 1837 I went in company with Thomas Mieure from the Bank of Virginia to the Hustings court office, and then and there each of us in each other's presence, signed the deed made by Durham, as I before referred to; and the said Mieure remarked at the same time that he should not

avail himself of its benefits to the exclusion of other creditors, but merely signed it so as to make the same binding on the said Durham. I did not give my assent to that or any other remark which went to show that I signed it for the same purpose." But did he express his dissent to that remark of Mieure? He does not say that he did, as he certainly would have said, had the fact been so. Then when the remark was made by Mieure, Mallory according to his own admission was
472 silent: And his silence was *either designed to give consent, or to induce Mieure to believe that he consented, and prevent him from informing the other creditors. For Mallory must have known that if he had given the slightest intimation of dissent Mieure would have at once informed the other creditors, so that they might by signing the deed in time, defeat the object of Mallory and accomplish that of Mieure. If the silence of Mallory was designed to give consent, then Mallory & Phippen are bound by such consent. If it was designed to deceive Mieure, it was a fraud which can give Mallory & Phippen no advantage over the other creditors.

If therefore the case stood alone upon the statement of Mallory, that statement would be fatal to the pretensions of Mallory & Phippen to the whole of the trust fund in exclusion of the schedule creditors.

The great difficulty I have had in this case, has been in determining whether Mallory & Phippen should be allowed to participate at all in the distribution of the fund.

In attempting to secure to themselves the benefit of the deed of trust in exclusion of the schedule creditors, they attempted to perpetrate a fraud. They came into a Court of equity with unclean hands; and one of the established maxims of that Court required it, I think, to dismiss their bill; "for the Court will never assist a wrongdoer in effectuating his wrongful and illegal purpose." 1 Story's Equ. Jur. § 64, c. But it must be remembered that the schedule creditors also came into a Court of equity; and though they came in with clean hands, yet they came asking equity. And another maxim of the Court, one which, of all others, it perhaps most delights to enforce, certainly most often enforces, declares that "he who asks equity must do equity." Then the question is, Is there any equity which these schedule creditors should be required to do to the
473 accepting creditors, as the price of that equity which is *demanded by the former? I think there is. The deed of trust was not in itself fraudulent; and was accepted by Mieure, if not Mallory also, with the understanding that it should enure to the benefit of all the creditors. They seem therefore to have acquired a legal advantage, and to have some equity. And the schedule creditors cannot deprive them of that legal advantage without the aid of a Court of equity; and cannot obtain that aid without doing equity. But what

is the measure of that equity? Certainly not the payment of the whole of the claims of the accepting creditors; for that would exhaust the whole trust subject, and be against the understanding with which the deed was accepted, besides giving effect to the unlawful purpose to which Mallory & Phippen afterwards sought to pervert their acceptance of the deed. The answer to the question is given by another maxim of the Court, that "equality is equity;" or, as it is sometimes expressed, "equity delighteth in equality." 1 Story's Equ. Jur. § 64, f. The application of this maxim to the case will carry into effect the understanding with which the deed was accepted, and will do equal justice to all the creditors.

But a question still remains to be answered, and that is, whether the creditors shall be required to release their debtor Durham from all further claim on account of the debts due them after the fund aforesaid shall have been exhausted in the payment of said debts, according to a provision to that effect in the deed? With all deference for the opinions of those of my brethren who differ in opinion with me on this question, I think the creditors should not be so required. To require them to do so, would be to give effect to the deed against the express agreement of all the creditors that it should be ineffectual; would be to take away from the schedule creditors rights acquired by legal diligence, without any necessity whatever for so doing. All that the accepting creditors can require is, to
474 be allowed to *participate pro rata in the distribution of the fund. When that is accorded to them, why should any other terms be imposed on the schedule creditors? Why should they be required to release the debtor? The accepting creditors will not be benefited by the lease of the debtor. Their interest is the other way. The schedule creditors ask no equity against the debtor: against him their rights both at law and in equity are complete. He not only has no equity, but demands no equity in the case. He is defendant in both of the bills, and answers neither of them. According to the pretensions of Mallory & Phippen, they and Miere would get the whole trust fund and release the debtor, while the entire claims of the schedule creditors would be left unsatisfied and liable to be enforced against him. According to the pretensions of the schedule creditors they would get the whole trust fund, leaving the balance of their claims, and the entire claims of the accepting creditors, or at least of Mallory & Phippen, unsatisfied and liable to be enforced against the debtor. In this conflict of pretensions the debtor has no legal or equitable interest, and claims none. In his deposition he maintains the pretensions of the schedule creditors, which leave him bound for the entire amount of the claims against him after applying the trust fund to their payment. The only question is whether the schedule creditors should get all under their execution liens, or allow the accepting cred-

itors to participate with them. These two classes of creditors are alone interested in the solution of this question. It is a matter of indifference to the debtor whether the balance due by him after the application of the trust fund be due to one class or other of his creditors. Why then should a release be required of the creditors? Why should this measure of relief be forced upon a debtor not seeking it? Not entitled to it according to his own evidence in the case?

I am for giving no effect whatever to
475 the deed of trust except *to the extent of affording an opportunity to a Court of equity for the application of its favourite maxims, that "he who asks equity must do equity," and "equality is equity," and it is with great difficulty that I go even to that extent in this case.

The Court below in dismissing the bill of Mallory & Phippen did not intend to decide that they were not entitled to participate in the distribution of the fund, but reserved that question for future decisions in the suit of the schedule creditors. In that suit, to which all the parties to this suit are defendants, the fund can, and ought I think, to be apportioned pro rata among all the creditors.

I am for affirming the decree.

DANIEL, J. I have not been able to discover anything on the face of the deed out of which this controversy has arisen, or in the history of the case, from which to draw the conclusions that the said deed is fraudulent in fact or in law. The right of a debtor, in making a deed of trust upon all of his estate for the benefit of his creditors, to insert in the deed the condition that all who should accept its provisions should release him from all further demand on account of the debts secured, was recognized by this Court in the case of Skipwith's ex'or v. Cunningham, 8 Leigh 271; and reason and authority are there furnished for the distinction made between the conveyance of the whole and the conveyance of part only of the debtor's property upon such condition.

There is, I think, nothing in the case from which to infer that the deed made by Durham originated in any purpose or design to conceal from his creditors or secure to himself any portion of his property. It is true that the schedule rendered by him on taking the oath of an insolvent debtor, contains a list of small debts due to him, and a few
476 articles of personal property of trifling *value not mentioned in his deed.

There is no proof however that these debts existed, or that he owned these articles of property at the date of the deed. And if such proof existed, or the probability of the existence of the fact is to be inferred from the short space of time that elapsed between the date of the deed and the time of surrendering the schedule, it would, in the absence of all other evidence of fraud, and in view of the inconsiderable value of the subjects in question, be harsh, I think, to refer the failure to embrace them

in the deed to any dishonest purpose on the part of the grantor. The charitable and fair presumption is, that he omitted them from forgetfulness, if indeed he was the owner of them when he made the deed.

The deed may therefore be justly treated as one devoting the whole of the debtor's property to the demands of his creditors, and the objection made on the condition which it imposes on the creditors, is answered by the decision of this Court in the case above cited. The deed is, I think, unassailable on this ground or on any other so far as the grantor is concerned; and the Circuit court erred in dismissing the plaintiff's bill on the ground that the deed was fraudulent and void. The conduct of the plaintiffs has however been such as, in my opinion, to debar them of all claim to the interference of the Court of equity to enforce, at their suit, any right which they acquired by virtue of their having signed and accepted the deed within the time prescribed. They and Mieure only of the creditors having executed the deed, stand according to its provisions as preferred creditors, and entitled to appropriate the whole of the trust fund, if necessary, to the satisfaction of their debts. The testimony taken in the suit of Stevens and the other schedule creditors, however, discloses the fact that the deed was signed by Mieure, and by Mallory, in the name of Phippen &

477 Mallory, with the express understanding that the deed should enure to the benefit of all the creditors as fully as if each of the others had also signed the deed. Phippen & Mallory now repudiate this understanding, and avail themselves of their position to claim for themselves and Mieure the whole of the trust fund to the exclusion of the other creditors. This conduct, taken in connection with the fact disclosed in the testimony of Mieure, that Mallory had proposed to him that they should sign the deed and claim the benefit of it to the exclusion of the other creditors; and only consented to the understanding above mentioned upon being warned by Mieure, that if he did not the other creditors should be notified of his course, and thus have an opportunity also of signing the deed, furnishes, I think, sufficient proof that the use now sought to be made of the deed by Mallory was one contemplated by him at the time he became a party to it. Such being the origin and nature of their claim, Phippen & Mallory, as plaintiffs in a Court of equity, were, in my opinion, entitled to no aid or relief whatever; and the Chancellor, for the reasons I have stated, did right, I think, in dismissing their bill. Whether their position as defendants in the suit brought by the schedule creditors will so far avail them as to give them the right to insist that they shall not be compelled to yield their place in the deed, except on the condition of being allowed to receive, according to the understanding with Mieure, their pro rata share of the fund, is a question reserved by the Chancellor for a future adjudication,

which I do not wish to anticipate by any expression of opinion further than what has been rendered necessary in passing upon their rights in their own suit. As yet no step has been taken in either branch of the proceedings of which the appellants have, in my opinion, any right to complain; and I am for affirming the decree.

478 *BALDWIN, J. This is an appeal from a joint decree, rendered in two suits embracing the same subject and involving the same controversy, and heard together without objection: and the appeal has therefore brought up both causes for adjudication here. In one of them, that first instituted, Mallory & Phippen are the plaintiffs; and in consequence of the omission as defendants of all the creditors secured by the trust deed in question, except Mieure, the merits of the controversy are not fully developed in that suit. But in the other, brought by nearly all the creditors secured by the deed very shortly after the first, the merits of the controversy have been fully developed, by the pleadings, proceedings and proofs, between the proper parties. It is not to be supposed for a moment that it would be proper, from separate and unconnected views of the two cases, to render a decree repugnant and conflicting in itself in regard to the rights of the parties and the relief consequent thereupon. We must therefore, of necessity, look in the first place to the suit in which the merits have been fully developed, for the consideration and determination thereof, and the result will then designate the disposition to be made of the other case.

In Virginia the principle is established that a deed of trust made by a debtor conveying his property for the security of creditors, which is in all other respects fair and bona fide, is not to be treated as fraudulent because it imposes upon the creditors intended to be secured the condition of releasing to the grantor so much of their respective demands as may remain unsatisfied after the application thereto of the proceeds of the trust subject, and requires of them their acceptance of the provisions of the deed within a given time. Skipwith's ex'or v. Cunningham, 8 Leigh 271. The effect of such a condition is to give the whole benefit of the trust to the creditors

479 who comply with it, to the exclusion of those who fail to do so within the prescribed period. It has somewhat the nature of a forfeiture, and there ought to be perfect fairness and good faith on the part of the creditors seeking to avail themselves of it. If therefore some of the creditors, with the design of excluding the rest, resort to false representations or other deceptive arts, by which the latter are surprised or deluded, and so prevented from acceding to the terms proposed in the deed, such misconduct furnishes a proper ground for relief in a Court of equity.

I think it appears from the record, that by common understanding and agreement

amongst the creditors, including the defendants Mallory & Phippen, it was determined, in consequence of apprehensions entertained in respect to the validity of the deed, that none of them would become parties to the instrument, but that the same should be suffered to become inoperative, by their failure to affix their signatures within the prescribed period of thirty days; that in conformity with this understanding and agreement the deed was not signed by any of the creditors, with the exception of Mallory & Phippen, and the defendant Mieure; that within a day or two before the expiration of the time limited, Mallory and Mieure went together to the clerk's office where the deed was deposited and recorded, and then and there signed the same, the latter individually, and the former for himself and his partner Phippen; that Mieure acted for the honest purpose of preserving to the creditors in general intended to be secured by the deed the benefit of its provisions, by admitting them to a participation therein; and Mallory for the dishonest purpose, and with the preconceived design, of taking the other creditors by surprise, excluding them from all resort to the property, and appropriating it to the satisfaction of the debt due to himself and partner; and that Mallory accomplished his purpose by taking advantage

480 of the general delusion and general expectation of *the creditors to which he had contributed, by lying by until it was too late to warn the other creditors, unless by the vigilance and diligence of Mieure; and by quieting the latter, (who had indignantly rejected a proposition to become his confederate, and threatened to rouse the other creditors,) by consenting to concur with him in admitting them to participation in the benefits of the trust.

These facts, I think, are established by the deposition of Mieure, of whose competency there can be no doubt, his evidence being directly against his own pecuniary interest, which, like that of Mallory, is to exclude the other creditors from all participation in the trust subject. The testimony of Mieure is strongly corroborated and sustained by the deposition of Durham, if the latter be a competent witness, which is a question of some difficulty, from the peculiar nature of the case. It is a question which I do not deem it necessary to consider, and I shall therefore not rely upon the evidence of Durham, but treat Mieure as the only witness for the plaintiffs.

The credibility of Mieure is quite obvious, and the weight of his testimony is not impaired by the rule of evidence that requires a responsive answer, negating allegations of the bill to be overcome by two witnesses, or one witness and corroborating circumstances. The rule is not applicable to a case like this, in which the respondent does not speak from his personal knowledge. The answer though purporting to be that of Mallory & Phippen, is in fact the answer of Phippen alone; and was sworn to and filed by him only, and not by Mallory,

against whom the bill is taken for confessed. It is a sweeping answer putting in issue by denial general allegations of the bill, but evading the details therein set forth in regard to the misconduct of Mallory, as to which the respondent Phippen knew nothing personally, though 481 seeking to avail himself of *it, and in regard to which he does not undertake to express any knowledge or even belief.

The veracious testimony of Mieure is therefore sufficient in itself, and I need not even refer to the circumstances of the case by which it is corroborated. In regard to the deposition of Mallory, one of the plaintiffs, filed after the rendition of the decree, if the matter of it were entitled to any weight, it is so obviously irregular and incompetent, that in my view of the case it would be waste of words to make any remarks upon it.

It seems to me clear that the plaintiffs are entitled to relief within the scope of the allegations of their bill, but not to that specifically designated in the bill, which seeks to set aside the deed of trust altogether, and enforce their supposed rights as schedule creditors subsequently acquired when Durham took the oath of insolvency. But that relief would, I think, be improper, the sound objections being not to the validity but the abuse of the deed, which was regularly accepted by both Mieure and Mallory, and avowedly with the view of admitting the other trust creditors into participation with them of its benefits. The purpose of Mieure was bona fide, and though that of Mallory was not so, it may be treated as if it had been; and it cannot be doubted that it was competent for them to waive any exclusive advantage to themselves, and constitute themselves trustees for the other creditors intended to be secured. To abrogate the deed would be wrong and injurious in regard to some of the trust creditors, who were not also schedule creditors, including Mallory & Phippen, and against them the plaintiff are entitled to relief only upon the condition of doing equity, according to the well established rule which operates in favour of wrong doers, however iniquitous and fraudulent their conduct may have been. It would be improper 482 also in *respect to Durham, against whom the trust ought to be carried out upon the prescribed condition of his being released from the demands of the creditors so far as unsatisfied by the application of the trust subject.

Mallory & Phippen, for the reasons already stated, are not aggrieved by so much of the Chancellor's decree as dismisses their bill with costs, that being the legitimate consequence of a decision against them upon the merits in the other suit, in which any equities on their part are reserved for the final decree, by which complete justice may be done all round amongst the parties. It is true the reason for dismissing the bill of Mallory & Phippen is stated to be that the deed of trust is fraudulent and void;

but the presumption is that the Chancellor had in mind the fraudulent operation sought to be given to the deed, and he did not mean to treat the provisions of the deed as nought, directly in the teeth of the express decision of this Court in the case of Skipwith's ex'or v. Cunningham. And however this may be, the decree is merely interlocutory, with the proper reservation, and we are not to anticipate that it will be carried out by the final decree upon erroneous principles.

I think there is no error in the decree to the prejudice of the appellants, and that it ought to be affirmed.

ALLEN, J. The case of Skipwith v. Cunningham has affirmed the right of the debtor conveying all his property for the benefit of his creditors, to exact a general release from the creditors accepting the provisions of the deed, as the condition on which they shall participate in the fund provided. The deed in this case cannot be assailed on that ground; nor is there any evidence of actual fraud in its execution. The evidence however, I think, shews that there was an understanding on the part of the creditors, including the appellants,

483 that the proceeds of the property embraced in the trust *should be applied to the payment of all the debts named in the deed in the same manner as if all had signed it. The appellants therefore have been guilty of the fraudulent attempt to acquire an unfair advantage over the other creditors, in the effort to exclude them from the benefits of the deed. Still it seems to me the Court below erred in dismissing the bill filed by the appellants to enforce the execution of the deed. Though the case came on for hearing together with the bill filed by the judgment creditors to impeach the deed for fraud, there was no necessary connection between the causes. The decree dismissing the bill is a final adjudication against the appellants. Mallory & Phippen are not judgment creditors. Their whole claim to satisfaction of their debt, or any part of it, out of this property, rests upon the deed, and this the Court by its decree declares to be fraudulent and void, and therefore dismisses the bill. If this decree stands, of what avail is the instruction of the Court in the case of the creditors directing the commissioner to make alternative apportionments of the fraud amongst the creditors, one embracing, the other excluding the debt of Mallory & Phippen? Resting as they must do on the deed alone, and that being adjudged in so many words to be fraudulent and void, it is difficult to perceive how they can be let in to participate in the fund. The general creditors claim, not under but against the deed; they assert their legal lien; and when by the decree in the case of the appellants the deed is put out of the way as utterly void, the property must of necessity be distributed amongst the creditors at whose suit the debtor has taken the insolvent oath. Considering the deed as valid,

and that the conduct of the appellants in asserting an exclusive claim to the benefits of it, though improper as it regards the other creditors, could not avoid the deed or do away with the effect of an acceptance of its provisions, it only remained 484 for the Court to carry into *execution the agreement and understanding of the parties; and to apply the proceeds to the debts named, in the same way as if the creditors had signed it. If they had signed they would have released their debtor for the residue of their debts. This has been done by Mallory & Phippen.

The debtor having made a fair dedication of his property upon terms which the law justified him in imposing, has a right to insist upon a release from all who claim to participate. And the fund should have been divided between the creditors who have signed and such of those named in the deed as may agree to the terms prescribed. Such a distribution of the trust fund can only be made in the suit instituted by Mallory & Phippen to execute the trust; and would be totally inconsistent with the case made by the general creditors, who rely on their legal lien alone; and repudiate the deed. And it would present a most anomalous case, were the Court, after a solemn decree declaring the deed fraudulent and void in a suit brought to enforce it, to proceed in a suit brought to impeach it, to distribute the trust fund as though the deed were a valid security.

The rule that the party to entitle himself to relief must appear with clean hands, cannot be applied to this case without injustice to others as well as the appellants, the plaintiff is in the Court below. The deed if valid divested the debtor of his property and vested it in the trustee for the benefit of the creditors who signed within the period prescribed. The signatures of Mallory & Phippen and Miere imparted vitality to the deed; and the fund could only be administered by the trustee or under the direction of a Court of equity. When therefore the trustee declined to act, a Court of equity was constrained upon the application of any party interested to interpose and protect the fund. And its jurisdiction having once attached it 485 must go on to dispose of *the subject according to the rights of the parties.

The bill was not filed to set up a fraudulent deed, that is conceded to be good and valid; the claim therefore as preferred by the bill was proper, and the objection goes, not to the validity of the deed, but to the extent of the rights of the creditors named, as modified by the understanding and agreements amongst them. This therefore is nothing more than the ordinary case of a party who has rights proper to be enforced in a Court of equity, claiming more than the proof shews him entitled to. The Court in such cases may, in the exercise of its discretion, subject the party to costs; but it cannot refuse relief of some kind. This will appear more clearly if the case is viewed by itself and without reference to

the bill filed by the creditors after the institution of the suit by Mallory & Phippen. Could the Court if that were the sole case pending, have dismissed the bill after its jurisdiction had attached and it had actually taken possession of the trust fund? It must of necessity go on to dispose of the fund; if the deed is sustained it could not be restored to the debtor for he had parted with all rights to it. Nor would it be proper to place it in the hands of the trustee, even if as in this case he had not declined to act. Nothing would remain for the Court to do but to enquire into the rights of the parties and to distribute the fund accordingly. A dismissal of the bill would have been erroneous in the case supposed, and there does not seem to be any distinction between that and the case before us. But in this case the error is aggravated by the decree declaring the deed fraudulent and void; thus precluding the Court from ever treating it as a valid subsisting security for any purpose as between these parties, in any subsequent proceeding. I think the decree should be reversed, and the cause remanded with instructions to hear both causes together and to distribute the trust fund amongst the creditors who have signed the deed, and such others of the creditors named therein as may elect to come in and release the debtor according to the terms of the deed.

But the other Judges differ from me, and the decree is therefore affirmed.

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Cross References to Monographic Notes.

Abatement, Pleas in, appended to Warren v. Saunders, 27 Gratt. 259.

Appeals.

Attachments, appended to Lancaster v. Wilson, 27 Gratt. 624.

Bankruptcy and Insolvency, appended to Dillard v. Collins, 25 Gratt. 343.

Charities, appended to Kelly v. Love, 20 Gratt. 124.

Constitutional Law.

Courts.

Creditors' Bills, appended to Suckley v. Rotchford, 12 Gratt. 60.

Decrees, appended to Evans v. Spurgin, 11 Gratt. 615.

Divorce, appended to Bailey v. Bailey, 21 Gratt. 43.

Executors and Administrators.

Fraudulent and Voluntary Conveyances, appended to Cochran v. Paris, 11 Gratt. 348.

Injunctions, appended to Claytor v. Anthony, 15 Gratt. 518.

Judgments, appended to Smith v. Charlton, 7 Gratt. 425.

Justices of the Peace.

A. GENERAL JURISDICTION.

I. DEFINITION AND SCOPE.

Definition.—Jurisdiction is the power to hear and determine a cause. 17 Am. & Eng. Enc. Law (2d Ed.) 1041.

Scope.—The plan of this article is to treat under the title of "Jurisdiction" the general principles applicable to this subject, in three main divisions, general, equitable and criminal jurisdiction. Its relation and application to specific subjects will be found in the monographic notes on those subjects, and for the jurisdiction of specific courts, and their appellate jurisdiction, reference is made to the monographic notes on "Courts" and "Appeals."

II. ELEMENTS AND ACQUISITION.

1. OF THE PERSON.

a. Essential in Personal Actions.

Want of Service in Personal Action.—In a personal action actual service of process upon the defendant is necessary to complete the jurisdiction of the court, and if no such service is had the judgment will be void and subject to collateral attack unless waived by voluntary appearance or otherwise. Gray v. Stuart, 23 Gratt. 351; Underwood v. McVeigh, 23 Gratt. 418; Wade v. Hancock, 76 Va. 620; Lavell v. McCurdy, 77 Va. 763; Ferguson v. Teel, 82 Va. 690; Dillard v. Central, etc., Co., 82 Va. 734, 1 S. E. Rep. 124; Blanton v. Carroll, 86 Va. 539, 10 S. E. Rep. 329; Staunton, etc., Co. v. Haden, 92 Va. 201, 23 S. E. Rep. 285; Capehart v. Cunningham, 12 W. Va. 750; Fowler v. Lewis, 36 W. Va. 112, 14 S. E. Rep. 447; O'Brien v. Stephens, 11 Gratt. 610; Barrett v. McAllister, 33 W. Va. 760, 11 S. E. Rep. 228; Coleman v. Waters, 13 W. Va. 311; Mahany v. Kephart, 15 W. Va. 619; Taylor v. Cox, 22 W. Va. 159, 9 S. E. Rep. 75; Wetherill v. McCloskey, 28 W. Va. 198.

Same—Presumptions.—The rendition of a judgment against a party not before the court in any

way will be as utterly void as though the court had undertaken to act when the subject-matter was not within its cognizance. This rule has reference to all courts, with this difference, that the jurisdiction of a superior court will be presumed until the contrary appears, whereas that of an inferior court must be shown. Blanton v. Carroll, 86 Va. 539, 10 S. E. Rep. 329; Underwood v. McVeigh, 23 Gratt. 409. See also, Lancaster v. Wilson, 27 Gratt. 624; Fairfax v. City of Alexandria, 28 Gratt. 16; Connolly v. Connolly, 23 Gratt. 657; Gray v. Stuart, 23 Gratt. 351.

Same—Effect of Depositions by Nonresident.—Where nonresident defendants were not served with process, and did not in any way enter an appearance, the fact that they gave their depositions in the case did not authorize a personal decree against them. Edichal Bullion Co. v. Columbia Gold Mining Co., 87 Va. 641, 13 S. E. Rep. 100.

Same—Unauthorized Acceptance of Legal Service.—A judgment rendered against a defendant is void, where it was done so, on legal service of the summons accepted by his son without his knowledge or authority. In such case collection of execution should be enjoined. Finney v. Clark, 86 Va. 354, 10 S. E. Rep. 569.

Order of Publication against Defendants in Lines of Enemy.—A judgment or decree pronounced in an action at law or a suit in equity instituted during the late civil war by a plaintiff residing within the Union lines, in a court within those lines, against parties residing within the Confederate lines and in the Confederate service, without any appearance by or notice to such parties other than an order of publication published within the Union lines, is absolutely void and may be so treated in the same or any subsequent collateral suit or proceeding. Sturm v. Fleming, 23 W. Va. 404; Haymond v. Camden, 23 W. Va. 180; Grinnan v. Edwards, 21 W. Va. 247.

Applies to Judgment of Justice.—A judgment pronounced by a justice, without service of process upon or notice to the defendant is void. But as such judgment may be set aside by the circuit court upon a writ of *certiorari*, the defendant cannot obtain relief against it in a court of equity. Kanawha, etc., R. Co. v. Ryan, 31 W. Va. 264, 6 S. E. Rep. 924.

Suit against Foreign Executor.—The courts of Virginia have no jurisdiction to entertain a suit against a foreign executor who has not qualified here, for the distribution of assets collected in a foreign state and which have not been brought into this state. Fugate v. Moore, 86 Va. 1045, 11 S. E. Rep. 1063.

b. How Acquired.

(1) **By Appearance.**—Where there has been no actual or implied notice to a party, and he has not consented to the jurisdiction of the court over him, it may still be acquired by his appearance in the cause, and if a party appear for any purpose other than to object to the legality of the process or its service, it dispenses with service of process. Frank v. Zeigler, 46 Va. 614, 23 S. E. Rep. 761.

Bill Must Contain Proper Allegations.—An appearance in a suit by a person not a party, as to whom the bill has no allegation, does not bind him by a decree therein. Frank v. Zeigler, 46 W. Va. 614, 23 S. E. Rep. 761.

By Attorney.—When the record shows that an attorney appeared for the defendant in a court of general jurisdiction, such appearance gives the court jurisdiction of the person of the defendant. Wandling v. Straw, 25 W. Va. 692.

Same—May Show Appearance Unauthorized.—A party is not within the jurisdiction of a court unless there has been proper service of process upon him, or he or his authorized attorney has personally appeared, and a defendant may testify in such a case that the attorney who appeared for him was not employed by him, nor even known to him. *Raub v. Otterback*, 89 Va. 645, 16 S. E. Rep. 983.

Effect of Cross-Examination of Witness.—A person not a party to a judgment, is not bound by it, in law or equity, merely on the ground that he was present and cross-examined the witnesses. *Turpin v. Thomas*, 2 H. & M. 139.

(2) **By Consent.**—See sec. 2, subsec. c, "Consent," *infra*.

Jurisdiction of Person Conferred Not of Subject-Matter.—Consent of parties cannot confer upon a court jurisdiction which the law does not confer, or confers upon some other court, although the parties may by consent submit themselves to the jurisdiction of the court. In other words, consent cannot confer jurisdiction of subject-matter, but it may confer jurisdiction of the person. *Yates v. Taylor Co. Ct.* (W. Va.), 35 S. E. Rep. 24; *Bogle v. Fitzhugh*, 2 Wash. 213.

All Parties Must Consent.—The consent of two of the parties cannot give jurisdiction where the objection appears on the face of the bill, and there are many other parties. *Randolph v. Kinney*, 3 Rand. 394.

At Special Term of Court.—Section 3062, of the Va. Code of 1887, provides that at a special term of a court, any cause then ready for hearing, although not ready at the previous term, may, with consent of parties, be heard. But without such consent the court cannot hear a demurrer to a bill at such special term, and dissolve an injunction. *Fowler v. Mosher*, 85 Va. 421, 7 S. E. Rep. 542.

Effect of Taking Continuance.—If the parties consent that a suit shall be docketed and proceeded in to a final decree in a court which had general jurisdiction of the class of cases to which the case belonged, they waived all right to object to the jurisdiction of the court. The fact of taking and agreeing to a continuance is evidence of being made parties to the record, and of having recognized the case as in court. *Bell v. Farmville, etc., R. Co.*, 91 Va. 99, 20 S. E. Rep. 942.

Pleadings Made and Cause Docketed—No Objection after Trial and Judgment.—Parties may, by consent, make up the pleadings in a case, and have it docketed and tried in any court having jurisdiction, and if they appear and make no objection to its regularity, such court may exercise jurisdiction, and no objection can be made after the trial and judgment. *Hunter v. Stewart*, 23 W. Va. 549.

Suit against State.—It is an established principle that a sovereign state cannot be sued in its own courts, or in any other, without its consent and permission, and in the manner and in the tribunals expressly provided. And this principle, except so far as modified by the U. S. Const. art. III, § 2, cl. 1, applies as well to the states of the Union as to the government of the United States. *Board of Public Works v. Gantt*, 76 Va. 455; *McCandlish v. Com.*, 76 Va. 1002.

(3) **By Actual Notice.**

General Principles.—In order that jurisdiction may be conferred upon a justice in an action to recover money, the summons must be properly issued and served upon the defendants, or an attachment properly issued must be levied upon the property of the

defendant in such case. And of course it need not be stated that this well-known elementary principle applies equally to all other courts. *Colborn v. Booth*, 41 W. Va. 289, 23 S. E. Rep. 556.

Notice Must Be on Proper Party.—In order that a valid judgment may be rendered by a justice of the peace, the suit must be brought against a defendant upon whom the liability is, and service of process upon a different party will not confer jurisdiction of the subject-matter. *Yates v. Taylor Co. Ct.* (W. Va.), 35 S. E. Rep. 24.

Territorial Limits.—The several superior courts of chancery have jurisdiction in cases where their process is served upon the defendant within their respective districts, though his place of residence, and also the land in controversy be in a different district. *Hughes v. Hall*, 5 Munf. 431. See section III, "Territorial Jurisdiction," and subsec. c, "Ex-territorial Effect," *infra*.

Same—Statutory Restrictions.—Where the circuit court of a county is without jurisdiction under any of the clauses of § 1, ch. 123, W. Va. Code, amended by ch. 46, Acts 1897, it cannot obtain jurisdiction by reason of service of process in any other county, except as against a railroad, canal, turnpike, telegraph, or insurance company. *Rorer v. People's, etc., Assoc.* (W. Va.), 34 S. E. Rep. 758.

In Action for Malicious Prosecution.—In an action for malicious prosecution, the process was issued and served on both of the defendants in one county, when one of the defendants lived in another county, the other lived in another state, and the cause of action and every part thereof arose in the county where the first defendant lived. It was held that the circuit court of the county where they were found and served with process had jurisdiction of the action, and that this common-law rule was not affected by ch. 123 of the Code. *Vinal v. Core*, 18 W. Va. 1.

Transitory Action—Death by Wrongful Act.—An action to recover judgment for death by wrongful act is transitory, though statutory only; and where plaintiff's intestate was killed in West Virginia by negligence of the defendant, it was proper to institute the action for recovery of damages in Virginia, where the defendant was found, the right to recover in such case being governed by the law of West Virginia, such law not being inconsistent with the laws and policies of the state of Virginia. *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 14 S. E. Rep. 838; *Pulaski Iron Co. v. Palmer*, 89 Va. 384, 16 S. E. Rep. 275. See monographic *note* on "Death by Wrongful Act."

Failure of Judge to Attend Regular Term—Special Term.—A notice upon a forfeited forthcoming bond, given to a regular term of the court which the judge fails to attend, is sufficient to authorize an execution on the bond at a special term, held under section 17, of the circuit superior court of law. *Supp. Rev. Code*, p. 141; *Wootten v. Bragg*, 1 Gratt. 1.

(4) **By Constructive Notice.**

Order of Publication against Nonresidents.—Notice by publication against a nonresident defendant, prescribed by the statute, is in the nature of a substituted service of process, and must be duly published before the court can acquire full jurisdiction to make any order or decree affecting the defendant, or disposing of property which has been attached. As to persons who cannot legally see or obey it, such order of publication is without any effect or validity whatever. *Haymond v. Camden*, 22 W. Va. 180.

Absent Debtor—Presumption.—A decree against an absent debtor, where he was not made a party to the suit by order of publication, is improper although the chancellor ordered that it be made; its execution will not be presumed unless there is evidence of it in the record. *Hunter v. Spotswood*, 1 Wash. 145.

Attachments—Notice Essential.—In an attachment proceeding the jurisdiction acquired by the seizure of the property attached, is not to pass absolutely upon the rights of the parties, but to pass upon those rights after opportunity has been afforded its owner to appear and be heard. To this end the notice by publication prescribed by statute is indispensable, and a decree entered without such publication is void. *Haymond v. Camden*, 22 W. Va. 180.

Gives No Jurisdiction over Defendants in Lines of Enemy.—The act passed in 1862 by the general assembly of the reorganized government of Virginia at Wheeling, so far as it attempts to confer jurisdiction upon courts in the loyal counties of the state, by order of publication against persons who left these counties and went into the Confederate lines during the war, is invalid. *Sturm v. Fleming*, 22 W. Va. 404; *Haymond v. Camden*, 22 W. Va. 180.

c. Extraterritorial Effect.

(1) On Conveyances.

Valid if It Does Not Operate Territorially.—While it is true that a court of a state cannot enter a decree directly affecting land situated in another state, still the doctrine is well settled that if the person to do the act decreed is within the jurisdiction of the court, and the act may be done without the exercise of any authority operating territorially within the foreign jurisdiction, the court may act *in personam*, and oblige the parties to comply with the decree. Thus a conveyance of foreign lands may be made, but a partition cannot. *Polindexter v. Burwell*, 82 Va. 507; *Gibson v. Burgess*, 82 Va. 650; *Wimer v. Wimer*, 82 Va. 890, 5 S. E. Rep. 536.

Same—Cancellation for Fraud.—A person being within the commonwealth, may be decreed to execute a conveyance for lands lying in another state, or to cancel a deed for such lands obtained by fraud. *Guerrant v. Fowler*, 1 H. & M. 5.

Land Lying in Two States.—Although part of a tract of land lies in Virginia, and a part in West Virginia, a court having power over the proper persons may decree a sale of the whole tract. *Barger v. Buckland*, 28 Gratt. 850, and *foot-note*.

In Another County.—A decree of the court of a county requiring a defendant residing within its limits to execute a conveyance for land lying in another county, can be enforced upon the person only of such defendant, and does not of itself vest any legal title in the complainant. *Aldridge v. Giles*, 3 H. & M. 136.

(2) On Partitions.

Land in Foreign State Cannot Be Partitioned Here.—It is a well-settled general rule that a court of one state has no jurisdiction to make a decree which will directly affect either the legal or equitable title to land situated in another state. It is not competent for a court to decree touching a foreign subject when the act to be done can be accomplished only by an authority operating territorially. Thus a conveyance may be decreed of lands abroad if the defendant is within the jurisdiction of the court, but a partition of land cannot be made. *Polindexter v. Burwell*, 82 Va. 507; *Gibson v. Burgess*, 82 Va. 650; *Wimer v. Wimer*, 82 Va. 890, 5 S. E. Rep. 536.

Land in Two States.—A court, where all the parties are before it, has no jurisdiction to enter a decree partitioning land, the major portion of which is situated in another state. *Wimer v. Wimer*, 82 Va. 890, 5 S. E. Rep. 536.

2. OF THE SUBJECT-MATTER AND RES.

a. General Effect and Acquisition.

Jurisdiction of a Class.—A court has jurisdiction over the subject-matter of action when it has general jurisdiction over matters of that class, though the facts may not give jurisdiction over the particular case. *Schultz v. Schultz*, 10 Gratt. 358, 60 Am. Dec. 335.

May Be Subjected to Claims.—When a party out of the jurisdiction of the court has property within the jurisdiction, it may be subjected to a claim against the party, although he cannot be served with personal process. *O'Brien v. Stephens*, 11 Gratt. 610; *Fowler v. Lewis*, 26 W. Va. 126, 14 S. E. Rep. 451; *Barrett v. McAllister*, 28 W. Va. 760, 11 S. E. Rep. 228; *Coleman v. Waters*, 13 W. Va. 311; *Mahany v. Kephart*, 15 W. Va. 619; *Taylor v. Cox*, 23 W. Va. 159, 9 S. E. Rep. 75; *Wetherill v. McCloskey*, 23 W. Va. 198.

A bill was filed by a creditor of a company against the persons constituting that company in the circuit court of a county, to subject to the payment of his debt the land of one of them lying in that county, and the minerals conveyed by one of the members in another county. One of the members of the company is a resident of the county where the suit is brought, and the others are non-residents of the state. The court has jurisdiction of the case both on the ground that a part of the subject sought to be subjected lies within the county where the suit is brought, and also that one of the defendants is a resident of that county. *Clayton v. Henley*, 32 Gratt. 65.

Same—Property of Foreign Corporation.—Thus where a suit was brought by a stockholder of a foreign corporation against a domestic corporation having property in West Virginia belonging to the foreign corporation or owing debts to it, and the bill showed that the foreign corporation had ceased to use its franchises and had been dissolved by the laws of the state which created it, and had no property or assets within the jurisdiction of the court except those in the hands of the domestic corporation, the courts of West Virginia had jurisdiction of such suit, notwithstanding the fact that the foreign corporation could not be brought within the jurisdiction of its courts. *Crumlish v. R. Co.*, 28 W. Va. 623.

Rescission of Contract and Deed for Land.—Under the Code of 1873, ch. 165, §§ 1 and 2, a suit to rescind a contract of a sale of land and to vacate the deed made thereunder, was properly brought in the county where the transaction occurred, although process was not served in that county on either of the defendants, both of whom resided elsewhere. *Hull v. Fields*, 76 Va. 594.

Administration—Jurisdiction of Claim against State.—The circuit court of the county wherein is the seat of government, has jurisdiction to grant administration on the estate of an intestate who resided and died in another state, having no estate in this state except a claim on the state for money. *Com. v. Hudgin*, 2 Leigh 248. See monographic note on "Executors and Administrators."

Mandamus—Place Where Duty Violated Gives Jurisdiction.—The circuit court of the city of Richmond has jurisdiction to hear and determine the right to

a writ of mandamus, when the alleged violation of duty occurred in the city of Richmond, within the jurisdiction of its circuit court, and it was a matter of no importance that the obligation to perform such duty appeared from a record of the county court of Henrico county. § 3318, of the Code has no application to the case. *Richmond Ry. & Electric Co. v. Brown*, 97 Va. 26, 32 S. E. Rep. 775.

Injunction—Application for Purchase of Delinquent Land.—Where a bill to remove an application to purchase delinquent tax lands and to enjoin proceedings thereunder was filed against the applicant and the county clerk in the county where the land was situated, which showed the title to the land to be in the commonwealth, the statute conferring jurisdiction of all suits with the commonwealth on the circuit court of the city of Richmond did not apply, since the act of February 11, 1893, designated the county clerk to represent the state in matters relating to tax lands. *Baker v. Briggs*, 99 Va. 360, 38 S. E. Rep. 277. See *Christian v. Taylor*, 96 Va. 508; *Lewis v. Com.*, 96 Va. 506.

Place Where Injury to Stock Occurs Gives Jurisdiction.—Where in an action for injury to stock shipped, brought in the circuit court of the city of Lynchburg, it appears that part of the injuries were received while the stock were being unloaded in that city, the court has jurisdiction. *Ches., etc., R. Co. v. American Exch. Bk.*, 93 Va. 495, 23 S. E. Rep. 935.

Diversion of Water—Effect of Acts 1878-'9.—It was held in *C. & O. R. Co. v. Rison*, 99 Va. 18, 37 S. E. Rep. 320, that notwithstanding § 4 of the Acts of 1878-9, that the circuit court of Fluvanna county had jurisdiction of an action brought by the owner of a mill in that county against the successor in title of the Richmond & Alleghany Railroad Company to recover damages for the diversion of water and the failure to maintain a dam there.

Foreign Corporation—Management—Individual Rights Affected.—Where the act complained of in a suit against a foreign corporation affects the plaintiff solely in his capacity as a member of the corporation, and is the act of the corporation, then such action is the management of its internal affairs, and in the case of a foreign corporation courts will not take jurisdiction. Where the act complained of affects individual rights of the plaintiff only, then the court will take jurisdiction, whenever the cause of action arises within its jurisdiction. *Taylor v. Mut., etc., Life Assoc.*, 97 Va. 60, 33 S. E. Rep. 385.

Eminent Domain—Exemption from by Legislature.—A special act of the legislature authorized a railroad company to construct its road, and exempted the property of another railroad company from condemnation, it being an interference with the charter rights and franchises of the latter company. Hence it was not within the jurisdiction of any court to condemn it, because by the exemption it was not subject to the right of eminent domain. And where the county court of a county condemned a portion of this property, its judgment was null and void because it had no jurisdiction over the subject-matter. *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780.

b. Notice Essential.—See subsec. a, "Essential in Personal Actions," *supra*.

Applies to All Courts and Proceedings.—Notice and an opportunity to be heard are essential requisites to the jurisdiction of all courts, even in proceedings *ex rem*. It is a principle of natural justice, and lies at its very foundation, that before the rights of an

individual are affected by a judicial sentence, he shall be given an opportunity to be heard by notice, either actual or implied. A different rule would be a blot upon our jurisprudence and civilization, and a judgment so pronounced a nullity. *Dorr v. Rohr*, 82 Va. 362; *Fultz v. Brightwell*, 77 Va. 742; *Hess v. Gale*, 93 Va. 470, 25 S. E. Rep. 533; *Moorman v. Arthur*, 90 Va. 472, 18 S. E. Rep. 869; *Bowler v. Huston*, 30 Gratt. 276; *Staunton, etc., Co. v. Haden*, 92 Va. 207, 23 S. E. Rep. 285; *Ferguson v. Teel*, 82 Va. 696; *Grigg v. Dalsheimer*, 88 Va. 511, 13 S. E. Rep. 993; *Lavell v. McCurdy*, 77 Va. 771; *Buford v. North Roanoke Land, etc., Co.*, 90 Va. 423, 18 S. E. Rep. 914; *Balt., etc., R. Co. v. P. W. & Ky. R. Co.*, 17 W. Va. 835; *Renick v. Ludington*, 20 W. Va. 536; *Dower v. Church*, 31 W. Va. 49; *Haymond v. Camden*, 22 W. Va. 199; *McCoy v. McCoy*, 29 W. Va. 809, 2 S. E. Rep. 817; *Fowler v. Lewis*, 36 W. Va. 126, 14 S. E. Rep. 451; *Hukill v. Guffey*, 37 W. Va. 474, 16 S. E. Rep. 560; *Fairfax v. City of Alexandria*, 23 Gratt. 16; *Underwood v. McVeigh*, 23 Gratt. 409; *Lancaster v. Wilson*, 27 Gratt. 624; *Connolly v. Connolly*, 33 Gratt. 657; *Gray v. Stuart*, 33 Gratt. 351; *Boggs v. Com.*, 76 Va. 989.

c. Consent.—See *supra*, sec. II, b. (2), "By Consent."

Jurisdiction of Subject-Matter Not Given by Consent.

—While consent may give a court jurisdiction of the person it cannot give it jurisdiction of the subject-matter. *Yates v. Taylor Co. Ct. (W. Va.)*, 35 S. E. Rep. 24; *Bogle v. Fitzhugh*, 2 Wash. 213; *McCall v. Peachy*, 1 Call 55.

Same—Restriction of Rule.—Consent of parties cannot give jurisdiction to a court which does not have it. But this rule is only applicable to a case of original jurisdiction. *Bogle v. Fitzhugh*, 2 Wash. 213.

Same—May Relax Strictness of Form.—Although consent of parties cannot give a court of equity jurisdiction, or supply the total absence of other necessary parties, yet such consent may dispense with strictness of form, and enable the court to decide a cause in relation to parties who are in *fact*, though irregularly before it. *Mayo v. Murchie*, 3 Munf. 358.

Same—Exception.—An exception to the rule that consent cannot give a court jurisdiction over a cause, lies when the court once had jurisdiction, but has exhausted it; then jurisdiction may be restored by consent. *Bogle v. Fitzhugh*, 2 Wash. 213.

Jurisdiction in Vacation.—Consent of parties cannot give jurisdiction to the circuit court to render in vacation any decree or judgment not authorized by statute. *Tyson v. Glalze*, 23 Gratt. 799.

Jurisdiction of Court of Appeals.—Neither consent nor long acquiescence of parties can give the court of appeals jurisdiction. *Clarke v. Conn.*, 1 Munf. 160.

8. NECESSARY ALLEGATIONS.

Effect of Want of Allegation against Defendant.—Where a person by a decree in a cause on the defendant's motion was made a party defendant, but there was no allegation in the bill, nor was there any decree prayed against him, and he was not named in the bill, he was not in any sense of the term a defendant, and the court had no jurisdiction to render a decree against him, and if it did so it would be a mere nullity. *McCoy v. Allen*, 16 W. Va. 724; *Moseley v. Cocke*, 7 Leigh 226; *Newman v. Molloham*, 10 W. Va. 503.

Same—Where Answer Is Tendered Waiving Process.—An answer to a bill in chancery shows that a third party should have been made defendant. Such

third party then tendered his answer, waiving service of process. The original bill was not amended and in it there were no allegations against this third person, no relief prayed against him, and no allusion whatever to him. Evidence was taken which showed the interest of this party in the suit, but the court had no jurisdiction over him, as he was no proper party to the suit, and a decree affecting him was a mere nullity as to him. *Shaffer v. Fetty*, 80 W. Va. 248, 4 S. E. Rep. 278.

Rule as to Stating Where Cause of Action Arose—Videlicet.—Actions may be brought in the courts of this state upon contracts entered into, or personal injuries committed, anywhere. It is not necessary as a general rule to state in the declaration where the contract arose or the injury was committed. But this is sometimes necessary and then the plaintiff is permitted by a fiction to state under a *videlicet*, that the place is within the jurisdiction of the court in which the suit is brought; which fiction cannot be traversed. *Shaver v. White*, 6 Munf. 110.

Effect of Omission to Allege Cause of Action within Jurisdiction.—In an action of assumpsit in the superior court of a county, the declarations laying the venue in a different county, and omitting to state that the cause of action arose within the jurisdiction of the court, is not error sufficient in arrest of judgment. *Buster v. Ruffner*, 5 Munf. 27.

Action for Insurance on Vessel.—The declaration in an action of debt to recover the value of a ship, insured in case of its being captured and condemned, should show where, when, and by whom she was captured, and that the court which condemned her had jurisdiction. *Stone & Co. v. Patterson*, 6 Call 71.

Under Rev. Code—Nonresidence of Defendant.—A bill against an absent debtor or defendant, in order to give the court jurisdiction, under the statute concerning attachments and suits against absent defendants, 1 Rev. Code, ch. 128, must distinctly aver the nonresidence of the debtor, and if his nonresidence be not distinctly averred the court has no jurisdiction. *Kelso v. Blackburn*, 8 Leigh 299.

Nonresidence of Plaintiff in Federal Court.—A plaintiff in a federal court must state himself to be the citizen or subject of a foreign state, in order to entitle the court to jurisdiction. And if he omits it, the defendant may take advantage of the omission by motion in arrest of judgment. *Shedden v. Custis*, 6 Call 241.

Bill against Nonresident—On Traverse Residence Must Be Proved.—If the home defendants, to a bill in chancery filed against them and an absent defendant or debtor, alleging them to have in possession lands of the debtor by a voluntary or fraudulent conveyance, answer that the debtor is a resident, the plaintiff to sustain the jurisdiction of the court, under 1 Rev. Code, ch. 128, must prove the fact of the debtor's residence abroad. *Kelso v. Blackburn*, 8 Leigh 299.

Corporation Court—Declaration Must Lay Cause of Action in Jurisdiction.—Where a suit is brought in a corporation court, the declaration must lay the cause of action to have arisen *within the jurisdiction of the court*. *Thornton v. Smith*, 1 Wash. 81. See *Turberville v. Long*, 3 H. & M. 309.

District Court—Not Necessary to Aver Jurisdiction.—In *Turberville v. Long*, 3 H. & M. 309, it was held not to be necessary in actions in the district court to aver in the declaration that the cause of action arose within the jurisdiction of the court; but that it

seemed that such averment was necessary only in actions in the corporation courts.

4. BY FRAUD.—See *infra*, "Equitable Jurisdiction," sec. III. 8, "Colorable Allegation."

Colorable Claim.—If a claim is merely colorable in order to give a court jurisdiction, and that fact was made to appear, jurisdiction will be declined, for jurisdiction can no more be conferred than it can be taken away by improper devices of parties. *Cox v. Carr*, 79 Va. 28; *Fink v. Denny*, 75 Va. 667.

5. JURISDICTIONAL AMOUNT.

Principal Sum and Interest.—Where the principal sum demanded, together with the interest, is of sufficient amount to give jurisdiction, a court may hold cognizance of the case. *Stratton v. Mutual Assurance Society*, 6 Rand. 22. See monographic notes on "Courts" and "Appeals," for jurisdictional amounts of particular courts.

Penal Bill.—An action of debt was brought on a penal bill for \$100, conditioned to pay \$47, the defendant moved the court to stay the proceedings, because the penalty was inserted for the purpose of giving the court jurisdiction. It was decided that the motion would not be sustained. *Heath v. Blaker*, 3 Va. Cas. 215.

III. TERRITORIAL JURISDICTION.

1. LIMITATIONS AND EXTENT.

Laws Have No Extraterritorial Force.—It is a principle universally recognized that laws have no extraterritorial force. Their authority is limited to the territorial jurisdiction of the state or country that enacts them, so far as their right or power of enforcement or claim to obedience is concerned. *Stevens v. Brown*, 20 W. Va. 450.

State Has No Jurisdiction over Land Ceded to Federal Government—Valid Reservations.—Where the United States purchases land from a state with the consent of its legislature, it acquires under the federal constitution jurisdiction over the ceded lands, and they are no longer a part of that state and are not subject to the jurisdiction of its courts. The reservation in the act of cession of concurrent jurisdiction with the United States over the land, so that the courts and officers of the state may take such cognizance, execute such process and discharge such legal functions within the same as may not be incompatible with the consent given, is subject to the provisions of the first article and eighth section of the federal constitution, that is, as may not be incompatible with the exclusive jurisdiction of the United States, and which may operate to authorize the service by the officers of the state of the civil and criminal process of the state courts, with reference to acts done within the acknowledged territory of the state outside of the ceded lands. This reservation is valid and is intended to prevent such places from becoming harbors of refuge for debtors and criminals. *Foley v. Shriver*, 81 Va. 568.

Condemnation of Land in Incorporated Town for County Clerk's Office—County Court Has No Jurisdiction.—The condemnation of land for a county clerk's office in an incorporated town, does not create a conflict of jurisdiction between the city and county courts, as the city court has jurisdiction of the locality and the county court does not acquire the same by the condemnation proceedings. *Board of Supervisors v. Cox*, 98 Va. 270, 36 S. E. Rep. 380.

State Cannot Interfere with Interstate Commerce.—The navigable waters of the state and the soil under them within its territorial limits, are the property of the state, for the benefit of its people, and it has the right to control them as it sees proper, provided

it does not interfere with the authority granted the United States to regulate commerce, and navigation. *Morgan v. Com.*, 98 Va. 812, 35 S. E. Rep. 448. See *McCready v. Com.*, 27 Gratt. 985, 94 U. S. 891.

Writs Cannot Issue into Another District.—A writ cannot issue from one district court into another district, although against joint defendants. *McCall v. Turner*, 1 Call 133.

Justice Cannot Summon Defendant to Place outside His District.—A justice cannot issue a summons to a defendant to appear before him at a place named outside of his district. *Stanton-Belmont Co. v. Case* (W. Va.), 35 S. E. Rep. 851.

Chancery Courts Cannot Enjoin Courts of Law outside Their Districts.—The several superior courts of chancery have power to grant injunctions to the judgments of all courts of common law within their respective districts, and not otherwise; the place where the court of law is held, and not the residence of the parties, furnishing the rule of jurisdiction in such cases. *Cocke v. Pollok*, 1 H. & M. 499.

Extends over Navigable Waters of State.—Courts have jurisdiction of cases of attachments against the owners of steamboats navigating in the waters of a state, and levy can be made on such boats. *Com. v. Fry*, 4 W. Va. 721.

Judge May Hear Motion in One County Relative to Cause Pending in Another County in His Circuit.—It was held in *Horn v. Perry*, 11 W. Va. 694, that it was not error for the judge of the circuit court sitting in chambers in Wood county to hear and determine a motion to dissolve an order of injunction in a cause pending in the circuit court of Ritchie county, without the said cause having been first removed to Wood county, those two counties being in the same judicial circuit. *Hayzlett v. McMillan*, 11 W. Va. 464, is authority for this proposition.

2. RIGHTS IN REAL PROPERTY.—See *supra*, sec. II, 2, "Subject-Matter and Res."

Jurisdiction is in Local Courts.—Real property being fixed and immovable, rights therein are local, and when adjudicated so as to operate directly on the land, and not on the person of the owner, resort must be had to the local courts, and those outside the state cannot be resorted to. *Wimer v. Wimer*, 82 Va. 890, 5 S. E. Rep. 536; *Gibson v. Burgess*, 82 Va. 650; *Poindexter v. Burwell*, 82 Va. 513; *Pillow v. Southwest Virginia Imp. Co.*, 93 Va. 144, 23 S. E. Rep. 32.

Exclusive Jurisdiction of Forum Rei Sitae.—In actions at law affecting lands or other immovable property, the *forum rei sitae* has exclusive jurisdiction, and the judgment of such forum is conclusive as to such property. *Witten v. St. Clair*, 27 W. Va. 762.

Injunction of Clerk from Conveying Delinquent Tax Lands.—Under § 2436 as amended by Acts 1889-1900, p. 96, providing that jurisdiction of a bill for an injunction to restrain an act or proceeding, shall be in the circuit court in the county in which the act or proceeding is to be done or is done or apprehended, the circuit court of the county in which the land is situated, has jurisdiction of a suit to enjoin the clerk of that county from conveying certain delinquent tax lands to an applicant for the purchase thereof. *Baker v. Briggs*, 99 Va. 860, 38 S. E. Rep. 277.

3. JUDGMENTS OPERATIVE AGAINST THE PERSON.—See *supra*, sec. II, 1, "Of the Person."

General Rule.—Where a judgment or decree is operative against the person, a court may exercise its jurisdiction, if the person is within the jurisdiction of the court, and oblige the party to comply,

even if it affect land in another jurisdiction, if this does not operate territorially. *Poindexter v. Burwell*, 82 Va. 507; *Davis v. Morriss*, 76 Va. 31; *Guerrant v. Fowler*, 1 H. & M. 5.

Thus, where the commonwealth proceeds by information in the nature of a *quo warranto* against a corporation, the superior court of law in which the president and director resides, has jurisdiction to grant the rule and try the cause, although the acts of violation, which are the grounds of proceeding, may have been committed *sparsim* in other countries. *Com. v. James River Co.*, 2 Va. Cas. 190.

4. PENALTIES AND EXEMPTIONS.

Foreign State—Exemptions.—The courts of a state will not, through comity to a sister state, recognize or enforce the exemption laws of such state. *Stevens v. Brown*, 20 W. Va. 450.

Same—Penal Laws.—Penal laws of a foreign country cannot be enforced in our courts, although contracts entered into there will be enforced here according to the *lex loci*. *Jackson v. Rose*, 2 Va. Cas. 34.

Same—Statutory Penalties.—The courts of a state will not enforce the statutory penalties of another state. *Stevens v. Brown*, 20 W. Va. 450.

5. OVER FOREIGN CORPORATIONS.

Insurance Company—Rights Dependent on Contract.—Where the plaintiff in a suit against a foreign corporation has rights which rest upon his contract of insurance, and not upon his contract of membership in the association, he is entitled to redress in the courts of this state. *Taylor v. Mut., etc., Life Assoc.*, 97 Va. 60, 33 S. E. Rep. 885.

Specific Performance.—A personal decree may be rendered for specific performance against a foreign corporation, upon which actual service of process has been had within the state under the provisions of the statute. *Shafer v. O'Brien*, 31 W. Va. 601, 8 S. E. Rep. 298.

Bank Incorporated under National Currency Act.—A state court has jurisdiction of an action brought by a borrower against a national bank to recover the penalty prescribed by the National Currency Act for exacting and receiving usurious interest on loans. *Lynch v. Merchants' Nat. Bk.*, 22 W. Va. 554.

Foreign Railroad Company—Operation of Road in This State.—Where a foreign railroad company constructs and operates its road in this state by legislative authority, it becomes a domestic corporation and is liable to be sued in the courts of this state. *Balt., etc., R. Co. v. Gallahue*, 12 Gratt. 655, and *note*.

IV. CONCURRENT, EXCLUSIVE AND ANCILLARY JURISDICTION.—See *infra*, "Equity Jurisdiction," sec. V. "Concurrent Jurisdiction," and sec. III, 6, "Ancillary Jurisdiction."

Concurrent—Violation of Revenue Laws.—By the Acts of 1897-8, ch. 264, pp. 289-90, it is provided that the county and corporation courts, police justices, and justices of the peace shall have concurrent jurisdiction, among other things, of all violations of the revenue laws of this state. Catching and taking fish in the waters of the commonwealth without first having obtained a license and paid the required tax (Acts 1897-8, p. 864), is a violation of the revenue laws, and a county court has jurisdiction to indict and try persons for violation of this law. *Morgan v. Com.*, 98 Va. 812, 35 S. E. Rep. 448.

Same—Cases of Fraud.—Concurrent jurisdiction in cases of fraud exists at law and in equity, and the latter will not refuse to act merely because there is also a remedy at the former. *Poore v. Price*, 5 Leigh 52, 37 Am. Dec. 582.

Same—To Enforce Contribution.—The jurisdiction now assumed by courts of law to enforce contribution in some cases, does not affect the jurisdiction originally belonging to a court of equity. *Wayland v. Tucker*, 4 Gratt. 267, 50 Am. Dec. 76.

Same—Illegal Confinement under Authority of United States.—In cases of illegal confinement under color of the authority of the United States, the state courts have concurrent jurisdiction with the federal courts, except where the confinement is in consequence of a suit or prosecution pending in the courts of the United States. *Ex parte Pool*, 2 Va. Cas. 276.

Same—Court First Acquiring Jurisdiction Retains It.—It is well settled as a general rule that in cases of conflict of jurisdiction between two courts of concurrent jurisdiction, the court which first acquires cognizance of the controversy, or obtains possession of the property in dispute is entitled to dispose of it without interference or interruption from the co-ordinate court. Having first acquired jurisdiction, it is entitled to retain it to the exclusion of the other and should proceed to decide all proper questions in the controversy, and finally dispose of the case. *Craig v. Hoge*, 95 Va. 275, 28 S. E. Rep. 317; *Spiller v. Wells*, 96 Va. 598, 32 S. E. Rep. 46; *Ford v. Watts*, 95 Va. 192, 28 S. E. Rep. 179; *Parsons v. Snider*, 42 W. Va. 517, 26 S. E. Rep. 285.

As was said in *Griffin v. Birkhead*, 84 Va. 612, 5 S. E. Rep. 685: "Two courts, at one and the same time, cannot entertain suits over the same subject-matter and adjudicate the rights of the same persons thereto, contrary to the rule that there must not be a double investigation of the same matter."

Same—Same—Limitations of Rule.—Even among courts of concurrent jurisdiction, the rule that the court which first obtains jurisdiction has the right to decide every question in the case, is subject to limitations, and is confined to suits between the same parties seeking the same remedy, and to such questions as properly arise in the progress of the suit first brought, and does not extend to all matters which may possibly become involved. *Davis v. Morriss*, 76 Va. 21.

Same—Pending Suits in Two States.—A Virginia court has jurisdiction of a suit by the plaintiff, a resident of Virginia, who is the legatee of a deceased citizen of Mississippi, against the executors of the trustee of the legacy for a breach of trust, although there be pending in the latter state another suit by another legatee, to which the plaintiff and the executors of the trustee are parties. *Davis v. Morriss*, 76 Va. 21.

Same—Exception—Creditors' Suits.—Creditors' suits form an exception to the general rule which pertains to conflict of jurisdiction between co-ordinate courts, for in that class of suits each suit has the same general object and contemplates the same general relief. But no other creditor is required to await or rely on the diligence of him who has first instituted his suit, for until a decree of reference, each complainant has control of his own suit, and may dismiss it before a decree of reference is made in it, but after such decree is made in any suit, all proceedings in the other suits, even in the first suit brought, must be stayed. *Craig v. Hoge*, 95 Va. 275, 28 S. E. Rep. 317; *Spiller v. Wells*, 96 Va. 598, 32 S. E. Rep. 46; *Piedmont, etc., Ins. Co. v. Maury*, 75 Va. 508; *Stephenson v. Taverners*, 9 Gratt. 398. See monographic note on "Creditors' Bills," appended to *Suckley v. Rotchford*, 13 Gratt. 60.

Exclusive—Common-Law Courts—Recovery of Stock Subscriptions—No Vested Right to Remedy.—The act of December 22, 1897, vesting courts of common law with exclusive jurisdiction of suits for the recovery of unpaid stock subscriptions, is not invalid as taking away a vested right to sue in equity, since the right of a remedy existing when an obligation is established, is not a vested right, within the constitution. *Shickel v. Berryville, etc., Co.*, 99 Va. 88, 37 S. E. Rep. 813. See monographic note on "Constitutional Law."

Ancillary—Injunction to Sale of Real Estate.—Where an injunction to restrain the sale of real estate in another county is sought, as ancillary to this relief, the court of the county or city where the defendants, or some of them reside, has jurisdiction of the cause, and the order properly proceeds from the court of that county or city. *Winston v. Midlothian Coal Min. Co.*, 20 Gratt. 686, and foot-note.

V. DIVESTITURE OF JURISDICTION. — See *infra*, "Criminal Jurisdiction," sec. II, "Divestiture of Jurisdiction."

1. REPEAL OF STATUTE.

Effect on Pending Cause.—Where a bill was filed in a county court for the sale of a ward's real estate, when that court had jurisdiction of such cases, the repeal of the statute giving it jurisdiction while the cause is pending, will not affect the validity of its decree entered after the repeal of the statute. *Pennybacker v. Switzer*, 75 Va. 671.

Justice of the Peace—Restrained by Prohibition.—Where an enactment of the legislature which authorized certain causes of action has been repealed, the jurisdiction of the justice of the peace over the same is repealed therewith, and he cannot, under the pretense of deciding whether such enactment has been repealed or not, take jurisdiction of such causes of action, and, if he does so, he is guilty of exceeding his legitimate powers, subjecting him to restraint by prohibition. *Norfolk & W. Ry. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. Rep. 196.

2. DISABILITY OF DEFENDANT.

Effect on Pending Cause.—Where a court has fairly acquired jurisdiction of a cause and the parties, that jurisdiction continues notwithstanding the subsequent disability of the defendant, as where process was served upon a defendant prior to his conviction of a felony, and judgment by default was obtained against him while confined in the penitentiary. *Neale v. Utz*, 75 Va. 480.

The three succeeding cases, while not directly in point with the preceding case, are cited in connection with the general principle of exemption and privileges from suit.

Exemptions to Members of General Assembly.—It was held in *M'Pherson v. Nesmith*, 3 Gratt. 237, that the act, 1 Rev. Code, ch. 51, § 31, did not privilege members of the general assembly, during the period therein prescribed, from the issuing of process against them; but it privileged them from the service of such process. Upon the commencement of the privilege all proceedings prior to that time should cease until its termination. But if an office judgment be rendered against him contrary to the above, then he might set aside by motion at the next term all proceedings, although his privilege had then ceased.

Same—Waiver.—But this privilege must be claimed, as it may be waived, and cannot be noticed *ex officio* by the courts. Thus if a member of assembly allows a judgment to be rendered against him during the period of his privilege, and does not

seek to either abate or suspend them during the progress of the proceedings, he will be deemed to have waived his privilege, and will not be afterwards allowed the writ of error *coram vobis* to reverse the judgment. *Prentis v. Com.*, 5 Rand. 697.

Judgment Recovered against Defendant in Confederate Army.—In *Turnbull v. Thompson*, 27 Gratt. 306, the defendant having been sued and judgment recovered against him whilst he was in the military service of the confederate states, it was held that the court in which the action was brought could not know, unless the matter was brought to its attention, that the defendant was in such service. If he was so situated that he could not plead the exemption, he ought to do so within a reasonable time after his disability was removed.

3. RECESSION OF TERRITORY.

Effect on Remanded Cause.—A cause pending in the supreme court of the United States at the time the county of Alexandria was receded to the state of Virginia was properly heard by that court after that time, and it was proper for its decision to be sent down to the circuit superior court for that county, and is to be enforced by that court. *McLaughlin v. Bk. of Potomac*, 7 Gratt. 68.

4. ILLEGAL EXTENSION.

By Inferior Tribunals—Usurpation of Power.—The jurisdiction of inferior tribunals is fixed by law, and for such a tribunal, even though in good faith, to extend its jurisdiction beyond the limitations of law, is to make it guilty of usurpation and abuse of power. *Norfolk & W. Ry. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. Rep. 196.

Same—Same—Pretense of Determining its Jurisdiction.—Underpretense of determining its jurisdiction, an inferior tribunal cannot usurp a jurisdiction which is denied to it, nor, having jurisdiction of the subject-matter in controversy, abuse or exceed its legitimate powers. *Norfolk & W. Ry. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. Rep. 196.

Same—Same—Prohibition.—In all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject-matter in controversy, or, having such jurisdiction, exceeds its legitimate powers, prohibition now lies as a matter of right, and not as a matter of sound judicial discretion. *Norfolk & W. Ry. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. Rep. 196.

Valid in Part—Void in Part.—A judgment may be valid to the extent of the jurisdiction to render it, while so much of it as is in excess of jurisdiction is void. *Wade v. Hancock*, 76 Va. 620.

Justice of the Peace—Causes Unknown to Common Law and Statute.—Although a justice of the peace has jurisdiction of civil actions of debt, he exceeds his legitimate powers whenever he extends such jurisdiction to include matters of controversy or causes of action unknown to the common law, and unauthorized by legislative enactment. *Norfolk & W. Ry. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. Rep. 196.

Jurisdiction May Be Exceeded in Progress of Cause.—It is an elementary principle of jurisprudence that jurisdiction of the subject-matter and of the parties is essential to the conclusiveness of a judgment or decree. And though the court may obtain jurisdiction rightfully, yet its decrees may be void, because, in the progress of the cause, it has exceeded its jurisdiction. *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. Rep. 36.

VI. PRESUMPTIONS OF JURISDICTION.

1. SUPERIOR COURTS OF GENERAL JURISDICTION.

a. *Exercising General Powers.*

Presumption of Jurisdiction in Favor of Superior Courts of General Jurisdiction.—A superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to have jurisdiction until the contrary appears, and this presumption embraces jurisdiction of the subject-matter, and of the parties. *Devaughn v. Devaughn*, 19 Gratt. 564; *Gilchrist v. W. Va. etc., Co.*, 21 W. Va. 118; *Pulaski Co. v. Stuart*, 28 Gratt. 872; *Cox v. Thomas*, 9 Gratt. 323.

Same—Want of Jurisdiction Must Not Appear by Record.—While it is well settled that every reasonable presumption will be indulged in support of the legality and validity of the judgment of a court of competent jurisdiction, when both the parties and the subject-matter are within the territorial limits of the court's jurisdiction, yet with respect to such courts, no presumption is allowable when the want of jurisdiction affirmatively appears on the face of its proceedings. This rule only applies when the record is silent on the question of jurisdiction, and no presumption will be indulged in support of the determination of any question that the record does not expressly or by necessary implication show to have been determined. If it does not appear by the record, then the judgment or decree is of no greater force than that of an inferior court acting beyond its powers. *Dillard v. Central, etc., Co.*, 83 Va. 784, 1 S. E. Rep. 124; *Wynn v. Heninger*, 82 Va. 172; *Wade v. Hancock*, 76 Va. 620; *Hill v. Woodward*, 78 Va. 767; *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447. See discussion of this subject, by MR. JUSTICE FIELD in *Galpin v. Page*, 18 Wall. (U. S.) 350.

Same—Of Foreign State—Proof.—If the court of a foreign state which rendered a judgment, was a court of general jurisdiction, the presumption is that it had jurisdiction of the particular case, and to render its judgment void, this presumption must be overcome by proof. *Stewart v. Stewart*, 27 W. Va. 167; *Gilchrist v. W. Va., etc., Co.*, 21 W. Va. 115.

County Courts Held Courts of General Jurisdiction.—It was held in *Devaughn v. Devaughn*, 19 Gratt. 556, that county courts were courts of general jurisdiction, and that in proceedings under § 9, ch. 110, Code of 1860, for the assignment of dower, it is to be presumed, in the absence of proof to the contrary, that the court had jurisdiction of the case and had proceeded regularly in it.

b. *Exercising Special Powers.*

By Special Statute—Ministerial Exercise.—Where a special statute confers special powers upon a court of general jurisdiction, no presumption of jurisdiction will attend its judgments, where those powers are only exercised *ministerially*, and not *judicially*, and the facts essential to the exercise of the special jurisdiction must appear on the face of the record. *Pulaski County v. Stuart*, 28 Gratt. 872; *Dinwiddie County v. Stuart*, 28 Gratt. 531; *Chesterfield County v. Hall*, 80 Va. 321. Each of the above cases distinguishes the case of *Ballard v. Thomas*, 19 Gratt. 14, which is a case where the court was proceeding under its ordinary jurisdiction, and not where it proceeded under a special statute, and its action was *ministerial*, not *judicial*. See note to *Ballard v. Thomas*, *supra*.

2. INFERIOR COURTS OF LIMITED JURISDICTION.

No Presumption in Favor of Inferior Courts.—With respect to inferior courts, jurisdiction is never

presumed in their favor, but the record or evidence must affirmatively show that it exists, or their judgments will be deemed void; but this rule only applies to questions of jurisdiction of the subject-matter. *Hill v. Pride*, 4 Call 107; *Ballard v. Thomas*, 19 Gratt. 14; *Devaughn v. Devaughn*, 19 Gratt. 556; *Western Union Tel. Co. v. Bright*, 90 Va. 778, 20 S. E. Rep. 146; *Mayer v. Adams*, 27 W. Va. 245.

Inferior Court Judge of Its Own Jurisdiction.—Where an inferior court has general jurisdiction of the subject-matter, it must exercise its own judgment as to the sufficiency of the process by which it acquires jurisdiction of the special subject or person in any particular case, and an erroneous judgment in that regard is no ground for a writ of prohibition, but is the subject of a writ of error. But this general rule is subject to this modification, that where, the inferior courts having a general jurisdiction of the subject-matter in controversy, it clearly appears that in the conduct of the trial they have exceeded their legitimate powers, for which there is no adequate remedy in the ordinary course of proceedings, the writ of prohibition will lie in such cases under the West Virginia statute and under the general principles of law. *McConiha v. Guthrie*, 21 W. Va. 134; *Supervisors v. Gorrell*, 20 Gratt. 484; *Swinburn v. Smith*, 15 W. Va. 488.

Prohibition Only Lies for Clear Excess of Jurisdiction.—The rule seems to be well established that where an inferior court has, originally, jurisdiction of the cause, prohibition will only lie when the court clearly exceeds its jurisdiction or powers in collateral matters. *McConiha v. Guthrie*, 21 W. Va. 134. See *Ex parte Ellyson*, 20 Gratt. 10, and *note*.

Summary Motion—Proof of Defendant's Residence—Presumption.—Where an act of assembly authorizes a judgment, by motion in a summary way, in the court of the county where the defendant resides, the plaintiff is bound to prove the defendant's residence, though no objection is made on his part; for the court will presume nothing in favor of a summary motion. *Mayor v. Hunter*, 2 Munf. 228.

Jurisdiction Must Be Affirmatively Shown.—The judicial facts necessary to give courts of special and limited jurisdiction a right to act must appear in the record of its proceedings, or such proceedings will be regarded as had without any jurisdiction and therefore as absolute nullities. *Mayer v. Adams*, 27 W. Va. 245; *Yates v. Taylor County Court* (W. Va.), 35 S. E. Rep. 24. This rule applies as well in real as in transitory actions. *Hill v. Pride*, 4 Call 107.

Same—United States District Court.—The district court of the United States is a court of limited jurisdiction, and it is necessary to give validity to its decrees and orders, that its jurisdiction of the case should be shown by the record. And where this is not shown a decree is null and void. *Mason v. Tuttle*, 75 Va. 105.

Same—Legislature May Change Rule.—While the general rule is that the jurisdiction of a court of limited jurisdiction must appear by the record, yet it is in the power of the legislature to change the rule and declare that it shall be presumed, until the contrary appears. *Rutter v. Sullivan*, 25 W. Va. 427.

VII. EFFECT OF POSSESSION AND WANT OF JURISDICTION.—See *infra*, sec. X, 7, "Collateral Attack."

1. POSSESSION OF JURISDICTION.

Effect of Possession of Jurisdiction.—A judgment may be directly attacked for irregularity, but this can only be done in a direct proceeding in the same

court, or in an appellate court; if a court has jurisdiction it is immaterial how erroneous its proceedings are, when its judgment is collaterally called in question. *Pennybacker v. Switzer*, 75 Va. 671; *Woodhouse v. Millbates*, 77 Va. 317; *Wimblish v. Breeden*, 77 Va. 324; *Perkins v. Lane*, 82 Va. 59; *Allan v. Hoffman*, 83 Va. 129, 2 S. E. Rep. 603; *Lawson v. Moorman*, 85 Va. 880, 9 S. E. Rep. 150; *Pugh v. McCue*, 86 Va. 475, 10 S. E. Rep. 715; *Lemmon v. Herbert*, 93 Va. 653, 24 S. E. Rep. 249; *Harman v. Stearns*, 95 Va. 58, 27 S. E. Rep. 601; *Cox v. Thomas*, 9 Gratt. 223; *Cline v. Catron*, 23 Gratt. 378; *Lancaster v. Wilson*, 27 Gratt. 624; *Smith v. Henning*, 10 W. Va. 596; *Hall v. Hall*, 12 W. Va. 1; *Patton v. Merchants' Bank*, 12 W. Va. 587; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476; *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. Rep. 561; *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. Rep. 316; *Braddock Bank v. Hyer*, 46 W. Va. 13, 22 S. E. Rep. 1000.

Same—Suit against Domiciliary Executors—Effect on Executors and Administrators.—A decree against a domiciliary executor binds every executor of the same will in every jurisdiction, and it may be enforced against an administrator *d. b. a.* of the decedent in any jurisdiction. *Garland v. Garland*, 84 Va. 181, 4 S. E. Rep. 334.

Same—Decree of Former Term Inter Partes.—A court cannot examine the propriety of a decree made at a former term *inter partes*, nor set aside such decree of a former term, on the ground that it decided matters *coram non judice* at the time. *Bank of Va. v. Craig*, 6 Leigh 399.

Same—Administration—Administration De Bonis Non.—When the administration of a decedent's estate has been duly granted by any court of competent jurisdiction, that same court only, upon the death of the administrator, has jurisdiction to grant administration *de bonis non*. *Ex parte Lyons*, 2 Leigh 761.

Same—Judgment Conclusive until Reversed.—Where a court by statute has jurisdiction of the subject-matter and parties, its judgment is conclusive on the parties, until reversed, although it may be erroneous. This is true independent of statute. *Balt., etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812; *Peirce v. Graham*, 85 Va. 237, 7 S. E. Rep. 189.

Same—Probate Proceedings.—It was said in *Connolly v. Connolly*, 33 Gratt. 657, that the then state of the law of probate was in Virginia, that a sentence pronounced by a court having jurisdiction, whether admitting or excluding the paper, as long as it remains in force, binds conclusively not only the immediate parties, but all other persons, and all other courts.

2. WANT OF JURISDICTION.

Effect of Want of Jurisdiction.—If a court does not have jurisdiction, it is a matter of no importance however correct its proceedings and decisions may be; its judgments are nullities, and may not only be set aside in the same court, but may be declared void by every court in which they are called in question. *Wade v. Hancock*, 76 Va. 620; *Lavell v. McCurdy*, 77 Va. 763; *Dillard v. Central, etc., Co.*, 83 Va. 785; *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. Rep. 36; *Anthony v. Kasey*, 83 Va. 333, 5 S. E. Rep. 176; *Gresham v. Ewell*, 85 Va. 1, 6 S. E. Rep. 700; *Blanton v. Carroll*, 86 Va. 539, 10 S. E. Rep. 229; *Staunton, etc., Co. v. Haden*, 92 Va. 201, 23 S. E. Rep. 285; *Underwood v. McVeigh*, 23 Gratt. 418; *Gray v. Stuart*, 33 Gratt. 851; *Houston v. McCluney*, 8 W. Va. 135; *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447; *Hoback v. Miller*, 44 W. Va. 635, 29 S. E. Rep. 1014.

Same—Apparent from Record—Void Everywhere.—Jurisdiction of the person and of the subject-matter are prerequisites and must exist before a court can render a valid judgment or decree, and a judgment, which appears upon the face of the record to have been rendered without jurisdiction of the subject-matter or person, is absolutely void, whenever it is called in question. *Wade v. Hancock*, 76 Va. 620; *Dorr v. Rohr*, 82 Va. 359; *Blanton v. Carroll*, 86 Va. 539, 10 S. E. Rep. 329; *Haymond v. Camden*, 23 W. Va. 180; *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. Rep. 36.

Same—Proceedings after Cause Ended.—Where a cause is ended and final decree is entered, the court has no further jurisdiction either of the subject-matter or of the parties and any subsequent proceedings without notice are void, and will be so treated everywhere. *Johnson v. Anderson*, 76 Va. 766.

Same—Letters of Administration.—Letters of administration granted by a court having no jurisdiction to grant them, are merely void; and the court having competent jurisdiction to grant the administration, may proceed to grant it, though the letters of administration before improperly granted, have not been revoked. *Ex parte Barker*, 2 Leigh 719.

Same—Defendant Nonresident with No Assets Here.—A bill against a defendant, not an inhabitant of this country, and having no property therein, cannot be sustained. *Hopkirk v. Bridges*, 4 H. & M. 418.

Same—Effect of Dismissal of Suit Not Conclusive on Parties.—It is no objection to the jurisdiction of one chancery court, that a suit, not conclusive of the rights of the parties, had been dismissed in another district. *Carter v. Campbell*, Gilmer 159.

VIII. JURISDICTION IN VACATION.—See monographic note on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

Depends on Statute—Consent.—It was held in *Tyson v. Glalze*, 23 Gratt. 799, which case was approved in *Chase v. Miller*, 88 Va. 795, 14 S. E. Rep. 545, that the circuit court had no authority to make a decree in a cause in vacation, except when authorized by statute; and that consent could not give jurisdiction. But see § 3437, Code 1887, as amended by Acts 1897-8, p. 754, allowing consent to give jurisdiction.

Same—Entry in Vacation.—*Kinports v. Rawson*, 29 W. Va. 487, 2 S. E. Rep. 85, is authority for the proposition that a court, without statutory authority, cannot enter a decree in vacation.

Circuit Courts—General Powers.—Section 60 of ch. 126 of the Code of W. Va. 1868, provides that the circuit court shall have control of all proceedings in the office, during the preceding vacation. It may reinstate any cause discontinued during such vacation, set aside any of the said proceedings, or correct any mistake therein, and make such order concerning the same, as may be just. *Baylor v. Balt., etc.*, R. Co., 9 W. Va. 270; *State v. Martin*, 88 W. Va. 568, 18 S. E. Rep. 748.

Same—Same—Power of Judge.—The circuit court, in term time, and at all times and places prescribed by statute, may exercise the powers and functions conferred upon it as a court of original and general jurisdiction. But the judge, acting in vacation, has no authority except that expressly conferred by the statutes under which he acts, and by the terms of which he is necessarily restricted. Thus § 3436 of the Virginia Code, which authorizes the circuit judge to hear and determine in vacation whether a judgment of the lower court is right or wrong, does

not authorize him to inquire as to the appeal bond, and order a new one, or other security to it. If he enters such order it is *coram non judice* and void. *Chase v. Miller*, 88 Va. 795, 14 S. E. Rep. 545.

Same—Applies to Hustings Court Having Powers of Chancery Court.—Under Va. Code 1873, ch. 167, § 53, which provides that any chancery cause may be submitted by consent to the judge of the court where it is pending for decision in vacation, a judge of the hustings court of Richmond, sitting as judge of the chancery court, under Acts 1869-70, p. 427, authorizing the judge of the hustings court in certain cases to discharge any duty of the judge of the chancery court, is for that time a judge of that court, and a decree entered by him in vacation is valid. *Morris v. Va. Ins. Co.*, 85 Va. 588, 8 S. E. Rep. 333.

Bills of Exception Signed in Vacation—West Virginia Rule.—Prior to ch. 100, Acts of 1891 (§ 9, ch. 131, Code of 1890), a bill of exception or certificate of evidence must be signed before the close of the term of final judgment. Subsequent to that act, and in accordance with its provisions, thirty days are allowed after term for the signing of such bills. *Welty v. Campbell*, 37 W. Va. 797, 17 S. E. Rep. 312; *State v. McGlumphy*, 37 W. Va. 805, 17 S. E. Rep. 315. The judge cannot extend the time beyond thirty days after term, because the statute limits the time to that period, and any bill of exception made after that time is void, and no part of the record. *Jordan v. Jordan (W. Va.)*, 37 S. E. Rep. 556.

Same—Virginia Rule.—In the recent case of *Va. Dev. Co. v. Rich Patch Iron Co.*, 98 Va. 700, 37 S. E. Rep. 280, it was held, reviewing the decisions on the question, that the court could not sign a bill of exception in vacation under any circumstances, either by reserving leave or by consent, where no power in vacation had been expressly conferred by statute. And that an act providing that on the trial of a case, exceptions may be taken, and when properly tendered and signed should be a part of the record, gave no authority for the signing of the exceptions after the close of the term, except where the court had reserved some control over the case. The result of this decision was the amendment of § 3385 of Va. Code 1887, by ch. 172, Acts of 1901, which authorizes the signing of bills of exception within thirty days after the end of the term, or at such other time as the parties by consent entered of record shall agree upon. See monographic note on "Bills of Exception" appended to *Stoneman v. Com.*, 25 Gratt. 337.

IX. JURISDICTION OVER LEGISLATIVE DEPARTMENT.—See monographic note on "Constitutional Law."

Sole Jurisdiction in Legislature—No Inquiry of Verity of Facts on Which Act is Based.—Where the legislature has sole jurisdiction of a subject, the courts cannot inquire into the truth or falsity of facts upon which an act in regard to the subject is predicated. *Lusher v. Scites*, 4 W. Va. 11.

Expediency of Exercise of Powers.—The general assembly having the power to extend the boundaries of the city of Richmond, the justice or expediency of it is not a question of which the courts can take jurisdiction. *Wade v. City of Richmond*, 18 Gratt. 583. See *Slack v. Jacob*, 8 W. Va. 639; *Board of Education v. Board of Education*, 30 W. Va. 424, 4 S. E. Rep. 640.

Act Unconstitutional Giving Legislative Powers to Courts.—Act of West Virginia 1875, ch. 72, so far as it attempts to confer upon the circuit courts the power

to "supersede, revoke or annul" an ordinance of a city, upon the petition of ten taxpayers residing in said city, is unconstitutional because such power is legislative, and therefore forbidden to be exercised by the courts of the state. *Shepherd v. City of Wheeling*, 80 W. Va. 479, 4 S. E. Rep. 635.

X. OBJECTIONS TO JURISDICTION.

1. OBJECTIONS IN GENERAL.

Must Be Taken at Early Stage of Cause.—When want of jurisdiction arises from formal defects in the process, or when the want of jurisdiction is over the person, it must be taken advantage of in the early stages of a cause. *Western Union Tel. Co. v. Pettyjohn*, 88 Va. 296, 18 S. E. Rep. 431.

Prior Judgment at Law—Evidence—Inspection of Record.—In any action or proceeding at law upon a judgment of a court of general jurisdiction between the parties thereto, in which such judgment may be used as evidence of the right established, the defendant cannot show as a matter of defence at law that the court did not acquire jurisdiction, except by an inspection of the record. *Wandling v. Straw*, 25 W. Va. 692.

2. DISMISSAL WITHOUT OBJECTION.

No Demurrer.—If a court has no jurisdiction, it will dismiss a bill on the hearing, although there was no demurrer. *Cresap v. Kemble*, 26 W. Va. 603; *Poin-dexter v. Burwell*, 82 Va. 507; *Green v. Massie*, 21 Gratt. 356; *Salamone v. Kelley*, 80 Va. 86.

No Plea in Abatement—Answer Filed.—By Rev. Code, vol. 1, p. 66, it is provided that if it appear from the face of the bill that the matter thereof is not proper for a court of equity, it should be dismissed even after answer filed, and no plea in abatement to the jurisdiction of the court. *Pollard v. Patterson*, 3 H. & M. 67.

Joint Defendants—Bill Confessed as to One—Dismissal as to Both.—In a suit against a guardian, the surviving justices who appointed him, and the representatives of a deceased justice, the surviving justices answer, but the bill is taken for confessed against the representatives of the deceased justices. The court not having jurisdiction against the justices, and their representatives, the bill should be dismissed as against both. *Austin v. Richardson*, 1 Gratt. 810.

Attachment in Equity—Defendant without Interest in Property.—Where a defendant has no estate, right, title or interest in or to the land which has been attached in an equitable proceeding, it is proper to dismiss the bill for want of jurisdiction. It is the attachment that gives the jurisdiction in such case, and if there is nothing to attach there is no ground for the jurisdiction. *Culbertson v. Stevens*, 82 Va. 406, 4 S. E. Rep. 607.

Pleadings in Justices' Courts.—The pleadings in justices' courts are prescribed by statute, and are intended to be as simple and free from technicalities as a due regard to the rights of the litigants will permit. No provision is made for pleas in abatement in these courts, and as a substitution for such pleas to the jurisdiction of a justice it is provided that an action shall be dismissed at the cost of the plaintiff whenever it appears that the justice has no jurisdiction. *Todd v. Gates*, 20 W. Va. 464.

8. PLEA IN ABATEMENT.—See monographic note on "Pleas in Abatement" appended to *Warren v. Saunders*, 27 Gratt. 259.

Proper Mode of Objection When Proceedings Show Proper Matter.—In accordance with the provisions of § 19, ch. 171, Code of 1860, the only proper way to except to the jurisdiction of a court, when the pro-

ceedings show upon its face proper matter for the jurisdiction, is by plea in abatement. *Bank of the Valley v. Gettinger*, 3 W. Va. 309.

It is similarly provided by § 3200 of the Code of 1887, that where a bill shows on its face matters proper for the jurisdiction of the courts, and the parties are within its jurisdiction, no exception for want of such jurisdiction shall be taken except by plea in abatement. *Wells v. Hughes*, 80 Va. 543, 16 S. E. Rep. 689; *Cox v. Cox*, 95 Va. 173, 27 S. E. Rep. 834.

Transitory Actions—Objections Made by Plea, Not by Demurrer.—"In a transitory action it is unnecessary to aver in the declaration that the cause of action arose, or that the matter is within the jurisdiction of the court. Code, §§ 3243-4; 4 Min. Inst. (2d Ed.) 574-5, 590, 955-6; 3 Rob. Pr. (New Ed.) 503-505. In these actions objections to the jurisdiction of the court must be made by plea in abatement, and not by demurrer." Code, § 3200; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. Rep. 226.

Same—Plea Should Give Defendant Better Writ.—A plea to the jurisdiction of a court is bad when it omits the prayer for judgment, and fails to state that the cause of action did not arise within the jurisdiction of the court, and does not state where it did arise, and fails to give the plaintiff a better writ by showing what court of the state has jurisdiction of the cause of action. As a general rule a plea to the jurisdiction of a court in a transitory action must show a more proper and sufficient jurisdiction. *Guarantee Co. v. Nat. Bank*, 95 Va. 480, 28 S. E. Rep. 909. See also, *Middleton v. Pinnell*, 2 Gratt. 202; *Raine v. Rice*, 2 P. & H. 529; *Hortons v. Townes*, 6 Leigh 58.

Objections Should Be Made before Pleas in Bar.—Objections to the jurisdiction of a court must be taken by plea in abatement, before the defendants plead in bar. Code 1849, ch. 171, § 19; *Wash., etc., Tel. Co. v. Hobson*, 15 Gratt. 122.

Demurrer and Reply Cannot Be Made to Plea.—A plaintiff cannot both demur and reply to a plea to the jurisdiction. *Ches., etc., R. Co. v. American Exch. Bk.*, 92 Va. 495, 23 S. E. Rep. 985.

Pending Cause in Lower Court Good Plea.—A plea to the jurisdiction of the court of appeals that a suit is pending in an inferior court for the same matter, is proper. *Johnston v. Bower*, 4 H. & M. 487.

Attachment of Real Estate—Suit Brought Where Defendant Resided—Plea Overruled.—In an attachment of real estate a plea to the jurisdiction of the court was properly overruled where the suit was brought in the county where one or more of the defendants resided, although the real estate was situated in another county, and the principal defendant was a nonresident. *Porter v. Young*, 85 Va. 49, 6 S. E. Rep. 803.

Suit for Freedom—Court of General Jurisdiction—Objection by Plea or Motion.—In a suit for freedom though the detention of the plaintiff where the suit was brought is necessary to give the court jurisdiction, yet where the court has general jurisdiction over the subject-matter of controversy, the objection to the exercise of jurisdiction in the particular case is a matter in abatement and should be so pleaded, or brought to the notice of the court by rule or motion before the jury is sworn. *Hunter v. Humphreys*, 14 Gratt. 287. See also, *Ratcliff v. Polly*, 12 Gratt. 533.

4. MOTION AND DEMURRER.

Motion.—The proceedings of a court without jurisdiction of the person or subject-matter may be set

aside and vacated on motion. *Hooe v. Barber*, 4 H. & M. 439. See *Hunter v. Humphreys*, 14 Gratt. 287; *Ratcliff v. Polly*, 12 Gratt. 528.

Motion and Demurrer—Other Ways.—Questions of jurisdiction may be appropriately raised by a motion for instruction, by demurrer, by motion in arrest of judgment on general issue, or by writ of error. *Ryan v. Com.*, 80 Va. 385, *Philips' Case*, 19 Gratt. 519.

Demurrer.—The question of jurisdiction may always be raised by demurrer, and though no objection has been so taken, the court will dismiss at the hearing if it does not state a case proper for relief. *Polindexter v. Burwell*, 82 Va. 507; *Green v. Massie*, 21 Gratt. 356; *Salamone v. Kelley*, 80 Va. 86.

Habeas Corpus Sued Out as Contrivance for Jurisdiction.—Where a writ of habeas corpus was sued out as a contrivance to give to the court jurisdiction by bringing the defendant before it, such court on the motion of the defendant to dismiss the suit, should issue a rule on the plaintiff to show cause why the suit should not be dismissed, and thereupon decide the question of jurisdiction. *Ratcliff v. Polly*, 12 Gratt. 528.

Cause Dismissed Whenever Brought to Notice of Court.—Whenever a cause of action is not within the jurisdiction granted by law to the tribunal, the court will dismiss the suit at any time when the fact is brought to its notice. *Western Union Tel. Co. v. Pettyjohn*, 88 Va. 296, 13 S. E. Rep. 431.

5. FOREIGN JUDGMENTS.

When Entitled to "Full Faith and Credit."—A judgment of a sister state is not entitled to "full faith and credit" unless the court rendering it has jurisdiction of the person and subject-matter. *Crumlish v. Central Imp. Co.*, 88 W. Va. 390, 18 S. E. Rep. 456. See monographic note on "Constitutional Law."

Jurisdiction May Be Inquired Into.—Where a judgment rendered in another state is sought to be enforced in a court in West Virginia, they may inquire into the jurisdiction of the court which rendered it, and if it appear that the court which rendered the judgment had no jurisdiction, the judgment is void, but if it had jurisdiction it is valid and binding in this state. *Stewart v. Stewart*, 27 W. Va. 167; *Gilchrist v. W. Va., etc., Co.*, 21 W. Va. 115.

Effect a Question of Constitutional Obligation.—It is a question whether a state will in good faith live up to the constitutional obligations assumed, and not a question of state policy, whether effect will be given to the judgments of the courts of competent jurisdiction of other states. *Stewart v. Stewart*, 27 W. Va. 167.

Patent of Sister State for Land—Entitled to Full Faith and Credit.—A patent for land granted by a sister state is one of those public acts to which every other state is bound to give full faith and credit under the constitution of the United States; therefore the validity of such patent cannot be collaterally drawn in question in the courts of another state on the ground that the survey on which it was found was a forgery. *Lassly v. Fontaine*, 4 H. & M. 146, 4 Am. Dec. 510.

6. WAIVER OF OBJECTIONS.—See *infra*, "Equity Jurisdiction," sec. VII, "Waiver of Objections."

Lack of Jurisdiction of Subject-Matter Cannot Be Waived.—The objection that a court has no lawful power to act by reason of lack of jurisdiction of the subject-matter, cannot be waived; it is fatal to the proceedings at any time. *Polindexter v. Burwell*, 82 Va. 507; *Beckley v. Palmer*, 11 Gratt. 625.

No Objection after Joinder of Issue.—It is too late

after issue is joined, to object to the jurisdiction of the court, on the ground of the nonresidence of the defendant. *Monroe v. Redman*, 2 Munf. 240.

Appearance for Any Cause Other Than to Object to Execution of Process Is Waiver.—By making an appearance in a cause, for any other purpose than to take advantage of the defective execution, or non-execution of process, a defendant places himself in the same situation as though process were executed upon him, and he thereby waives all objection to it, and a personal decree can be made against him. *Mahany v. Kephart*, 15 W. Va. 609; *Stevens v. Brown*, 20 W. Va. 450.

Same—Demurrer to Bill.—Where an original or amended bill is filed by leave of court, and the defendant appears and demurs thereto, he thereby waives any objection he may have for want of process, and submits himself to the jurisdiction of the court. *Totten v. Nighbert*, 41 W. Va. 800, 24 S. E. Rep. 627.

Same—Pleading to Action.—The defendant by appearing and pleading to an action waives all irregularities in the service and filing of papers. *Atlantic, etc., R. Co. v. Peake*, 87 Va. 130, 12 S. E. Rep. 848.

Same—Filing Answer.—Where a bill in chancery states matter proper for relief in equity, and the defendant without pleading to the jurisdiction in abatement, answers the bill, he is precluded from taking exceptions to the jurisdiction afterwards by 1 Rev. Code, ch. 66, § 86. It is otherwise if the bill on its face shows a case not properly relievable in equity. *Hickman v. Stout*, 2 Leigh 6.

Same—Attachment Proceeding.—Where a decree and sale in an attachment proceeding are declared void for the want of jurisdiction in the court, the owner of the land so sold by appearing and filing his answer asserting the invalidity of the sale, thereby becomes a party to the suit and waives the want of jurisdiction as to all the proceedings not objected to and asked to be set aside in his answer. *Haymond v. Camden*, 22 W. Va. 180.

Appearance without Objection Constitutes Waiver.—Parties may by consent make up the pleadings and issue in a case, and have it docketed in any court having jurisdiction to try such a case. When the parties appear before such court, and make no objection to the regularity of the docketing, that court may exercise jurisdiction of the case; and the objection to the jurisdiction made for the first time after trial and judgment cannot be sustained. *M'Alexander v. Hairston*, 10 Leigh 486.

Thus, a bill was sustained where it was brought by a single surviving trustee of a town, for the purpose of asserting the rights of the inhabitants in common to certain lands annexed thereto, where the parties went to trial upon the merits without objecting to the jurisdiction. *Mayo v. Murchie*, 8 Munf. 358.

Exercise of Equity Jurisdiction at Defendant's Instance.—Where a court of equity at the instance of the defendant, and without any objection to its jurisdiction took possession of slaves and directed them to be sold, and having since held and controlled the proceeds, it was too late for the defendants to object to the jurisdiction of the court. *Henley v. Perkins*, 6 Gratt. 615.

Plaintiff Cannot Object—Pure Bill of Injunction.—And where the plaintiff in a pure bill of injunction institutes a suit in one county to restrain a sale of real estate situated in another, and the defendants answer and do not object to the jurisdiction, the plaintiff cannot afterwards raise the question of

jurisdiction. *Muller v. Bayly*, 21 Gratt. 521. See monographic *note* on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518.

Bond Given by Committee of Lunatic under Appointment of Court of General Jurisdiction.—In 1858 the court was a court of general jurisdiction, and was invested by law with special jurisdiction over the persons and estates of lunatics. The sureties of a committee appointed by such court cannot object in another proceeding that the order was void, having voluntarily entered into bond under such appointment. *Pannill v. Calloway*, 78 Va. 387.

7. COLLATERAL ATTACK.

Judgments of Courts of General Jurisdiction in Scope of General Powers.—Where a court of general jurisdiction, having jurisdiction of the person and subject-matter, acts within the scope of its general powers, its judgment or decree will be presumed to be in accordance with its jurisdiction, and cannot be collaterally assailed. This rule of course does not apply when there is want of jurisdiction, or where there has been fraud. *Shelton v. Jones*, 26 Gratt. 891; *Pulaski Co. v. Stuart, etc., Co.*, 28 Gratt. 879; *Lawson v. Moorman*, 85 Va. 880, 9 S. E. Rep. 150; *Pennybacker v. Switzer*, 75 Va. 671; *Brengle v. Richardson*, 78 Va. 406; *Marshall v. Cheatham*, 88 Va. 81, 18 S. E. Rep. 808; *Grigg v. Dalsheimer*, 88 Va. 508, 18 S. E. Rep. 998; *Hill v. Woodward*, 78 Va. 765; *Wimbish v. Breeden*, 77 Va. 324; *Pugh v. McCue*, 86 Va. 475, 10 S. E. Rep. 715; *Wilcher v. Robertson*, 78 Va. 602; *Woodhouse v. Fillbates*, 77 Va. 817; *Building, etc., Co. v. Fray*, 96 Va. 559, 32 S. E. Rep. 58; *Lancaster v. Wilson*, 27 Gratt. 629; *Cox v. Thomas*, 9 Gratt. 323; *Gresham v. Ewell*, 85 Va. 5, 6 S. E. Rep. 700; *Davis v. Town of Point Pleasant*, 32 W. Va. 289, 9 S. E. Rep. 228; *Fisher v. Bassett*, 9 Leigh 119; *Devaughn v. Devaughn*, 19 Gratt. 556; *Durrett v. Davis*, 24 Gratt. 302; *Cline v. Catron*, 22 Gratt. 378; *Spilman v. Johnson*, 27 Gratt. 33; *Neale v. Utz*, 75 Va. 487; *Perkins v. Lane*, 82 Va. 62. See also, *note* to *Lancaster v. Wilson*, 27 Gratt. 624, collecting other authorities on this point.

As was said in *Howison v. Weeden*, 77 Va. 710: "It is a well-established principle, that the judgment of a court of record, having jurisdiction of the cause and of the parties, is binding and conclusive upon parties and privies in every court until it is regularly reversed by some court having jurisdiction for that purpose. Notwithstanding the proceedings may be erroneous, yet, as between the parties, the judgment must stand until regularly vacated or reversed. Where a court has jurisdiction, it has a right to decide every question which arises in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. In no collateral way can the parties question the correctness of a judgment which has been rendered between them in a court having jurisdiction of them and of the subject-matter." See also, *Lawson v. Moorman*, 85 Va. 880, 9 S. E. Rep. 150, and *note* to *Cox v. Thomas*, 9 Gratt. 312.

Applies Only to Unreversed Judgments.—But it is well established that only the reversed judgment of a court of competent jurisdiction is conclusive, and cannot be collaterally attacked. *Wimbish v. Breeden*, 77 Va. 324; *Woodhouse v. Fillbates*, 77 Va. 817; *Wilson v. Smith*, 22 Gratt. 493. See *Shelton v. Jones*, 26 Gratt. 898.

Judgment Offered as Evidence Collaterally.—It is an axiom of law "that, when a judgment of a court is offered in evidence collaterally in another suit, its validity cannot be questioned for errors which do

not affect the jurisdiction of the court which rendered it." *Cooper v. Reynolds*, 10 Wall. (U. S.) 308; *Miller v. White*, 46 W. Va. 67, 23 S. E. Rep. 332.

County Court—Laying County Levy.—The county court which lays the county levy is not a special tribunal erected for that special purpose. It is the original county court, and that court is a court of general jurisdiction. And though the record does not show that the justices had been summoned or a majority were present, the act of the court in laying the levy cannot be questioned collaterally. *Ballard v. Thomas*, 19 Gratt. 14.

Same—Grant of Administration.—Where the county court commits an estate to the sheriff for administration, before the expiration of three months from the death of the intestate or testator, in such case the court having general jurisdiction to grant the administration, the act in committing the estate to the sheriff cannot be questioned in any collateral proceeding. *Hutcheson v. Priddy*, 12 Gratt. 85.

Circuit Courts—Presumption.—The circuit court is a court of general jurisdiction taking cognizance of all actions at law between individuals with authority to pronounce judgments and to issue execution for their enforcement. Where its jurisdiction is questioned it must decide the question itself, and whenever the subject-matter is a controversy at law between individuals, the jurisdiction is presumed from the fact that it has pronounced judgment, and the correctness of such judgment can only be inquired into by some appellate tribunal. *Cox v. Thomas*, 9 Gratt. 323.

Same—Motion against Sheriff for Deputy's Default.—A judgment of a circuit court upon a notice and motion in favor of a creditor against a sheriff for the default of his deputy in not paying over money collected on an execution from the county court, is conclusive of the jurisdiction of the court unless reversed on appeal; and its validity cannot be called in question by the deputy on a motion against him by the sheriff founded on the judgment. *Cox v. Thomas*, 9 Gratt. 323.

Judgment on Writ of Scire Facias for Money.—But a judgment on a writ of *scire facias* for money, and not merely for award of execution, is in excess of the jurisdiction of the court, and is absolutely void, and may be so declared either in a direct or a collateral proceeding. *Lavell v. McCurdy*, 77 Va. 763.

Failure to Comply with Details of Statute.—When jurisdiction is acquired in a particular case by statute, if the court fails to comply with the details of the statute in hearing the cause, the error may be reviewed upon appeal, but is no ground for collateral attack. *Wimbish v. Breeden*, 77 Va. 324.

Judicial Exercise of Special Powers.—Where a special statute confers special powers upon a court of general jurisdiction, its judgment cannot be collaterally assailed where such powers are *judicially* exercised. *Pulaski County v. Stuart*, 28 Gratt. 872, and *note*.

Where Court Proceeds without Notice No Presumption of Jurisdiction.—But when the record shows in any court, whether superior or inferior, that the court has proceeded without notice, any presumption in its favor is at an end, and it may not only be reversed as erroneous, but be impeached and set aside collaterally as void, the rendition of a judgment against a party not before the court in any way being as utterly void as though the court had undertaken to act when the subject-matter was not within its cognizance. Thus, where the original process, and the return thereon, showed the defend-

ant was not included in either, a judgment against her was held to be void, as the presumption of jurisdiction was overcome. *Blanton v. Carroll*, 86 Va. 589, 10 S. E. Rep. 329; *Fairfax v. City of Alexandria*, 28 Gratt. 16, and *note*; *Lawson v. Moorman*, 85 Va. 890, 9 S. E. Rep. 150.

Courts of Record—Want of Jurisdiction Must Appear on Record.—Unless the want of jurisdiction appears on the face of the record, the validity of a judgment of a court of record cannot be collaterally attacked on that ground. *Wandling v. Straw*, 26 W. Va. 692. See *Poole v. Dilworth*, 26 W. Va. 583.

Inferior Courts—Jurisdiction Shown by Record.—In the case of an inferior court, if the record shows that facts necessary to give it jurisdiction existed, its jurisdiction will not be open to attack, in a collateral proceeding. It is presumed that the courts ascertained that the facts giving it jurisdiction existed. *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. Rep. 316.

Effect of Decision on Jurisdiction Assailed in Collateral Suit.—Where the jurisdiction of a court has been directly assailed in a collateral suit, in which it was decided that the first court had jurisdiction, such decision is conclusive of that question upon the parties in any subsequent direct proceeding or appeal taken in the same suit to correct or set aside the decrees of the first suit. *Hall v. Lowther*, 22 W. Va. 570; *Western Min., etc., Co. v. Va., etc., Co.*, 10 W. Va. 250; *Corrothers v. Sargent*, 20 W. Va. 351.

Awards—Error Apparent on Face.—Under the statute an award cannot be set aside in a common-law court, except for error apparent on its face, or unless it has been secured by undue means or by wrongful conduct of the arbitrators. *Moore v. Luckess*, 23 Gratt. 160.

B. EQUITY JURISDICTION.

I. SCOPE.—It is difficult to classify precisely a jurisdiction so extensive and of such diverse application, and no attempt has been made in this article to completely analyze the broad subject of equity jurisdiction. Its numerous divisions and applications will be found treated in the monographic *notes* of this series, to some of which specific reference is made at the beginning of this article.

II. DISMISSAL FOR WANT OF JURISDICTION.—See *supra*, "General Jurisdiction," sec. X.

Bill without Equity—Effect of Statute Requiring Exception to Jurisdiction to Be Made by Plea in Abatement.—The statute of 1787 provided "that after answer filed and no plea in abatement to the jurisdiction of the court, no exception for want of jurisdiction shall afterwards be made." It was held that notwithstanding the statute, the bill will be dismissed whenever it appears from its face that the matter was not proper for the jurisdiction of a court of equity, although the defendant had not pleaded in abatement. *Pollard v. Patterson*, 8 H. & M. 67.

Same—No Amendment Could Give It.—When a bill is without equity on its face, and it appears from the depositions and the whole record, that no amendment of the bill could give equity jurisdiction of the case, it was proper to dismiss it. *Surber v. McClintic*, 10 W. Va. 236.

Same.—A *feme sole* sold slaves and took the bond of the purchaser. On the same day she released the bond by will. Her will was offered for probate in Nelson county, and was continued. Before the next term the purchaser filed his bill in Nelson county against two defendants, alleging that the slaves had been in Stafford county, but before the will was

probated the defendants had removed, or were removing them so as to put it out of the defendant's power to regain possession of them. An injunction was awarded, though neither the slaves nor the defendants had ever been in that county. The defendants objected to the jurisdiction, but set up no title to slaves except as next of kin to decedent. It was held to be no case for equitable jurisdiction, and if it were it could not have been exercised by the circuit court of Nelson county, and the bill was dismissed. *Brent v. Peyton*, 1 Rob. 604.

False Allegations.—Where a bill alleges proper matter for the jurisdiction of a court of equity, if it appears on the hearing that the allegations are false, the result is the same as if it had not been alleged; the bill will be dismissed for want of jurisdiction. *Jones v. Bradshaw*, 16 Gratt. 355.

Allegations Not Sustained by Proof.—Where fraud is alleged and proved, courts of equity have jurisdiction and will give relief; yet, if the allegations are not sustained by proof, the bill will be dismissed. *Jones v. White*, Wythe 111.

Discovery Not Needed.—Where the only allegation in a bill, as a ground of equitable jurisdiction, is a prayer for a discovery and it appears from the bill and answer that the complainant does not need a discovery, the bill will be dismissed. *Hall v. Smith*, 25 Gratt. 70.

Trespass Set Up.—Where the allegations of a bill lacked certainty and precision, and it was also without equity because the action set up was virtually nothing but a trespass, the bill was demurrable, and was dismissed. *Cleaver v. Matthews*, 83 Va. 801, 3 S. E. Rep. 439.

Failure of Attachment.—When a suit in equity, on a debt not mature when begun, rests for jurisdiction only on attachment, and that fails, the suit should be dismissed. *Miller v. Zeigler*, 44 W. Va. 484, 29 S. E. Rep. 981.

Attachment in Equity for Legal Demand—Amended Bill.—In 1883 there was no statute in West Virginia authorizing an attachment in equity for a purely legal demand, and a bill filed to enforce an attachment lien for a purely legal demand will be dismissed, because the court has no jurisdiction. And if it has no jurisdiction when the bill was filed, it could not be conferred by an amended bill. *Lively v. Winton*, 30 W. Va. 554, 4 S. E. Rep. 451.

Bill to Remove Cloud on Title—Plaintiff Has No Title.—Where a bill is filed to remove a cloud from the plaintiff's title to a tract of land, and it shows on its face that he has no title to the land himself, and has no right to interfere with others who appear to have a good title, the bill will not be heard in equity, and will be dismissed. *Harr v. Shaffer*, 45 W. Va. 709, 31 S. E. Rep. 905.

Petitions in Chancery.—Petitions filed in chancery suits will be dismissed, if they fail to show sufficient equitable grounds for the relief sought thereby. *Cox v. Horner*, 43 W. Va. 786, 28 S. E. Rep. 780.

III. ACQUISITION AND EXTENT.

1. IN GENERAL.

Will Not Interfere with Legislative Department.—It is not within the province of a court of equity to relieve property from taxation charged thereon according to the value of the property prior to the rebellion, where it is greatly depreciated in value by acts resulting from the war. Such should be addressed to the legislative department of the government. *White Sulphur Springs Co. v. Robinson*, 3 W. Va. 542.

Laches.—A court of equity will not take jurisdic-

tion of an equitable claim where the party delays until there can be no longer a safe determination of the controversy, and his adversary is exposed to the danger of injustice from loss of information and evidence occasioned by death, insolvency and other untoward circumstances. *Smith v. Thompson*, 7 Gratt. 112, 54 Am. Dec. 126; *West v. Thornton*, 7 Gratt. 177, 54 Am. Dec. 134. See generally, on this subject, monographic *note* on "Laches" appended to *Peers v. Barnett*, 12 Gratt. 410.

Same—Repeal of Patent.—A court of equity will not entertain a bill to repeal a patent filed more than ten years after the patent was issued. *Goodwin v. M'Cluer*, 3 Gratt. 291.

2. STATUTORY PROVISIONS.

Giving Chancery Jurisdiction of Crimes is Unconstitutional.—A prosecution for having contracted a marriage within the prohibited degrees contrary to statute is a criminal proceeding, and hence the provision in the act giving the court of chancery jurisdiction of such prosecution is repugnant to the constitutional provision limiting the jurisdiction of the court of chancery to civil matters. *Attorney General v. Broadbush*, 6 Munf. 116.

Liability of Justices for Taking Defective Bond.—The justices of the county court appoint a guardian and take a defective bond from him and his sureties, so that the sureties are released from liability. Equity has no jurisdiction to enforce the liability upon the justices by the Act of 1819, 1 Rev. Code, ch. 180, § 5, p. 406. *Austin v. Richardson*, 1 Gratt. 310.

Issue of *Devisavit Vel Non*—Limited Jurisdiction.—Where an issue of *devisavit vel non* is directed, a court of equity does not proceed under its general jurisdiction, but can exercise only the special limited powers conferred upon it by the statute; it acts as a court of probate with the single object to ascertain by a jury trial whether the paper in question is or is not the will of the decedent; it can perform no other act, and can grant no further relief. It has no jurisdiction of the estate of the decedent and can make no order respecting it. *Kirby v. Kirby*, 84 Va. 637, 5 S. E. Rep. 539; *Coalter v. Bryan*, 1 Gratt. 18; *Hartman v. Strickler*, 82 Va. 233.

3. COLORABLE ALLEGATIONS.

Will Not Support Jurisdiction.—Averments and allegations giving equitable jurisdiction, which are shown to be merely colorable, will not do so, if the real cause of action is one for which there is an adequate and full remedy at law. *Laidley v. Laidley*, 25 W. Va. 525; *Thompson v. Whitaker*, 41 W. Va. 574, 23 S. E. Rep. 795.

Same—Vague and General Statements.—Where a bill shows that the relief sought may be obtained in a court of law, the simple fact that it contains vague and general statements of grounds for equitable relief will not support the jurisdiction of equity. These statements will be considered as colorable and as pretexts to give jurisdiction to equity when it does not properly belong to it, and the jurisdiction will be declined. *Grafton v. Reed*, 26 W. Va. 437. See *Lafever v. Billmyer*, 5 W. Va. 33; *Bass v. Bass*, 4 H. & M. 478.

To Defeat Jurisdiction—Partition—Allegation of Adverse Possession.—The jurisdiction of a court of equity to make partition of land cannot be defeated by the mere allegation of the defendants that they hold adverse possession, when in point of fact they do not, for it could be defeated at any time by such false allegations, if this were so. *Hudson v. Putney*, 14 W. Va. 561.

4. CREATION AND ENLARGEMENT.

Equity Cannot Extend over Matters Entitled to Jury Trial.—In matters of such nature as give a right to the jury trial under the constitution, the legislature cannot extend equity jurisdiction over them, and deprive the party of jury trial against his will. *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. Rep. 216. See monographic *note* on "Constitutional Law."

Defence of Set-Off Does Not Enlarge.—Sections 5 and 6 of ch. 126 of the Code of 1863 of West Virginia, allowing defendants by plea to defend actions on contract by way of set-off, which could not be done in a court of law, were held in *Black v. Smith*, 13 W. Va. 780, not to enlarge the jurisdiction of courts of equity.

5. RETENTION OF JURISDICTION.—See *infra*, sec. VI, 2, "Multiplicity of Suits."

To Give Complete Relief.—No question is better settled than that where a court of chancery has jurisdiction for one purpose, it will not send the parties back to a court of law, but will retain the jurisdiction for all purposes, and do complete justice between the parties. *Western Min., etc., Co. v. Va., etc., Coal Co.*, 10 W. Va. 250; *Chinn v. Heale*, 1 Munf. 63; *Chichester v. Vass*, 1 Munf. 98; *Stuart v. Coalter*, 4 Rand. 74; *Cady v. Gale*, 5 W. Va. 566; *Hickman v. Painter*, 11 W. Va. 386; *Shields v. Com.*, 4 Rand. 541; *Harrison v. Field*, 2 Wash. 136; *Mitchell v. Chancellor*, 14 W. Va. 22; *Rison v. Moon*, 91 Va. 384, 22 S. E. Rep. 165; *Sinnett v. Cralle*, 4 W. Va. 600; *Hanly v. Watterson*, 39 W. Va. 314, 19 S. E. Rep. 536; *Booten v. Scheffer*, 31 Gratt. 474; *Love v. Braxton*, Wythe 144; *Smith v. Smith*, 93 Va. 696, 24 S. E. Rep. 280; *Billups v. Sears*, 5 Gratt. 31; *Zetelle v. Myers*, 19 Gratt. 63; *Rust v. Ware*, 6 Gratt. 50; *Walters v. Farmers' Bank*, 76 Va. 12; W. Va., etc., Co. v. Vinal, 14 W. Va. 637; *McComas v. Easley*, 21 Gratt. 31. Unless some good reason appears for not doing so. *Hotchkiss v. Fitzgerald*, etc., Co., 41 W. Va. 357, 23 S. E. Rep. 576. Even in matters as to which considered alone it would not have jurisdiction. *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. Rep. 216. Although the relief sought be denied in the end, any relief justified by the pleadings and tending to end the litigation between the parties whether legal or equitable, will be granted. *Evans v. Kelley* (W. Va.), 38 S. E. Rep. 497.

Same—Legal Rights and Remedies.—And the general principle seems to be that when a court of equity has once acquired jurisdiction of a cause upon equitable grounds, it may go on to a complete adjudication, even to the extent of establishing legal rights and granting legal remedies, which would otherwise be beyond the scope of its authority. *Walters v. Farmers' Bank of Va.*, 76 Va. 12; *McArthur v. Chase*, 13 Gratt. 683, and *foot-note*. This principle is one of universal application. See *Pomeroy's Eq. Jur.* § 181, n. 2, where many authorities are cited; 1 *Story, Eq. Jur.* § 65 *et seq.*; *Beecher v. Lewis*, 84 Va. 630, 6 S. E. Rep. 367; *Laurel, etc., Co. v. Browning*, 99 Va. 523, 39 S. E. Rep. 156, 7 Va. Law Reg. 574; *Love v. Braxton*, Wythe 144; *Chichester v. Vass*, 1 Munf. 98, 4 Am. Dec. 53; *Vaught v. Meador*, 99 Va. 569, 39 S. E. Rep. 225.

Same—When It Had No Jurisdiction Originally.—In the progress of a cause (no objection to the jurisdiction of the court having been taken in the lower court), an order was entered by consent for the sale of a part of the property, and another part was taken by the appellee under an agreement to account for its value in the event of an adverse decision. In this state of things, to dismiss the bill

for want of jurisdiction, would be to deny to appellant redress in any form, it being impossible for him to maintain an action for the property. If equity did not have jurisdiction originally, yet having taken jurisdiction and possession of the property and disposed of it, it must proceed to decide the case. *Eacho v. Cosby*, 26 Gratt. 112.

When Bill Brought to Establish Claim at Law.—Although a bill is brought for the purpose of compelling a creditor to establish his claim at law, yet if the facts disclosed entitle the debtor to relief upon equitable terms, the court of equity will give the relief to which he is entitled. *Bank of Washington v. Arthur*, 3 Gratt. 173.

To Determine Validity of Gift Causa Mortis.—Equity has jurisdiction to compel a disclosure by a person having possession of choses in action, which he claims as a gift *causa mortis* from an intestate, so as to enable the administrator to recover the same, and it will retain jurisdiction to determine the validity of the gift. *Smith v. Smith*, 93 Va. 696, 24 S. E. Rep. 280.

To Prevent Litigation.—Where a plaintiff in a suit to redeem a mortgage fails by reason of the court holding the transaction sued on to be a conditional sale, equity to prevent further litigation will order a decree in favor of the plaintiff for the balance of the purchase price with interest, but without cost. *Moss v. Green*, 10 Leigh 251, 34 Am. Dec. 731.

To Decide Whole Controversy in Suit to Set Aside Award.—Where in a suit to set aside an award every party in interest is before the court upon grounds which unquestionably give a court of equity jurisdiction, this jurisdiction having once attached, the court may decide the whole controversy and render a final decree, though all the issues are legal in their nature, and the legal remedies therefor are adequate. *Coons v. Coons*, 95 Va. 434, 28 S. E. Rep. 885.

To Carry Its Decrees into Effect.—It is well established that a court of equity always has jurisdiction to carry into effect its own decrees. *Trimble v. Patton*, 5 W. Va. 432; *Newman v. Chapman*, 2 Rand. 93, 14 Am. Dec. 766.

Discovery—Adequate Remedy at Law.—In cases where it is necessary and proper to go into a court of equity for a discovery, the court having possession of the subject will proceed to decide the cause, without turning the parties round to a court of law, notwithstanding if such discovery had not been necessary, relief might have originally been had at law. *Chichester v. Vass*, 1 Munf. 98.

Same—For Use in Pending Action at Law.—The general rule is that when a party comes into equity for a discovery, the court will retain the cause, and give the proper relief founded on the discovery, unless the discovery is sought to be used in a pending action at law. *Lyons v. Miller*, 6 Gratt. 427, 52 Am. Dec. 129.

To Avoid Multiplicity of Suits.—Where a court of equity takes jurisdiction of the cause for one purpose, it will go on to do complete justice and dispose of the question involved to avoid a multiplicity of suits. *Watson v. Watson*, 45 W. Va. 290, 31 S. E. Rep. 939; *Yates v. Stuart*, 39 W. Va. 124, 19 S. E. Rep. 423; *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. Rep. 536; *Chrislip v. Teter*, 43 W. Va. 356, 27 S. E. Rep. 288. Though in doing so, it has to try title or settle boundaries, and administer remedies which rightly pertain to courts of law. *Miller v. Wills*, 95 Va. 337, 23 S. E. Rep. 337; *Anderson v. Harvey*, 10 Gratt. 386;

McArthur v. Chase, 13 Gratt. 633; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. Rep. 271.

6. ANCILLARY JURISDICTION.

Preservation of Property Pending Litigation.—A court of equity, ancillary to its jurisdiction to set aside a fraudulent transfer of property, may take the necessary steps to preserve the property involved during the pendency of the litigation. *Keneweg Co. v. Schilansky* (W. Va.), 34 S. E. Rep. 773.

Same—Injunction.—Equity will not entertain a suit to settle title and boundaries to land, but in an urgent case the property will be protected by injunction, until the question of right can be settled at law. *Callaway v. Webster*, 98 Va. 790, 37 S. E. Rep. 276; *Manchester Cotton Mills v. Town of Manchester*, 25 Gratt. 825.

Assisting Execution.—The aid of a court of equity is necessary and proper in assisting process of execution levied on tobacco in public warehouses. *Ogg v. Randolph*, 4 H. & M. 445.

Specific Performance—Damages.—In a suit to rescind or enforce specific execution of a contract for the sale of land, if a proper case is made out for specific execution, the court has jurisdiction, as ancillary thereto, to decree compensation to the defendant for damages which he has sustained by the improper acts of the plaintiff and his agents. *Nagle v. Newton*, 23 Gratt. 814; *Campbell v. Rust*, 85 Va. 653, 8 S. E. Rep. 664; *Grubb v. Starkey*, 90 Va. 834, 20 S. E. Rep. 784. See *Witz v. Mullin*, 90 Va. 806, 20 S. E. Rep. 783.

IV. ESSENTIAL ELEMENTS.—See *supra*, "General Jurisdiction," sec. II.

1. JURISDICTION OF PERSON AND SUBJECT-MATTER.

General Statements.—A court of chancery has no power over a person not a party to the suit, nor as a general rule are its decrees binding on the subject-matter if it is not within the territorial limits of the court. But where a court of equity has jurisdiction of the parties and the subject-matter, and does not exceed its jurisdiction, its decrees are not void; but if it commits an error, for which relief could have been had under sec. 3451 of the Code, equity has no jurisdiction of the case, and any attempt to exercise it is erroneous and will be dismissed. *Preston v. Kindrick*, 94 Va. 760, 37 S. E. Rep. 588.

Defendant Out of State.—A court of chancery has no jurisdiction of a bill to perpetuate testimony, or for any other purpose, against a defendant who is absent from, or residing out of, the state, and has no property, and claims title to none, in the commonwealth. *Miller v. Sharp*, 3 Rand. 41.

So a court of chancery has no jurisdiction against an officer as an absent defendant, who resides out of the state at the time the claim is asserted here, which arises out of his official neglect. *Dunlop v. Keith*, 1 Leigh 430, 19 Am. Dec. 755.

Nonresident.—A court of equity has no jurisdiction of a resident of another state, without his consent to compel him to acknowledge the trust character of his holding of real property in another state. *Sollenberger v. Herr*, 2 Va. Dec. 550, 37 S. E. Rep. 832.

No Day in Court.—A person returned as appearance bail, who denies that he ever executed the bail bond, is not precluded from obtaining relief in equity, by his failing to appear and plead *non est factum* at law, after being informed that his name was subscribed to such bond; for if he did not execute the bond, he had regularly no day in court, and was therefore not bound to take any step for

his relief in the action at common law. *Spotswood v. Higgenbotham*, 6 Munf. 818.

Widow's Dower in Foreign State.—A court of chancery has no authority to decree an allotment of a widow's dower as to lands lying in another state, outside the jurisdiction of the court, but it is otherwise as to lands lying within this state. *Blunt v. Gee*, 5 Call 481.

Cannot Be Given by Consent—Arbitration.—Although the consent of parties cannot give jurisdiction to a court of equity, yet where after an injunction improperly granted, parties agree to refer all matters in difference between them in the suit to arbitrators and that their award shall be made the decree of the court, such consent will be binding and the whole case, including the question of law, is thereby transferred from the court to the arbitrators. *Brickhouse v. Hunter*, 4 H. & M. 868, 4 Am. Dec. 528. See monographic *note* on "Arbitration and Award" appended to *Bassett v. Cunningham*, 9 Gratt. 684.

Party Absent When Claim Arose Not an Absent Defendant.—An officer, residing out of the state at the time a claim arising out of his official neglect is here asserted, is not amenable to the jurisdiction of a court of chancery as an absent defendant. *Dunlop v. Keith*, 1 Leigh 480, 19 Am. Dec. 755.

Land in Another State Subjected if Parties before the Court.—A court of equity in Virginia may subject heirs living here, upon the covenants of the ancestor binding the heirs, to the extent of the value of land descended to them in another state. *Dickinson v. Hoopes*, 8 Gratt. 353.

Patents—To Set Aside Patentee Must Be before the Court.—A court of equity has jurisdiction to set aside a patent obtained with knowledge of a prior entry, but it cannot decree in such case on the merits, until the patentee or his representative is before the court. *Hagan v. Wardens*, 3 Gratt. 315.

Jurisdiction of Subject-Matter Not Dependent on Good Cause of Action.—The principle is almost universal that jurisdiction of the subject-matter does not depend upon the ultimate existence of a good cause of action in the particular case. Being once properly and lawfully acquired, no subsequent fact can defeat that jurisdiction. But this rule can have no application where it is manifest that the object is by false pretence to transfer the controversy from a legal to an equitable forum. *Walters v. Farmers' Bk. of Va.*, 76 Va. 12.

Conveyance of Land in Foreign State.—A court of equity can act upon the person, if he be within its jurisdiction, and compel him to convey land situated in another state or otherwise comply with its decree. *Vaught v. Meador*, 99 Va. 569, 39 S. E. Rep. 225; *Poinexter v. Burwell*, 82 Va. 507; *Hotchkiss v. Middlekauf*, 96 Va. 649, 32 S. E. Rep. 36.

Same—Fraud or Trust—Partition.—The courts of Virginia have no jurisdiction to partition lands lying in another state. And while it is true that the jurisdiction of equity has been sustained in cases of fraud, of trust, or of contract, wherever the parties interested may be found, although lands not within the jurisdiction of a court may be affected by the decree, yet where the evidence in the principal case failed to establish any such case, equity refused in one state to compel the parties within their jurisdiction to make a conveyance of land within a foreign jurisdiction. *Pillow v. Southwest, etc., Co.*, 92 Va. 144, 23 S. E. Rep. 32.

Same—Same—Parties under Disabilities.—It is settled law that real estate is exclusively subject to

the laws and jurisdiction of the state in which it is located. But in cases of fraud, trust or contract, courts of equity, having jurisdiction over the person, will compel the party within its jurisdiction to obey its decree, even by compelling the conveyance of land in another state. Yet it cannot decree the sale of lands of a person under disability lying in another state. *Hotchkiss v. Middlekauf*, 96 Va. 649, 32 S. E. Rep. 36.

Clearing Title to Land in Foreign State.—A court of equity having jurisdiction of the parties has the power to compel the defendant to release and discharge an apparent cloud upon the title to land situated in another state. *Vaught v. Meador*, 99 Va. 569, 39 S. E. Rep. 225.

Fraudulent Title Affecting Foreign Land—Vacation of.—If a title or power affecting lands in another state was obtained by duress or fraud, and a court of equity has jurisdiction of the parties, upon proper averments it may enter a personal decree vacating such title or power. *Vaught v. Meador*, 99 Va. 569, 39 S. E. Rep. 225.

Same—Accounting by Party Converting Such Land.—Where one acting under a fraudulent title or power converts lands in a foreign state into money, he can be compelled to account either at law or in equity if the court has jurisdiction of the person. *Vaught v. Meador*, 99 Va. 569, 39 S. E. Rep. 225.

Foreign Executor Sued by Legatees for Account.—An executor having probated his testator's will and letters testamentary in England, and collected the assets of the estate there, and brought them with him to Virginia, but never having qualified in this state, is liable to be sued by the legatees in a court of chancery here, for an account of his administration, and for the legacies that remain unpaid. *Tunstall v. Pollard*, 11 Leigh 1.

2. INADEQUATE REMEDY AT LAW.—No principle in equity jurisprudence is more firmly established than that equity has no jurisdiction where there is a full, complete, and adequate remedy at law. *Coombs v. Shisler* (W. Va.), 34 S. E. Rep. 763; *Cleaver v. Matthews*, 83 Va. 801, 3 S. E. Rep. 439; *Hoke v. Davis*, 33 W. Va. 485, 10 S. E. Rep. 820; *Graveley v. Graveley*, 84 Va. 145, 4 S. E. Rep. 318; *Neff v. Baker*, 82 Va. 401, 4 S. E. Rep. 620; *Kanawha, etc., R. Co. v. Ryan*, 31 W. Va. 364, 6 S. E. Rep. 924; *Pearson v. Board of Supervisors*, 91 Va. 322, 21 S. E. Rep. 483; *Van Dorn v. Lewis Co. Ct.*, 38 W. Va. 267, 18 S. E. Rep. 579; *Maupin v. Whiting*, 1 Call 294; *Poage v. Bell*, 3 Rand. 586; *Green v. Spaulding*, 76 Va. 411; *Hall v. Taylor*, 18 W. Va. 547; *Alleman v. Kight*, 19 W. Va. 201; *Goolsby v. St. John*, 25 Gratt. 146; *Barnett v. Barnett*, 83 Va. 511, 2 S. E. Rep. 733; *Hudson v. Kline*, 9 Gratt. 379, and *note*; *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 23 S. E. Rep. 795; *Shepherd v. Groff*, 34 W. Va. 123, 11 S. E. Rep. 997; *Beckley v. Palmer*, 11 Gratt. 635, and *note*; *Va. Min. Co. v. Wilkinson*, 92 Va. 98, 22 S. E. Rep. 839; *Hall v. Scites*, 83 W. Va. 691, 18 S. E. Rep. 895; *Shickell v. Berryville, etc., Co.*, 99 Va. 88, 37 S. E. Rep. 818; *Sulphur Min. Co. v. Boswell*, 94 Va. 485, 27 S. E. Rep. 24; *Marye v. Diggs*, 98 Va. 749, 37 S. E. Rep. 315; *Boston Blower Co. v. Carman Lumber Co.*, 94 Va. 94, 26 S. E. Rep. 390; *Collins v. Sutton*, 94 Va. 127, 26 S. E. Rep. 415; *Commercial Bk. v. Cabell*, 96 Va. 552, 32 S. E. Rep. 53; *Southern R. Co. v. Franklin, etc., R. Co.*, 96 Va. 603, 33 S. E. Rep. 485; *Snyder v. Grandstaff*, 96 Va. 473, 31 S. E. Rep. 647; *Otey v. Stuart*, 91 Va. 714, 22 S. E. Rep. 513; *Stearns v. Harman*, 80 Va. 48; *Louisville, etc., R. Co. v. Taylor*, 93 Va. 226, 24 S. E. Rep. 1018; *Va. Coal and Iron Co. v. Kelly*, 93 Va. 232, 24 S. E. Rep. 1020;

Witz. Beidler & Co. v. Mullin, 90 Va. 805, 20 S. E. Rep. 788; Brown v. Chapman, 90 Va. 174, 17 S. E. Rep. 855; Goddin v. Bland, 87 Va. 706, 18 S. E. Rep. 145; Nelson v. Hamner, 84 Va. 909, 6 S. E. Rep. 462; S. V. R. Co. v. Robinson, 82 Va. 542; Buck v. Ward, 97 Va. 209, 33 S. E. Rep. 513; Kane v. Va., etc., Co., 97 Va. 229, 33 S. E. Rep. 627, and many other cases too numerous to mention.

On the other hand it is equally well settled that where there is no certain, complete and adequate remedy at law, equity will always take jurisdiction and grant the desired relief. Feckheimer v. Nat. Exch. Bk., 79 Va. 80; Grubb v. Starkey, 90 Va. 881, 20 S. E. Rep. 784; Ralphsnyder v. Ralphsnyders, 17 W. Va. 28; Pumphry v. Brown, 5 W. Va. 107; Walker v. Hunt, 2 W. Va. 491; Kuhn v. Mack, 4 W. Va. 186; Lowman v. Crawford, 99 Va. 688, 7 Va. Law Reg. 551; Sulphur Mines Co. v. Boswell, 94 Va. 480, 27 S. E. Rep. 24; Virginia, etc., Co. v. Kelly, 98 Va. 332, 24 S. E. Rep. 1020; Nat. Life Assoc. v. Hopkins, 97 Va. 167, 33 S. E. Rep. 539; Stuart v. Pennis, 91 Va. 688, 22 S. E. Rep. 509; Masonic Temple Assoc. v. Banks, 94 Va. 695, 27 S. E. Rep. 490; Jones v. Murphy, 98 Va. 214, 24 S. E. Rep. 835; Campbell v. Rust, 85 Va. 653, 8 S. E. Rep. 664; Moore v. Steelman, 80 Va. 331; Stearns v. Harman, 80 Va. 48; Vilwig v. Balt., etc., R. Co., 79 Va. 449; Tillar v. Cook, 77 Va. 477; Knifong v. Hendricks, 2 Gratt. 312, 44 Am. Dec. 335; Nease v. Aetna Ins. Co., 32 W. Va. 283, 9 S. E. Rep. 233; Cleavenger v. Franklin Fire Ins. Co. (W. Va.), 35 S. E. Rep. 998; Honaker v. Board of Education, 42 W. Va. 170, 24 S. E. Rep. 544. These are only a few of the leading cases, which are authority for this well-known proposition. It is unnecessary to mention more.

So in cases where the remedy at law was considered doubtful or partial, when the party applied to a court of equity, it was held to be too strict to deny him admittance into that court for relief. Spotswood v. Higgenbotham, 6 Munf. 313; Nease v. Aetna Ins. Co., 32 W. Va. 283, 9 S. E. Rep. 233; Cleavenger v. Franklin Fire Ins. Co. (W. Va.), 35 S. E. Rep. 998; so where the action at law was not free from difficulty. Mulhday v. Machir, 4 Gratt. 1.

Restriction of Rule.—The rule that a court of equity has no jurisdiction to relieve a party who has a remedy at law, applies only to cases in which the legal remedy lies against the same person of whom the relief in equity is sought. Jackson v. Turner, 5 Leigh 119.

Concurrent Jurisdiction.—It is plain that where a remedy at law is far less adequate and complete than in equity, and where the rights of all concerned can be ascertained and determined in a single suit, courts of equity have concurrent jurisdiction with courts of law. Nat. Life Assoc. v. Hopkins, 97 Va. 167, 33 S. E. Rep. 539. See Stuart v. Pennis, 91 Va. 688, 22 S. E. Rep. 509.

But the general rule is that where the subject-matter can be better disposed of in a chancery proceeding, by making all persons concerned, parties to the suit, and having the rights of all adjusted and determined, a court of equity has jurisdiction of the case, although the question might have been decided in an action at law. Charron v. Boswell, 18 Gratt. 216; Erskine v. Staley, 12 Leigh 406; Moore v. Holt, 10 Gratt. 284.

Rationale of Doctrine.—The remedy must be plain, for if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate; for if at law it falls short of what a party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and

justice of the case. It must reach the whole mischief and secure the whole right of the party in a perfect manner, at the present time and in the future, otherwise equity will interfere and give such relief and aid as the particular case may require. The jurisdiction of a court of equity is therefore sometimes concurrent with the jurisdiction of a court of law; it is sometimes exclusive of it, and it is sometimes auxiliary to it. Feckheimer v. Nat. Exch. Bk., 79 Va. 80.

Equity Will Not Take Jurisdiction to Evade the Law.—It is not sound reasoning that the fact that a party will lose his debt at law, if the statute of limitations be pleaded, is sufficient ground for equitable jurisdiction. Courts are not called upon to evade the law, or to assist others in doing so. The rights of parties should be adjusted according to the case in hand, and consequences left to take care of themselves. Pendleton v. Taylor, 77 Va. 580.

No Jurisdiction in Equity—Compensation in Damages.—As a general proposition courts of equity do not entertain jurisdiction to give redress by way of compensation or damages for breaches of contracts and other wrongs cognizable at law. This relief is only given in equity as incidental to other relief. Laidley v. Laidley, 25 W. Va. 525; Meze v. Mayse, 6 Rand. 658; Anthony v. Leftwich, 8 Rand. 238; Ewing v. Litchfield, 91 Va. 575, 22 S. E. Rep. 302.

Same—Same—Set-Off of Unliquidated Damages.—A bill in any form claiming damages for breach of a contract cannot be entertained in equity, neither can unliquidated damages be set off in equity. Robertson v. Hogsheads, 8 Leigh 667.

Same—Unliquidated Damages—Allegation of Insolvency.—A suit for unliquidated damages cannot be entertained by a court of equity unless there is an allegation of insolvency which is established. Bunting v. Cochran, 99 Va. 558, 39 S. E. Rep. 229, 7 Va. Law Reg. 327.

Same—Ejectment Proper Remedy.—Where a widow claims to be the sole heir of her husband, she has no right to file a bill in chancery against parties claiming to be the heirs of her husband, who are in possession of the lands, and the fact that dower had been assigned her in these lands on motion of the defendant would not give equity jurisdiction. Jones v. Fox, 20 W. Va. 370.

Same—Replevin Adequate Remedy.—A tenant complaining of distress made for more rent than was in arrear and due, not having resorted to an action of replevin for redress, nor showing any reason for failing to resort to his remedy at law, is not entitled to relief in equity. Mayo v. Winfree, 2 Leigh 370.

Same—Detinue Proper Action.—An heir claiming slaves which have been assigned to the widow for dower, title having commenced while the slaves were real estate, has the legal title and a remedy at law, and the court of chancery has no jurisdiction to entertain a bill to recover such slaves. A prayer in the bill for a *ne exeat* cannot give jurisdiction, since the benefit of that process could be obtained by bail in an action of detinue. Parks v. Rucker, 5 Leigh 149. Distribution of slaves if recovered, gives no jurisdiction. Hale v. Clarkson, 28 Gratt. 42.

Neither will a court of equity entertain a suit by a trustee or *cestui que trust* against purchasers at a sale under an execution, at the instance of parties not claiming under the deed, to recover the property, where there is no obstacle to their proceeding at law. Sheppards v. Turpin, 8 Gratt. 373.

Same—Action of Debt the Statutory Remedy.—A mandamus does not lie for the undertaker of a public bridge, to compel the county court to levy the stipulated reward in the county levy, because a specific remedy is given him by statute to recover the same by an action of debt against the justices refusing to levy it. *King William Justices v. Munday*, 2 Leigh 165.

Same—Restoration of Diverted Stream.—If a party, who is injured by a diversion of a watercourse, restores the stream to its original channel, equity has no jurisdiction to grant redress, as it is a proper case for damages at common law. The only ground of equitable jurisdiction is to *prevent* a threatened injury. *Coalter v. Hunter*, 4 Rand. 58.

Same—Remedy by Statute—Collection of Taxes.—Courts of equity will not entertain suits by the commonwealth to enforce the collection of taxes, where there are statutes prescribing an adequate remedy. But if there be already pending a suit for the sale of the land, the state or county may come in such suit and collect its taxes there. The county takes jurisdiction in order to clear the title. *Marye v. Diggs*, 98 Va. 749, 37 S. E. Rep. 315.

Same—Same—Subscription to Stock.—Under the act of December 22, 1897, vesting courts of common law with exclusive jurisdiction of all suits to recover unpaid stock subscriptions, and providing that a suit at law should be maintained, at which the defendant shall be entitled to a trial by jury, it could not be contended that equity still had jurisdiction in that such act did not provide an adequate remedy. *Shickel v. Berryville*, 99 Va. 88, 37 S. E. Rep. 813.

Same—Same—Debts of a County.—A county court cannot be compelled by a bill in chancery to issue an order against the county funds for any debt against the county, since the statutory law furnishes the remedy in all such cases and must be strictly pursued. *Hall, etc., Co. v. Scites*, 38 W. Va. 691, 18 S. E. Rep. 895.

Same—Same—Legal Claim.—Under § 1 of ch. 106 of Acts of 1882, a court of equity has no jurisdiction of a purely legal claim, and no attachment can issue. *Peyton v. Cabell*, 25 W. Va. 540.

Same—When Complete Remedy on Bonds.—A partnership executes bonds with a surety to a creditor. After the death of one partner, and the insolvency of the other, although the surety is perfectly solvent, the creditor brings a suit in chancery against the representative of the dead partner, and the other obligors, seeking to charge the estate of the deceased, or to have payment from the parties according to their liabilities. The creditor had a complete remedy at law on the bonds against the surety, and chancery had no jurisdiction to entertain the bill. *Linney v. Dare*, 2 Leigh 588.

Same—Extinguishment of Equity by Acceptance of Bond.—Where an annuitant accepts in exchange for the amount then due her, a bond and two bills of exchange, and afterwards attempts to recover that amount and the residue by a bill in equity, the acceptance of the bond and bills extinguished the annuity in equity, and that court hath no jurisdiction of the case. *Thornton v. Spotswood*, 1 Wash. 142.

Equity Takes Jurisdiction—Legal Remedy Inadequate.—Where a court of law cannot carry into effect the provisions of an act of assembly, this will be a sufficient ground to give jurisdiction in equity. *Pleasants v. Pleasants*, 2 Call 319.

Same—Action at Law Barred by Estoppel.—A deed acknowledges on its face that the purchase money

has been paid, though this was not true. In an action of assumpsit for the purchase money the defendant relies on the acknowledgment as an estoppel. The plaintiffs are entitled to the aid of equity, and may dismiss their action at law, believing that the estoppel will prevent a recovery. *Radcliff v. High*, 2 Rob. 271; *Wilson v. Shelton*, 9 Leigh 342.

Same—Disposition of Assets.—Where it is a question whether insurance money for buildings destroyed by fire should be treated as real or personal assets and disposed of as one or the other, a court of equity has jurisdiction of the question. *Portsmouth Ins. Co. v. Reynolds*, 32 Gratt. 613.

Same—To Award New Trial.—Where the justices composing a court leave the bench after the verdict, so that a motion for a new trial could not be made to them, a court of equity has jurisdiction to award it. *Knifong v. Hendricks*, 2 Gratt. 312, 44 Am. Dec. 385.

Same—When Obligor Could Not Sue at Law.—After the death of the obligee, one of four joint obligors in a bond to her qualifies as her administrator, and then files his bill against the obligors to recover the amount of the bond. A court of equity has jurisdiction to enforce the claim because the administrator being one of the obligors could not sue the others at law. *Rodes v. Rodes*, 24 Gratt. 256.

Same—Same—Award.—Where the remedy at law is inadequate, equity has jurisdiction to decree the specific execution of an award. *Smith v. Smith*, 4 Rand. 95.

Same—Specific Performance—Pretium Affectionis—Personal Services.—While it is well settled that a chancery court will not ascertain and award damages in any case where specific performance or other equitable relief would be improper, or where there is an adequate remedy at law, yet it is a general rule that courts of chancery will entertain suits for specific performance whenever there is no adequate remedy at law, whether the agreement relates to land or to chattels, possessing *pretium affectionis*. But they will not entertain a bill to specifically enforce contracts for personal services, or acts involving skill, labor and judgment. *Campbell v. Rust*, 85 Va. 653, 8 S. E. Rep. 664; *Wampler v. Wampler*, 30 Gratt. 454.

It is a general rule that a court of equity has jurisdiction to enforce specific performance of a contract by a defendant to do defined work upon his own property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages. *Grubb v. Starkey*, 90 Va. 831, 20 S. E. Rep. 784.

Same—Transfer of Shares of Stock—Specific Performance.—Where the owner of shares of stock in a bank fails, and being indebted to the bank, assigns the shares to a trustee, the transfer of which could only be made upon the books of the bank, which refuses to allow the transfer to be made, and the trustee comes into equity and asks that it be required to allow such transfer to be made, and to issue new certificates therefor, there is no adequate remedy at law, and relief can only be given by enforcing specific performance in a court of chancery. *Fekheimer v. Nat. Exch. Bk.*, 79 Va. 80.

Same—Injunction to Waste.—An injunction to stay waste will be denied, where there appears to be no impediment to the action of waste at law. *Cutting v. Carter*, 4 H. & M. 424.

Same—Injunction to Nuisance.—The jurisdiction of a court of equity to restrain by injunction the crea-

tion or continuance of a nuisance, which is likely to produce irremediable injury, is well established and constantly exercised. Actions at law in such cases afford no adequate redress. *Masonic Temple Assoc. v. Banks*, 94 Va. 695, 27 S. E. Rep. 490; *Miller v. Trueheart*, 4 Leigh 569; *Pruner v. Pendleton*, 76 Va. 516; *Sanderlin v. Baxter*, 76 Va. 299; *Wingfield v. Crenshaw*, 4 H. & M. 474; *Switzer v. M'Culloch*, 76 Va. 777.

Same—Injunction to Trespass.—To warrant the interference of equity to restrain a trespass to land, in the absence of any other ground, the injury complained of must be irreparable. *Cresap v. Kemble*, 26 W. Va. 608; *Becker v. McGraw* (W. Va.), 37 S. E. Rep. 532; *Bearus v. Mearns*, 44 W. Va. 744, 30 S. E. Rep. 112; *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. Rep. 596; *Collins v. Sutton*, 94 Va. 127, 26 S. E. Rep. 415; *Western, etc., Co. v. Va., etc., Co.*, 10 W. Va. 250; *Callaway v. Webster*, 98 Va. 790, 37 S. E. Rep. 276; *Anderson v. Harvey*, 10 Gratt. 386; *Moore v. Steelman*, 80 Va. 331; *Switzer v. M'Culloch*, 76 Va. 777; *Miller v. Wills*, 95 Va. 337, 28 S. E. Rep. 337.

Same—Same—Changing Substance of Inheritance.—Although the owner of lands has a legal title, and might maintain trespass for an injury done to it by raising iron ore upon it, yet equity has jurisdiction to enjoin another party, who claims the land, for taking ore from it, where the trespass is one which goes to change the very substance of the inheritance, by destroying the only thing that gives value to it. *Anderson v. Harvey*, 10 Gratt. 386; *Miller v. Wills*, 95 Va. 337, 28 S. E. Rep. 337.

Same—Municipal Corporations Enjoined.—Courts of equity have jurisdiction to enjoin municipal corporations from proceedings which encroach upon private rights, and are productive of irreparable injury. *Bristol, etc., Co. v. Bristol*, 97 Va. 304, 33 S. E. Rep. 588.

Same—Injunctions.—One of the most prolific sources of equity jurisdiction which calls for the exercise of its remedy by injunction is when there is no adequate remedy at law, and the act or acts being done or threatened unless inhibited will produce irreparable injury. *Miller v. Crews*, 2 Leigh 576; *James River, etc., Co. v. Anderson*, 12 Leigh 278; *Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co.*, 11 Leigh 42; *Pixley v. Roanoke Navigation Co.*, 75 Va. 320; *McFarland v. Dilly*, 5 W. Va. 185; *Walker v. Hunt*, 2 W. Va. 492; *Evans v. Taylor*, 28 W. Va. 184; *Dunn v. Baxter*, 30 W. Va. 672, 5 S. E. Rep. 214. See generally, monographic *note* on "Injunctions" appended to *Claytor v. Anthony*, 15 Gratt. 518.

V. CONCURRENT JURISDICTION.

Fraud.—Courts of equity and law have concurrent jurisdiction in cases of fraud. *White v. Jones*, 4 Call 253, 2 Am. Dec. 564; *Poore v. Price*, 5 Leigh 52, 27 Am. Dec. 582; *Meek v. Spracher*, 87 Va. 102, 12 S. E. Rep. 397.

Same—Estoppel—Negligence.—Though courts of law and equity have a concurrent jurisdiction in cases of fraud, yet if a suit be first brought in a court of law, in which the question of fraud may be tried and determined, the party injured by fraud must make his defence there; and if he neglect to do so, a court of equity has no jurisdiction to relieve him. *Haden v. Garden*, 7 Leigh 157.

Same—Sale of Land.—Courts of common law and of equity have concurrent jurisdiction to grant relief to a vendee of land where by reason of fraud of the vendor in misrepresenting the quantity, the former is entitled to compensation or abatement from the purchase money. *Kelly v. Riley*, 22 W.

Va. 247. And the fact that there is an adequate remedy at law does not oust equity of its jurisdiction, since fraud is an original ground of equitable jurisdiction. *Meek v. Spracher*, 87 Va. 102, 12 S. E. Rep. 397.

Mistake in Quantity of Land.—Equity has jurisdiction to give relief in cases of deficiency or excess in the estimated quantity of land sold on the ground of a mistake. And the fact that a complete and adequate remedy at law exists, will not deprive equity of its jurisdiction, as the matter comes within the scope of its elementary jurisdiction. *Hull v. Watts*, 95 Va. 10, 27 S. E. Rep. 829.

In Matters of Account.—In matters of account, courts of law cannot give so complete a remedy as equity, and hence such are *per se* within the scope of equitable jurisdiction, and among the most comprehensive of those questions of which it has assumed jurisdiction. Courts of law and equity have concurrent jurisdiction in matters of account but the difficulties in proceeding in the former court, and the convenience of the latter to attain substantial justice, where a discovery may be had, where multiplicity of suits will be awarded, and where fraud, accident or mistake is concerned, causes courts of equity to be most commonly resorted to. *Tillar v. Cook*, 77 Va. 477.

To Revise Awards.—The power of courts of equity to revise awards is concurrent with that of the courts of common law; but if the court of law first gets possession of the subject, its decision is binding on the court of equity; unless new circumstances be adduced to authorize the interposition of the latter. *Flournoy v. Halcomb*, 2 Munf. 34.

Under West Virginia Code.—Under sec. 6, ch. 126 of the Code of W. Va., giving defendants the right to defend at law or obtain relief in equity, it was held that if a verdict was rendered against him on an equitable plea at law, and the verdict be set aside and the plea withdrawn, he might still resort to equity. *Knott v. Seamands*, 25 W. Va. 99.

Appointment of Guardian.—The power of chancery courts to appoint guardians is not taken from them by sec. 11, ch. 129, Code of 1849, conferring that power on circuit, county and corporation courts. *Durrett v. Davis*, 24 Gratt. 302.

Statute Giving Law Courts Jurisdiction Does Not Deprive Equity in Absence of Restrictive or Prohibitory Words.—Where courts of equity have once acquired jurisdiction, a subsequent statute which gives to or enlarges the jurisdiction of the common-law courts over the same subject does not deprive the equity courts of their jurisdiction, although the statute may furnish a complete and adequate remedy at law, unless the statute conferring such jurisdiction uses restrictive or prohibitory words. *Steinman v. Vicars*, 99 Va. 595, 39 S. E. Rep. 227; *Kelly v. Lehigh, etc., Co.*, 98 Va. 405, 36 S. E. Rep. 511; *Filler v. Tyler*, 91 Va. 456, 22 S. E. Rep. 235.

Where equity has jurisdiction of a subject, and the legislature by statute gives a remedy at law for the injury complained of, which does not in terms take away equitable jurisdiction, the latter is not thereby ousted, and the act will be considered as giving an additional remedy. *Corrothers v. Board of Education*, 16 W. Va. 527.

In Cases of Lost Instruments.—In cases of lost instruments courts of law and equity exercise concurrent jurisdiction. Equity assumed jurisdiction originally because there was no remedy at law, and where the law courts subsequently took jurisdiction of these cases the equity jurisdiction was not ousted.

Lyttle v. Cozad, 31 W. Va. 188; *Hickman v. Painter*, 11 W. Va. 886; *Mitchell v. Chancellor*, 14 W. Va. 23; *Shields v. Com.*, 4 Rand. 541; *Harrison v. Field*, 2 Wash. 186; *Hall v. Wilkinson*, 35 W. Va. 167, 12 S. E. Rep. 1118.

Suits by Paupers for Freedom.—Courts of equity, as well as courts of law, have jurisdiction of suits by paupers for freedom, and in a case proper for a court of equity, it will appoint counsel for the pauper. *Dempsey v. Lawrence*, Gilmer 333.

Prohibition of Contracts against Public Good.—Both courts of equity and law will prohibit the effect of contracts made in violation of laws enacted for the public good. *Wilson v. Spencer*, 1 Rand. 76.

By Statute—Estoppel by Going in One Court.—When a statute gives a right to a defendant to either defend at law or obtain relief in equity, if he avails himself of the right to make his defence at law, and judgment is given against him, he cannot afterwards obtain relief upon the same grounds in equity. *Penn v. Reynolds*, 23 Gratt. 518, and *foot-note*.

Effect of Constitutional Guaranty of Jury Trial.—Where at the time of adoption of the constitution equity exercised jurisdiction in certain matters, the clause of the constitution guaranteeing jury trial, does not relate to such matters or deprive equity of the jurisdiction therein to act without a jury. *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. Rep. 216. See monographic *note* on "Constitutional Law."

Full Hearing in One Court Bars Suit in Other.—After a party has been fully heard in a court of law in a case in which the rule is the same in equity as at law, he shall not be permitted to go into a court of equity on the same point in controversy. *Morris v. Ross*, 2 H. & M. 408.

VI. SOURCES AND GROUNDS OF JURISDICTION.

1. IN GENERAL.

Familiar Grounds.—The familiar grounds of equitable jurisdiction may be stated as follows: accidents, mistakes, relief against penalties, accounts, fraud, discovery, trust, specific performance, injunctions, avoiding illegal transactions, contribution, substitution, want of adequate remedy at law, and jurisdiction conferred by statute. *Neff v. Baker*, 83 Va. 401, 4 S. E. Rep. 620.

Marshaling Assets.—The equitable principle of marshaling assets will be sufficient to give a court of equity jurisdiction of a case. *Henley v. Perkins*, 6 Gratt. 615. See monographic *note* on "Marshaling Assets" appended to *Carrington v. Didier*, 8 Gratt. 260.

Alimony.—A court of chancery has jurisdiction in cases of alimony. *Purcell v. Purcell*, 4 H. & M. 507.

Removal of Professor.—A court has no jurisdiction to review the action of the board of regents of the West Virginia University removing a professor. *Hartigan v. Bd. of Regents* (W. Va.), 38 S. E. Rep. 608.

Glebe Lands.—A court of chancery has jurisdiction of cases involving glebe lands, and can award an injunction to prevent its sale, if a good title is shown in a third party. *Turpin v. Locket*, 6 Call 118.

2. MULTIPLICITY OF SUITS.—See subhead, "Retention of Jurisdiction," *supra*.

General Jurisdiction.—A court of equity will assume jurisdiction to prevent a multiplicity of suits. *Rader v. Neal*, 13 W. Va. 378; *Baird v. Bland*, 3 Munf. 570; *Nease v. Aetna Insurance Co.*, 32 W. Va. 283, 9 S. E. Rep. 233; *Chalmers v. McMurdo*, 5 Munf. 252, 7 Am. Dec. 684; *Beecher v. Lewis*, 84 Va. 633, 6 S. E. Rep.

367; *Chrislip v. Teter*, 43 W. Va. 356, 27 S. E. Rep. 283; *Hanna v. Clarke*, 31 Gratt. 36; *Sims v. Lewis*, 5 Munf. 29; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. Rep. 411; *Pleasants v. Pleasants*, 2 Call 319; *Cross v. Cross*, 4 Gratt. 257; *Stearns v. Beckham*, 31 Gratt. 379. See *Perkins v. Seigfried*, 97 Va. 444, 34 S. E. Rep. 64; *Switzer v. M'Culloch*, 76 Va. 777; *Miller v. Wills*, 95 Va. 337, 28 S. E. Rep. 337.

Limitations—Suit Must Be against Same Person.—As a ground of equity jurisdiction the prevention of a multiplicity of suits can only be invoked where such suits are against the same person, and it will not lie when a bank seeks to enjoin separate suits against its stockholders for the collection of taxes levied on their shares. *People's Nat. Bank v. Marye* (U. S. Cir. Ct.), 7 Va. Law Reg. 47.

Ancillary Jurisdiction—Injunction.—A court of equity will take jurisdiction of a case when in so doing it will avoid a multiplicity of suits, and as ancillary will enjoin the prosecution of the several claims at law. *St. Lawrence, etc., Co. v. Price* (W. Va.), 38 S. E. Rep. 536.

Collection of Illegal Tax Restrained.—A suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal. There must exist in addition special circumstances, bringing the case under some recognized head of equity jurisdiction, such as, that the enforcement of the tax would lead to a multiplicity of suits, or irreparable damages will be prevented. *Corrothers v. Board of Education*, 16 W. Va. 527; *Bull v. Read*, 18 Gratt. 78; *Kuhn v. Board of Education*, 4 W. Va. 499; *McClung v. Livesay*, 7 W. Va. 329; *Douglass v. Town of Harrisville*, 9 W. Va. 162; *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408; *Christie v. Malden*, 28 W. Va. 657; *Williams v. County Court*, 26 W. Va. 488, 58 Am. Rep. 94.

Same—Necessary Allegations.—Where a bill of injunction is brought in equity to restrain the collection of a tax, on the ground that it is illegal, such bill must aver that it is filed by the plaintiff on behalf of himself and all other taxpayers subject to the illegal tax, as this is absolutely essential to give a court of equity jurisdiction on the ground of avoiding a multiplicity of suits. *Williams v. County Court*, 26 W. Va. 488, 58 Am. Rep. 94.

Code 1873—Jurisdiction of Questions Affecting Legal Title of Land.—By Statute, Code of 1873, ch. 130, § 1, it is provided that in order to prevent a multiplicity of suits, jurisdiction be expressly conferred on courts of equity of all questions affecting the legal title of the lands, partition of which is sought by a suit in equity. *Davis v. Tebbs*, 81 Va. 600.

Circuity of Action.—A purchaser of land, suing for breach of a contract, to make a good title, may with propriety come into a court of equity for pecuniary compensation, instead of proceeding at law in the first instance, if the vendor has conveyed away his property in trust, whereby there might be difficulty in obtaining satisfaction of a judgment when recovered. In such case the proceeding in equity is proper because it avoids circuity of action. *Sims v. Lewis*, 5 Munf. 29.

Life Tenant Enjoined by Remainderman.—A remainderman or reversioner has jurisdiction in equity against a tenant for life to enjoin waste, and to have compensation for the damages, the same as if he sued at law, to avoid a multiplicity of suits. *Williamson v. Jones*, 43 W. Va. 563, 27 S. E. Rep. 411.

Diversion of Natural Stream.—The diversion of a natural stream is a private nuisance and from an early period courts of equity have granted relief

by injunction at the suit of the injured party. The jurisdiction is founded upon the notion of restraining irreparable mischief, or of preventing vexatious litigation, or a multiplicity of suits. *Carpenter v. Gold*, 88 Va. 551, 14 S. E. Rep. 320.

Property Sold to Unknown Parties.—In order to avoid a multiplicity of suits, and to seek a discovery in relation to property sold to unknown parties, a court of equity has jurisdiction of the case. *Cross v. Cross*, 4 Gratt. 257.

Suit on Note—Liability Placed on Party First Responsible.—On a bill by the holder of a note against the indorsers and the maker thereof, a court of equity, in order to avoid circuity of action, may fix the liability on the party first responsible. *Chalmers v. McMurdo*, 5 Munf. 252, 7 Am. Dec. 684.

Recovery of Slaves—Account of Profits.—A person entitled to a legal estate in slaves may sue in equity to recover them, if thereby a multiplicity of suits may be prevented, calling on the defendant to discover how long he has had them in possession, and to discover and state an account of their profits. *Baird v. Bland*, 8 Munf. 570.

Specific Performance Refused—Compensation for Damages.—A court of equity, even where specific performance of a contract for the sale of land is refused, will decree compensation for damages, where there is no adequate remedy at law, where some peculiar equity intervenes; it will do so to prevent a multiplicity of suits, and where it has obtained jurisdiction of the case on other grounds. Where a bill asks alternative relief, if it cannot execute the contract, a court of equity will decree repayment of purchase money. *Stearns v. Beckham*, 31 Gratt. 379.

Unincorporated Religious Societies—Suit by One Member in Behalf of All.—There is no doubt about the right of unincorporated religious societies to sue on a contract made with them in their associate capacity and for the legitimate purposes of their association. Hence it was held in *Perkins v. Seigfried*, 97 Va. 444, 34 S. E. Rep. 64, that a court of equity has a jurisdiction in accordance with the above principle to entertain a suit by a plaintiff who sues on behalf of himself and the other members of a church, who were too numerous to admit of their all suing at law, to enforce collection of a legacy left the said church.

3. ACCOUNTS.

a. In General.

Statement of Jurisdiction.—Courts of equity have jurisdiction of matters of account (1) where there are mutual demands, (2) where the accounts are on one side and a discovery is sought that is material to the relief, and (3) equity having taken jurisdiction for discovery will, to avoid a multiplicity of suits, administer suitable relief. The reason for the doctrine is that there is no adequate remedy at law. On the other hand courts decline jurisdiction in matters on account, (1) where the demands are all on one side and no discovery is claimed or is necessary, and (2) where there are demands on one side, and on the other mere set-offs, and no discovery is required. *Lafever v. Billmyer*, 5 W. Va. 33. These propositions are in the main correct, but they do not include all cases of equity jurisdiction in matters of account, and no general rule can be stated, which will embrace all the cases. *Petty v. Fogle*, 16 W. Va. 497. See *Carey v. Coffee Stemming Mach. Co.*, 20 S. E. Rep. 778, 1 Va. Dec. 863.

As was said in *Grafton v. Reed*, 26 W. Va. 437, it is impossible to lay down with precision fixed rules

applicable to all cases in which it may be proper for equity courts to exercise jurisdiction in matters of account. The courts have therefore reserved to themselves a large discretion, in the exercise of which due regard may be had not only to the nature of the case, but to the situation and conduct of the parties.

Accounts Must Be Mutual.—The jurisdiction of equity in matters of account is among the most comprehensive of those which it has assumed, but it is not in every case of account that it takes jurisdiction. Where the accounts are all on one side, even though it be a very long one, equity will not take cognizance of the case, as there is an adequate remedy at law. But where there are mutual demands, items of debit and credit on both sides, and a balance is needed, then equity will take jurisdiction. *Goddin v. Bland*, 87 Va. 706, 18 S. E. Rep. 145; *Smith v. Marks*, 2 Rand. 449; *Bassett v. Cunningham*, 7 Leigh 403; *Hickman v. Stout*, 3 Leigh 6.

Must Be Able to Pronounce Final Decree.—The claim of an account of assets will not give equity jurisdiction, unless it can pronounce a final decree in the suit in which the account is sought. *Randolph v. Kinney*, 3 Rand. 394.

Remedy at Law Must Be Inadequate.—A court of chancery has no jurisdiction to ask for an account, and a decree for the balance, which should be found due upon a claim, on which an action at law would have lain, without showing some obstacle which would defeat or embarrass the legal remedy. *Poage v. Willson*, 2 Leigh 490.

Same—Defendants Insolvent—Fraud.—Where a bill alleges that the defendants are insolvent and ask that they be restrained from fraudulently converting to their own use the property of the plaintiff, and also ask an account, upon these facts there is no remedy at law, and the only complete remedy is in chancery, which will take jurisdiction of the case. *Brakeley v. Tuttle*, 3 W. Va. 86.

Same—Complicated Accounts—Equitable Trusts.—Wherever an account is so complicated that it would be incompetent to examine it at law, and wherever it stands upon equitable claims, or has equitable trusts attached to it, there is no doubt that the jurisdiction of equity in such case is universal and without exception. *Penn v. Ingles*, 82 Va. 65; *Tyler v. Nelson*, 14 Gratt. 214; *Coffman v. Sangston*, 21 Gratt. 263; *Tillar v. Cook*, 77 Va. 477.

Same—No Injunction to Legal Proceedings When Unliquidation Set-Off Claimed.—As a general rule, where a court of law has taken jurisdiction of a legal claim, and the defendant claims a balance due him by account, which can only be settled in a court of equity, the latter will not suspend the legal proceedings to enable the defendant to have the accounts settled, though this is an equitable defence, as the set-off is not a liquidated demand. *Miller v. Miller*, 25 W. Va. 495.

b. General Accountings.

By Tenant in Common.—One tenant in common may maintain a suit in equity against his cotenant, who has occupied the whole of the common property, for an account of rents and profits. *Early v. Friend*, 16 Gratt. 21.

By Shareholders in Building Association.—A court of equity has jurisdiction at the suit of shareholders of unredeemed shares in a building fund association to call the redeemed shareholders to account, enforce payment of what they owe, distribute the funds among those entitled thereto, and

wind up the institution. *Edelin v. Pascoe*, 23 Gratt. 826.

By Auctioneer.—Equity has jurisdiction of a bill by the principal against auctioneers for an account, if it be yet open, or to surcharge and falsify the account, if it has been stated. *Townes v. Birchett*, 12 Leigh 173.

By Cashier—Unchartered Bank.—A private unchartered company, associated for the purpose of carrying on business as a bank, though such associations are contrary to law, will be entertained in a court of chancery, in a suit against its cashier, for an account of his agency. *Berkshire v. Evans*, 4 Leigh 228.

On Building Contract.—Where a carpenter brings an action at law against the owner of a house on the agreements which were left in the hands of the latter, and the owner refuses to furnish the copies, which were necessary in order to frame the declaration, the case is a proper one for relief in equity, by filing a bill praying account and a decree for the balance due for the work done. *Sturtevant v. Goode*, 5 Leigh 83.

Debt Secured by Trust Deed Uncertain.—Where a debt secured by deed of trust appears to be unascertained in amount, either party may resort to a court of chancery to have the amount ascertained by accounts taken under its direction, which ought to be directed. The trustee cannot sell the trust subject until the debts secured are settled and ascertained. *Wilkins v. Gordon*, 11 Leigh 549.

Same—Payments on Bond.—Where a bond secured by deed of trust on land is assigned and passes through numerous hands, payments having been made on it, and the land being advertised under the deed for the payment of the balance due, the obligor may come into equity to ascertain the amount due, and the owner of the bond. *Crenshaw v. Seigfried*, 24 Gratt. 272.

c. Between Partners.—A well-recognized ground for equitable jurisdiction is where an account is sought between partners, for the law court regards them as one person, and will not interfere between them. *Neff v. Baker*, 82 Va. 401, 4 S. E. Rep. 620.

In a partnership the relation of parties in being engaged in a joint venture plainly gives jurisdiction to a court of equity as it involves not merely a community of interest, but the employment of a common stock, in a common undertaking with a view to a common profit. An account must be taken to ascertain the interest of an individual partner, which a common-law court cannot render; if a dissolution is sought the common-law jurisdiction is altogether excluded; specific execution of contract and to restrain one partner from jeopardizing the rights of another likewise can only be taken jurisdiction of in a court of equity. *Tillar v. Cook*, 77 Va. 477; *Kelly v. Largney*, 1 Va. Dec. 72.

Where a bill in equity shows upon its face that the agreement under which the parties acted made them partners, that there were partnership accounts between the parties which were proper to be stated and settled by a court of equity, and that the remedy of the complainant was not complete at law, a demurrer to the jurisdiction is properly overruled. *Jones v. Murphy*, 93 Va. 214, 24 S. E. Rep. 825.

Debt Due Partnership.—If a debt sought to be enforced was one due a partnership, it gives equity jurisdiction over the claim, as any recovery would have to be distributed among the partners, or go to the payment of the partnership debts. The rights and equities arising between the partners, and

between them and their creditors, could only be adjusted and enforced in equity. *Martin v. Lewis*, 80 Gratt. 672.

d. By Fiduciaries.

Accounts Blended.—Where the accounts of a party in his individual and fiduciary capacities are blended in a statement, it is an appropriate ground for the jurisdiction of chancery to take control of the case, and to state the accounts separately. *Staples v. Turner*, 29 Gratt. 330.

Fiduciary Relations in Agency.—In an agency where there is a fiduciary relation between the parties, a court of equity has jurisdiction to settle and adjust the accounts between them. *Thornton v. Thornton*, 31 Gratt. 212; *Simmons v. Simmons*, 33 Gratt. 451; *Bank v. Jeffries*, 21 W. Va. 508; *Berkshire v. Evans*, 4 Leigh 228; *Coffman v. Sangston*, 21 Gratt. 263; *Zetelle v. Myers*, 19 Gratt. 62, and *note*; *Huff v. Thrash*, 75 Va. 546; *Vilwig v. Balt., etc., R. Co.*, 79 Va. 449.

So it cannot be doubted that the jurisdiction of courts of equity in matters of account, involving the transactions and dealings of trustees and agents, is well settled where it appears that a discovery is necessary, or there are mutual accounts between the parties, or the remedy at law is not plain and free from difficulty. *Vilwig v. B. & O. R. Co.*, 79 Va. 449; *Coffman v. Sangston*, 21 Gratt. 263; *Zetelle v. Myers*, 19 Gratt. 62; *Segar v. Parrish*, 20 Gratt. 680; *Simmons v. Simmons*, 33 Gratt. 451; *Filler v. Cook*, 77 Va. 477.

Guardians.—A court of equity has jurisdiction to hold a guardian to account and his sureties with him to the payment of any balance found due to the ward, although the guardian lives out of the state and has no property within it. *Pratt v. Wright*, 13 Gratt. 175.

Trustees.—It is said by CHIEF JUSTICE MARSHALL, in *Fowle v. Lawrason*, 5 Peters (U. S.) 495, that: "In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted." *Huff v. Thrash*, 75 Va. 546.

Personal Representative—At Suit of Legatee.—Equity has jurisdiction to entertain a bill by legatees against the executor and trustee, to ascertain the balance due from a sale of the testator's land, secured by deed of trust, on the ground that they, though entitled to the balance due from the purchaser, are mere beneficiaries, having no legal right which they could assert at law; and because the case was one in which it would have been improper for the trustee to sue until by some proceeding the proper balance due was ascertained. *Miller v. Trevilian*, 2 Rob. 1.

Same—At Suit by Creditor at Large.—That a single creditor at large of a deceased debtor may sue the personal representative in equity, for an account of assets and the payment of his debt, and general relief, is well settled both upon principle and authority. The jurisdiction is not only well established, but is practically exclusive. *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. Rep. 572; *Duerson v. Alsop*, 27 Gratt. 239; *Carter v. Hampton*, 77 Va. 631; *Hurn v. Keller*, 79 Va. 415.

Same—Administration by Deputy Sheriff—Sheriff Sues.—A court of equity has jurisdiction in a suit by a sheriff against his deputy and his sureties to have a settlement of accounts of several administrations upon estates which went into the hands of the deputy. The suit may be maintained although the deputy had settled the accounts before the probate

court, and though the bill does not allege and it is not proved that the sheriff had paid the balances reported due on the accounts or any part of them. *Tyler v. Nelson*, 14 Gratt. 214. See also, *Lafever v. Billmyer*, 5 W. Va. 39; *Petty v. Fogle*, 16 W. Va. 514; *Penn v. Ingles*, 82 Va. 71; *Yates v. Stuart*, 39 W. Va. 124, 19 S. E. Rep. 423; *Coffman v. Sangston*, 21 Gratt. 263, and *foot-note*, collecting the cases on this point.

Settlement of Estates.—Where a claim involves matters which require an account to be taken, and the settlement of estates, it is proper to combine them in one suit in equity. *Hoge v. Vintroux*, 21 W. Va. 1.

Same—Suit by Creditors.—From a time antedating our system of government, equity has taken jurisdiction over controversies which involved the settling of decedents' estates, and in ascertaining and adjusting the liabilities of sureties and their equities among themselves. And when a suit was brought by one creditor against a decedent's estate, although filed on behalf of himself only, it may by decree convene all the creditors, direct the proper accounts to be taken, and convert it into a general creditors' suit. *Williams v. Newman*, 93 Va. 719, 26 S. E. Rep. 19. See *Duerson v. Alsop*, 27 Gratt. 229; *Piedmont, etc., Ins. Co. v. Maury*, 75 Va. 508.

Same—Debt Secured by Deed Ascertained.—Equity has jurisdiction of a suit in the name of either the administrator or trustee, or both, to settle the amount due on a debt secured by a deed of trust on land in favor of a decedent's estate, where various payments are claimed by the debtor, and disputed by the administrator. *Pendleton v. Bower* (W. Va.), 38 S. E. Rep. 487.

4. **DISCOVERY.**—Courts of chancery have jurisdiction of all cases where discovery is wanting. *Pryor v. Adams*, 1 Call 382, 1 Am. Dec. 533; *Yates v. Stuart*, 39 W. Va. 124, 19 S. E. Rep. 423; *Thompson v. Whitaker*, 41 W. Va. 574, 23 S. E. Rep. 795; *Simmons v. Simmons*, 33 Gratt. 451; *Rankin v. Bradford*, 1 Leigh 163; *Gregory v. Marks*, 1 Rand. 355; *Scott v. Osborne*, 2 Munf. 413; *Coffman v. Sangston*, 21 Gratt. 263, and *note*.

Allegations—Discovery Must Be Asked.—A court of chancery has jurisdiction where a bill plainly asks for a discovery, although the plaintiff might have had redress at common law, as courts of chancery have jurisdiction in all cases where a discovery is wanted. *Pryor v. Adams*, 1 Call 382, 1 Am. Dec. 533.

Same—Materiality or Necessity of Discovery Must Be Alleged.—Where the enforcement of a legal demand is attempted in a court of equity, and the need of a discovery is the alleged ground of jurisdiction, and there is no allegation that the discovery is material or necessary, the bill is demurrable. *Collins v. Sutton*, 94 Va. 127, 26 S. E. Rep. 415; *Childress v. Morris*, 23 Gratt. 802; *Kane v. Va., etc., Co.*, 97 Va. 329, 33 S. E. Rep. 627; *Armstrong v. Huntons*, 1 Rob. 323; *Hall v. Smith*, 25 Gratt. 76; *Jones v. Bradshaw*, 16 Gratt. 360; *Hale v. Clarkson*, 23 Gratt. 42; *Hardin v. Hardin*, 2 Leigh 572.

Thus in a suit involving the right to slaves, a court of chancery has jurisdiction of the case, if the bill charges the necessity of a discovery, and of the design to remove the slaves out of reach; and chiefly because they were a trust subject, represented by no trustee who could sue at law. *Rankin v. Bradford*, 1 Leigh 163.

Same—Inability to Prove Desired Facts by Testimony of Defendants.—To give a court of equity jurisdiction on the ground of discovery, it is not sufficient to charge that certain facts are known to the defend-

ants and ought to be disclosed by them; but it should be averred that the plaintiff is unable to prove such facts by their testimony. *Duvals v. Ross*, 2 Munf. 290; *Bass v. Bass*, 4 H. & M. 478.

Same—In Pure Bill of Discovery—In Other Cases.—A pure bill of discovery need not state that the discovery is indispensable to sustain the proceeding in another court, nor that there is no other evidence; but a bill for discovery and relief on a legal demand, must state that discovery is indispensable for want of other evidence. If it appears that the plaintiff has other adequate evidence, the bill will be dismissed. *Thompson v. Whitaker*, 41 W. Va. 574, 23 S. E. Rep. 795.

Bill Dismissed if Discovery Not Necessary.—If a call for a discovery be the only ground of equity jurisdiction, and the evidence shows that the plaintiff knew these facts at the time or had the means of knowing, the bill should be dismissed with costs. *Hale v. Clarkson*, 23 Gratt. 42; *Hardin v. Hardin*, 2 Leigh 572; *Harr v. Shaffer*, 45 W. Va. 709, 31 S. E. Rep. 905.

And where a bill was filed in chancery by the plaintiff against the executors of his deceased father and a purchaser under them, claiming slaves under a parol gift of the father in his lifetime accompanied by delivery of possession, and praying discovery of the increase of the slaves, of which the bill shows that the plaintiff was not ignorant, and which asked a decree for the slaves, and their increase before suit was brought, as well as *pendente lite*, and an account of profits, it was held that the court had no jurisdiction to entertain such a bill. *Hardin v. Hardin*, 2 Leigh 572.

So where the ground of equitable jurisdiction as alleged in the bill was want of a discovery, and it appears that some material facts are true, but that others were mere pretences, the bill will be dismissed for want of jurisdiction at the hearing. *Jones v. Bradshaw*, 16 Gratt. 355.

In Connection with Accounts.—Courts of equity have jurisdiction of matters of account, where the accounts are all on one side, if a discovery is sought that is necessary to the relief. *Yates v. Stuart*, 39 W. Va. 124, 19 S. E. Rep. 423.

Same—Principal and Agent.—So a bill in equity will lie, by an administrator of a principal against the general agent of his intestate for a discovery and an account of the transactions of the latter with his principal. *Simmons v. Simmons*, 33 Gratt. 451.

Same—Increase of Slaves.—And a court of equity has jurisdiction for the recovery of slaves, wherever a discovery is sought of the increase of the female slaves, after a considerable lapse of time, and an account of hires and profits of a stock of slaves, where some of them may have been young and chargeable. *Gregory v. Marks*, 1 Rand. 355.

Same—Whether Bond Was Paid and Where.—A father-in-law having promised to assist his son-in-law in paying for a tract of land by letting him have the amount of a certain bond when collected, it was proper for the latter to sue in chancery to discover whether and at what time the money due on the bond was collected. *Scott v. Osborne*, 2 Munf. 413.

In Relation to Lost Instrument.—Courts of equity have jurisdiction where a lost instrument is set up, and the discovery sought in relation thereto is material to the relief. *Yates v. Stuart*, 39 W. Va. 124, 19 S. E. Rep. 423.

Adverse Parties Witnesses—Jurisdiction Not Ousted.—The fact that a statute has made adversary parties

witnesses for each other at law, does not oust equity of jurisdiction for a discovery. *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 28 S. E. Rep. 795.

Voluntary Association—Sued by One Member for All.—A member of a voluntary association may sue in equity for the benefit of himself and all others. The court has jurisdiction on the ground either of discovery, or from the difficulty of proceeding at law. *Coffman v. Sangston*, 21 Gratt. 263; *Perkins v. Seigfried*, 97 Va. 449, 34 S. E. Rep. 64; *Sangston v. Gordon*, 22 Gratt. 764; *Berkshire v. Evans*, 4 Leigh 223.

5. PENALTIES AND FORFEITURES.

General Principles.—A court of equity will neither enforce a penalty or forfeiture, nor permit them to be enforced in a court of law. *Ewing v. Litchfield*, 91 Va. 575, 22 S. E. Rep. 362. But it will always relieve against a penalty where compensation can be made. *Hackett v. Alcock*, 1 Call 533.

So where the effect of a bill is to enforce payment of liquidated damages, or a penalty, it is demurrable. *Ewing v. Litchfield*, 91 Va. 575, 22 S. E. Rep. 362.

Thus where a contract is founded on an act forbidden by statute under penalty, a court of equity will interfere to prohibit the effect of it. *Wilson v. Spencer*, 1 Rand. 76, 10 Am. Dec. 491.

Execution of Bond in Larger Sum Than Is Owed.—Where a person owing a debt is induced to execute a bond for a larger sum, the excess being required as a penalty to secure punctual payment, equity will relieve against the penalty. *Dawson v. Winslow*, Wythe 106.

Time Essence of Contract—Breach of Condition a Forfeiture.—But where time is of the essence of a contract with conditions, a breach of which would work an absolute forfeiture, equity will not relieve against it. *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. Rep. 544.

Performance of Condition in Bond Prevented by Other Party—Penalty Relieved against.—Where the obligee of a bond has been prevented from performing an alternative by the interposition of the other party, he is entitled to relief against the penalty of the bond, not only by the general principles of equity to relieve against penalties on making compensation, but because of the circumstances of this particular case. *Dawson v. Winslow*, Wythe 106.

Accrual of Forfeiture—Sequestration of Rents and Profits of Mortgaged Property.—A court of equity may sequester the rents and profits of mortgaged or encumbered property where a forfeiture has accrued, and such rents and profits are necessary to discharge the encumbrances. *Clarke v. Curtis*, 1 Gratt. 289.

Joint Purchase of Land—Forfeiture of Rights on Failure of Either to Pay Share of Purchase Price.—Two parties purchased a tract of land on credit, and it is agreed that if one fails to pay all or any portion of his share of the purchase price, so that the other has to pay it, then he shall have the whole land and repay the first one any part that he has paid. This is a forfeiture against which a court of equity will relieve. *Asher v. Pendleton*, 6 Gratt. 628.

Forfeiture in Lease—Indulgence by Lessor.—Where there is a clause of forfeiture in a lease, but the lessor waives his rights and indulges the lessee, there is no forfeiture which equity would recognize; but if there was technically a forfeiture at law, equity would relieve against it. *Hukill v. Myers*, 36 W. Va. 639, 15 S. E. Rep. 151.

6. FRAUD.—See monographic note on "Fraudulent

and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348; also, subhead 9, "Illegal Contracts and Transactions," *infra*.

General Principles.—The first province of a court of equity is to enforce truth and fairness in the dealings of men, and it is universally conceded to be a ground of equitable jurisdiction to prevent and correct fraud. *Wampler v. Wampler*, 30 Gratt. 454; *Watkins v. Wortman*, 19 W. Va. 78; *Crislip v. Cain*, 19 W. Va. 438; *White v. Jones*, 4 Call 253, 2 Am. Dec. 564; *Carey v. Coffee-Stemming Mach. Co.*, 20 S. E. Rep. 778, 1 Va. Dec. 863. But the plaintiff must not be guilty of fraud in the transaction. *Maurice v. Devol*, 23 W. Va. 247. And if there is no fraud proved on the part of the defendant, the bill will be dismissed. *Jones v. White*, Wythe 111.

No Relief to Plaintiff if Party to Fraud.—It is a rule in equity never to give relief to parties, when in so doing it will relieve them from the consequences of their own iniquity. *Smith v. Chilton*, 84 Va. 840, 6 S. E. Rep. 142; *Helsley v. Fultz*, 76 Va. 671; *Barnett v. Barnett*, 83 Va. 504, 2 S. E. Rep. 733.

Fraud More Properly Investigated in Equity.—In an action for the recovery of mortgaged slaves, where fraud was charged, it was proper under the circumstances to bring the parties before a court of equity, where the whole subject of the fraud could be investigated, rather than proceed at law, and attempt to establish it before a jury. *Henley v. Perkins*, 6 Gratt. 615.

Limitation of Jurisdiction—Adequate Remedy at Law.—While it is true that one of the elementary grounds of jurisdiction of equity courts is to give relief in cases of fraud, yet this jurisdiction does not extend to all possible cases in which the commission of fraud may be involved. Thus where the party can have as effectual and complete a remedy at law as in equity, and that remedy is direct, certain and adequate, there can be no ground to resort to equity. *Green v. Spaulding*, 76 Va. 411; *Buck v. Ward*, 97 Va. 209, 33 S. E. Rep. 513; *Kane v. Virginia, etc., Co.*, 97 Va. 329, 33 S. E. Rep. 627.

Same—Defendant Must Be Guilty of Deception.—Where the debtor induced his surety to go upon a forthcoming bond by representing in the presence of the sheriff that the amount of the debt is one-seventh of the real amount, which the sheriff does not contradict, the surety is not entitled to relief in equity on the ground of deception, as the creditor was no party to the fraud, and the sheriff who was, was not the agent of the creditor in taking the bond. *Gordon v. Jeffrey*, 2 Leigh 410.

A court of equity cannot grant relief from a decree by default obtained upon a false return on the process by the sheriff, unless such false return was procured or induced by the plaintiff, or he can in some way be connected with the deception. *Preston v. Kindrick*, 94 Va. 760, 27 S. E. Rep. 563.

Jurisdiction Sustained Wherever Person Found.—In cases of fraud, trusts, or of contract, the jurisdiction of a court of equity is sustainable wherever the person can be found, although lands not within the jurisdiction of the court may be affected by its decree. *Davis v. Morriss*, 76 Va. 21.

Defence at Law Prevented by Fraud.—Where the plaintiff in an action at law prevents the defendant from producing an adequate defence by his fraudulent representations, he ought to be relieved in equity. *Poindexter v. Waddy*, 6 Munf. 418, 8 Am. Dec. 749.

Receipt for Money and Release of Deed Obtained by Fraud.—Where a receipt was obtained for money

secured by a deed of trust, and a release of the deed was also gotten, both of which were without consideration and a fraud on the beneficiaries, a court of equity has jurisdiction to annul and set aside the receipt and release, and having taken jurisdiction, it will grant full relief in the case. *Fleshman v. Hoylman*, 27 W. Va. 728.

Fraudulent Satisfaction of Judgment.—An indorsement of satisfaction on a judgment by attorneys who obtained it, may be cancelled in a suit by them on the ground that such satisfaction was procured by the fraud of the debtor, or by mistake. *Higginbotham v. May*, 90 Va. 288, 17 S. E. Rep. 941.

Fraudulent Changing Order of Indorsers.—A third endorser endorses a note on the faith of the solvency of a prior endorser; on a renewal of the note, the order of endorsements was changed without the consent of the former, who had left his blank endorsement with the makers for convenience in renewing. Equity will relieve him against the endorser who should have proceeded him. *Slagle v. Rust*, 4 Gratt. 274.

Fraudulent Possession and Destruction of Bonds and Notes.—And a bill which alleges that the defendants had obtained possession of certain bonds or promissory notes from the hands of the agent of the plaintiff by means of false and fraudulent representations with the design to cheat and defraud the plaintiff, and had destroyed them, shows sufficient grounds on its face for the jurisdiction of chancery for fraud. *Campbell v. Lynch*, 6 W. Va. 17.

Bill Filed to Determine Whether Bond Fraudulent or Not.—Under circumstances inducing suspicion that a bond was counterfeited or fraudulent, upon a bill filed by an executor, relief was given in equity by directing an issue to try whether the bond in question was the deed of the testator or not, and if so, what was the consideration; and this notwithstanding the trial at law was upon the plea of payment put in by counsel, and a new trial moved by the complainant was refused, it being alleged in the bill that the complainant's suspicions of fraud were for the first time excited on the trial at law, and then he was convinced that the signature of his testator was not genuine, which conviction was strengthened by other circumstances, some known before the trial and some afterwards. *West v. Logwood*, 6 Munf. 491.

Sale of Land—Vendor Entitled to Relief.—A vendor of land under some circumstances is entitled to relief on account of a fraudulent concealment of facts by the vendee. *Armstead v. Hundley*, 7 Gratt. 52.

Same—Defective Title—When Vendee Relieved.—Where a vendee is in possession of land under a conveyance with general warranty, and the title has not been questioned by suit prosecuted or threatened, equity will not relieve the vendee from payment of purchase money, unless he can show defect in title which the vendor fraudulently misrepresented or concealed. *Beale v. Seiveley*, 8 Leigh 658.

Same—Deficiency in Amount—Abatement of Price.—Equity has jurisdiction of an action by the purchaser of land, based on fraud, to recover back part of the purchase money by reason of the tract containing less land than it was sold for. *Boschen v. Jurgens*, 92 Va. 756, 24 S. E. Rep. 390; *Crislip v. Cain*, 19 W. Va. 488.

Grant of Lands—Claimant of Prior Equity—When Relieved.—After a grant is issued, any one claiming a prior equity against the grantee can in no case have relief in equity unless upon the ground of

actual fraud in the acquisition of the legal title; or unless the party was prevented from prosecuting a caveat by fraud, accident or mistake. *McClung v. Hughes*, 5 Rand. 458.

Same—Junior Grant Procured by Fraud—Repeal.—It was held in *Randolph v. Adams*, 2 W. Va. 519 (1868), that under § 64, ch. 112 of the Va. Code, that where a bill charges that a junior grant was procured by fraud and stratagem, it is sufficient to give the court jurisdiction to repeal, although the plaintiff has the elder legal title and the possession has always been with it.

Equity Takes Jurisdiction When Party Prevented by Fraud from Prosecuting Caveat.—Although a party may be let into a court of equity, on grounds which he could not have used on the trial of a caveat, and which in fact make another case, or upon a case suggesting and proving that he was prevented by fraud or accident from prosecuting his caveat, he is not to be sustained in a court of equity on such grounds as were or might have been brought forward on the trial of the caveat. *Noland v. Cromwell*, 4 Munf. 155.

No Reformation in Absence of Fraud or Misrepresentation.—If it has not been claimed that there was any fraud or misrepresentation in a transaction, it is not a case in which a court of equity will correct the paper, so as to conform it to an alleged agreement between the parties. *Martin v. Lewis*, 30 Gratt. 672.

For False Representation of Material Fact.—A false representation of a material fact, constituting an inducement to a contract, on which a purchaser has a right to rely, is a ground for a rescission in equity, although the party making the representation was ignorant whether it was true or false; the real inquiry is whether the purchaser believed it true, and was misled by it. *Lowe v. Trundle*, 78 Va. 65; *Grim v. Byrd*, 32 Gratt. 300; *Crump v. U. S. Min. Co.*, 7 Gratt. 352; *Linhart v. Foreman*, 77 Va. 540.

7. ACCIDENT, MISTAKE AND SURPRISE.—See monographic *note* on "Deeds" appended to *Flott v. Com.*, 12 Gratt. 564; also, subhead 6, "Fraud," *supra*.

Clear Proof of Mistake Necessary.—A court of equity will relieve against a mutual mistake of law as well as of fact when such mistake is established by clear and convincing proof, and the rights of innocent third parties do not interfere. *Biggs v. Bailey* (W. Va.), 38 S. E. Rep. 499; *Board of Trustees v. Blair*, 45 W. Va. 812, 32 S. E. Rep. 203; *Shirley v. Rice*, 79 Va. 442; *Mauzy v. Sellars*, 26 Gratt. 641; *Watson v. Hoy*, 28 Gratt. 698; *Yost v. Mallicote*, 77 Va. 610; *Chapman v. Persinger*, 87 Va. 581, 18 S. E. Rep. 549; *Major v. Ficklin*, 85 Va. 732, 8 S. E. Rep. 715; *Shen., etc., R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. Rep. 239; *Allen v. Yeater*, 17 W. Va. 128; *Weidebusch v. Hartenstein*, 12 W. Va. 760.

Mistakes in Legal Proceedings or Elsewhere.—It is within the jurisdiction of chancery courts to correct mistakes, whether they occur in the course of legal proceedings or elsewhere. *Fore v. Foster*, 86 Va. 104, 9 S. E. Rep. 497.

No Relief to Mistake of Law.—A court of equity will afford no relief to a mistake which was a mistake of law. *Zollman v. Moore*, 21 Gratt. 313, and *foot-note*.

Reformation and Cancellation of Deeds, etc., for Mistake.—Equity takes jurisdiction to reform deeds, set aside compromises, and rescind contracts, on account of mutual mistake. *Snyder v. Grandstaff*, 96 Va. 473, 31 S. E. Rep. 647; *Crislip v. Cain*, 19 W. Va.

438; *Epes v. Williams*, 89 Va. 794, 17 S. E. Rep. 235; *Fudge v. Payne*, 86 Va. 303, 10 S. E. Rep. 7.

Mistake Must Be Distinct from Sense of Instrument.

—Equity will not relieve against a mistake in a written instrument unless the mistake be perfectly distinct from the sense of the instrument. *Jarrell v. Jarrell*, 27 W. Va. 743.

Mutual Mistake by Grantor and Grantee.—A mutual mistake of fact of a grantor and of a grantee, whether it was a mistake as to the factors entering into the calculation, or as to the mode, process or result thereof, is one of the original grounds of equity jurisdiction to so amend as to do justice to all concerned, and to place them as nearly as practicable *in statu quo*. *Massie v. Heiskell*, 80 Va. 789.

Failure to Defend at Law Result of Accident, etc.—Relief will always be granted in equity when the failure to defend at law was because of the acts of the opposite party, or was the result of fraud, accident, surprise, or some other adventitious circumstance beyond the control of the party complaining. *Dey v. Martin*, 78 Va. 1; *Holland v. Trotter*, 22 Gratt. 141.

Error of Law by Arbitrators.—A court of equity alone has jurisdiction to correct an error of law made by arbitrators with respect to the time when the statute of limitations will cease to run; and if the executor declines to oppose the confirmation of their report, the next of kin may maintain the suit. *Moore v. Luckess*, 23 Gratt. 160.

Decree for Sale of Land Due to Mistake.—Equity will set aside and annul or correct a decree for the sale of land, which is the result of a mistake in the description of the land. *Baxter v. Tanner*, 35 W. Va. 60, 12 S. E. Rep. 1094.

Mistake in Estimated Quantity of Land Sold.—The principles upon which equity gives relief in cases of excess and deficiency in the estimated quantity upon a sale of lands, is that there is a mistake. *Nichols v. Cooper*, 2 W. Va. 847.

Where parties contract for the payment of a gross sum for a contract of land upon an estimate of a given quantity, which influences the price, if any mistake occurs, which if understood at the time would have prevented the contract, or have varied its terms, equity will give the required relief. *Yost v. Mallicote*, 77 Va. 610.

Accidental Mistake in Printing Record in Chancery Cause.—A will is construed by the court of appeals, but by some accidental mistake in printing the record a provision therein is changed. A court of equity has jurisdiction on the ground of accident, to correct the error of the court of appeals, and establish the true will. *Byrne v. Edmonds*, 23 Gratt. 200, and *foot-note*.

Judicial Sale Set Aside for Mistake, Surprise, etc.—It may be safely laid down as a general rule that after a judicial sale has been absolutely confirmed by the court which orders it, it will not be set aside except for fraud, mistake, surprise, or some other cause for which equity would give relief if the sale has been made by the parties in interest instead of by the court. *Va., etc., Ins. Co. v. Cottrell*, 85 Va. 857, 9 S. E. Rep. 182; *Berlin v. Melhorn*, 75 Va. 639.

Will Executed by Mistake.—Equity has jurisdiction of an issue of *devisavit vel non* to set aside a will on the ground that it was executed by mistake. *Couch v. Eastham*, 27 W. Va. 796. For a full discussion of this issue, see *Dower v. Seeds*, 28 W. Va. 113.

Awards Set Aside for Accident, Mistake, etc.—Courts of equity have always had and exercised jurisdiction to interfere to set aside awards for fraud,

accident, partiality, misconduct, or mistake of arbitrators. *Wheeling Gas Co. v. City of Wheeling*, 5 W. Va. 448.

Decree by Surprise.—A bill of injunction will lie to restrain proceedings on a decree obtained by surprise. *Callaway v. Alexander*, 8 Leigh 114, 31 Am. Dec. 640.

Penal Obligation Given by Mistake for Promissory Note.—A firm borrows a sum of money, and by mistake the partner executing the transaction makes a penal obligation instead of a promissory note. Although at law the remedy would only be against the partner who executed it, yet equity has jurisdiction to correct the mistake, and hold all the partners bound as if there was no seal. *Galt v. Calland*, 7 Leigh 594.

Mistake of Scrivener.—A mistake of the scrivener in drawing a deed, whether of law or fact, will be corrected by a court of equity, even against *bona fide* creditors of the grantor. *Alexander v. Newton*, 2 Gratt. 266. See *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. Rep. 89; *Weidebusch v. Hartenstein*, 13 W. Va. 700.

Cause Fully Heard in Law Court—Where Interference by Equity.—Where a cause has been once fully heard and decided in a court of common law, having competent jurisdiction of the case, a court of equity ought not to interfere unless fraud or surprise be suggested and proved, or some material adventitious circumstance has arisen, which could not have been foreseen, or guarded against. *Fenwick v. M'Murdo*, 3 Munf. 244.

Payment of Money by Mistake.—A court of equity has jurisdiction to decree the repayment of money paid by mistake, notwithstanding the plaintiff's remedy by assumpsit for money had and received. *Wilkins v. Woodfin*, 5 Munf. 183.

Evidence of Juror in Jury Room—Mistake or Surprise.—An executor being sued on a bond, was advised by his counsel to rely upon presumption of payment, and he neglected to use additional testimony believing such defence sufficient, but in consequence of evidence given by one of the jurors in the jury room, a verdict was found against him. He moved for a new trial but it was denied him. He afterwards obtained a new trial by applying to a court of equity, on the ground of mistake or accident. *Price v. Fuqua*, 4 Munf. 63.

Relief by Surety from Raised Bond—Surprise.—In giving notice on a forthcoming bond, the sheriff acts as agent of the creditor, who is not entitled to the benefit of any fraud committed by the sheriff in relation thereto; and where a surety was induced by the fraud of the principal to sign a bond, the amount of which was afterwards raised to a greater sum than the sheriff stated would be the amount, the surety was entitled to relief in equity on the ground of surprise, but only on terms that he should pay the amount for which he really intended to bind himself as surety. *Gordon v. Jeffery*, 2 Leigh 410.

Mistake in Title—Where No Agreement for Warranty of Title.—A mistake in respect to the title to land, is no ground for equitable relief to a purchaser, where he purchases without any agreement for a conveyance with warranty of title. *Sutton v. Sutton*, 7 Gratt. 234, 56 Am. Dec. 109.

8. REFORMATION AND CANCELLATION.—See monographic *note* on "Deeds" appended to *Flott v. Com.*, 12 Gratt. 564; also, subhead 6, "Fraud," *supra*.

General Jurisdiction.—Equity has jurisdiction to reform written instruments in two well-defined

classes or cases only: (1) Where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake; and (2) where there has been a mistake of one party accompanied by fraud or inequitable conduct of the remaining parties. *Shen., etc., R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. Rep. 239; *Donaldson v. Levine*, 93 Va. 472, 25 S. E. Rep. 541; *Meade v. Norfolk, etc., R. Co.*, 89 Va. 296, 15 S. E. Rep. 497.

Mistake of Draftsman.—There is no question of the power of a court of equity to correct and reform a contract or a written instrument between living parties, and for a valuable consideration, for the proved or admitted mistake of the draftsman. *White v. Campbell*, 80 Va. 180.

Defective Antenuptial Agreement—Fraud or Mistake.—An antenuptial agreement between a husband and his wife for the purpose of settling upon the wife's sister a sum of money out of her personal estate, was drawn by the husband, and afterwards turns out not to amount to a gift nor intercept the marital rights. Whether this defect proceeded from fraud or mistake equity will correct the instrument. *Brown v. Bonner*, 8 Leigh 1.

Undue Influence by Father on Daughter.—On the ground of undue influence, a court of equity will grant relief to a daughter, by vacating and setting aside a deed to her father, which was without consideration, and was obtained in a situation of a sudden surprise, without the presence or advice of friend or counsel; when she was rendered wholly unable to exercise a consenting mind, by the undue influence of her father and of his attorney and agent, who pressed her with importunity and strong persuasion, and assurances that she would be otherwise provided for and would not lose anything by it, and that it would be best for her to make the property back to her father as it was threatened to be burned; under the compulsion of which she hastily and inconsiderately executed the deed, to which she had been already most powerfully moved and induced by the distress and suffering of her aged father, occasioned by the reproaches and remonstrances and interference of his son-in-law and his other daughter. *Davis v. Strange*, 86 Va. 798, 11 S. E. Rep. 406.

9. ILLEGAL CONTRACTS AND TRANSACTIONS.—See monographic *note* on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348; also, subhead 6, "Fraud," *supra*.

No Relief to Parties in Pari Delicto.—Where the parties to a transaction are *in pari delicto*, a court of equity will leave them where it finds them, and will not grant relief at the suit of one against the other. *George v. Curtis*, 45 W. Va. 1, 30 S. E. Rep. 69; *Jeffries v. Southwest Imp. Co.*, 88 Va. 802, 14 S. E. Rep. 661.

Same—Compounding a Felony.—Equity will not entertain a bill to cancel a note and mortgage given under an agreement to compound a felony or stifle its prosecution, as the parties are *in pari delicto*. *Rock v. Mathews*, 35 W. Va. 531, 14 S. E. Rep. 137, 14 L. R. A. 508.

Same—Aiding Felon to Escape.—It is well settled that where a contract grows immediately out of, and is connected with an illegal or immoral act, a court of equity will not render any aid to enforce it. So when a contract is made for the sale of real estate at a very low price, to enable the seller to leave the state to avoid a prosecution for a felony, no aid will be given in equity to enforce this con-

tract on behalf of the purchaser. *Dodson v. Swan*, 2 W. Va. 511; *Wilson v. Spencer*, 1 Rand. 76.

Same—Contract Payable in Confederate Money.—It was held in *Brown v. Wylie*, 2 W. Va. 502, 98 Am. Dec. 781, that a court of equity would not lend its aid to enforce the payment of the purchase money for land, which by the contract of sale was payable in Confederate money; that it would not decree a sale of the land for the purpose nor order the contract canceled, but would leave the parties *in pari delicto*.

Same—Bond a Blind to Induce Innocent Parties to Buy Patent.—If there was an understanding between the parties that the bond of one to the other was to have no validity, but was to be used as a blind by which to induce others to buy patent rights, then palpable fraud was attempted to be perpetrated upon innocent strangers, which cannot be upheld in a court of equity; and the parties being *in pari delicto*, the complainants are not entitled to relief, for in such case *potior est conditio defendentis*. *Barnett v. Barnett*, 83 Va. 504, 2 S. E. Rep. 733.

Same—Contract in Fraud of Creditors.—It is a well-established rule of courts of equity not to assist one wrongdoer against another. This rule is more frequently invoked in cases of contracts entered into in fraud of the rights of creditors and other persons. It will not compel its execution or decree its cancellation while the agreement is executory, and it will not set it aside and restore the property fraudulently conveyed after the agreement has been executed. *Helsley v. Fultz*, 76 Va. 671.

Same—Grantor in Fraudulent Conveyance Entitled to No Relief.—Where property is fraudulently conveyed for the purpose of hindering and delaying creditors, except under very peculiar circumstances, the grantor cannot maintain a bill in equity to rescind the contract. Both grantor and grantee being generally *in pari delicto*, neither is entitled to come into equity. *James v. Bird*, 8 Leigh 510, 31 Am. Dec. 668.

Same—Money Paid under Contract Cannot Be Recovered.—Where a *plaintiff* in equity sues to take *advantage* of a contract found to be fraudulent, he is not to be sustained even to recover back money paid on such contract, but ought to be left to his remedy at law. *Sims v. Lewis*, 5 Munf. 29.

Fraudulent Conveyance—Suit by Creditor—Former and Later Doctrines.—A creditor at large, not having obtained judgment or decree against his debtor, cannot resort to equity to set aside a fraudulent conveyance of his debtor, though interference of the court be also prayed to prevent a sale or removal of the subject, and though the subject be equitable estate not liable to execution. *Tate v. Liggat*, 2 Leigh 84; *Kelso v. Blackburn*, 3 Leigh 200.

In the later case of *Tuft v. Pickering*, 28 W. Va. 330 (1886), citing *Watkins v. Wortman*, 19 W. Va. 78, it was decided that by the provisions of sec. 2 of ch. 133 of the Code it was expressly provided that a creditor shall not be required to obtain a judgment at law before proceeding in equity to set aside a fraudulent conveyance, but that he might proceed in the first instance on a mere legal demand and obtain relief by setting it aside and subjecting the property conveyed to the satisfaction of his debt.

Same—Injunction—Lien Ascertained and Enforced.—A court of equity has jurisdiction by injunction to restrain a defendant from disposing of property in fraud of creditors, and to ascertain and enforce the

lien of the complainant upon the property. *Morrison v. Wilkinson*, 1 Va. Dec. 772, 17 S. E. Rep. 787.

Same—Grantor and Grantee Out of State.—A creditor at large may maintain a suit in equity to set aside as fraudulent a deed conveying real estate made by the debtor, where both the debtor and his grantee live and are out of the commonwealth. *Peay v. Morrison*, 10 Gratt. 149.

Same—After Elegit Levied on Land.—An elegit is levied on the land of the debtor but the moiety is not set out by metes and bounds, and possession is not delivered to the creditor. The debtor makes a conveyance of the land to third persons and afterwards the elegit and return are quashed. The creditor files a bill impeaching the conveyance as fraudulent and it is held that equity has jurisdiction to entertain the suit. *Clairborne v. Gross*, 7 Leigh 331.

Same—No Attachment in Equity on Sole Ground of Nonresident—Must Be Proof of Intent to Make Fraudulent Conveyance.—Section 2964 of the Va. Code provides that a court of equity has no jurisdiction to enforce by attachment a claim to a debt not payable, where the only ground is that the defendant is a foreign corporation and has estate or debts owing to it within the county or corporation where the suit is brought. It is essential to its jurisdiction that there be proof of an intent to convey its property in order to hinder, delay or defraud the plaintiff. *Wingo v. Purdy*, 87 Va. 472, 12 S. E. Rep. 970.

Same—Conversion of Property by Defendant in Possession.—A suit in chancery properly lies against a defendant, who claiming title under a deed alleged to be fraudulent, has taken possession of and converted to his own use sundry articles; the plaintiff praying the court to set aside such fraudulent deed, and compel the defendant to render just account of the property so wrongfully taken and to pay the value thereof to the plaintiff. *Cocke v. Harrison*, 6 Munf. 184.

Deed of Trust to Secure Creditors—Fraud by Two on Others.—A deed of trust to secure creditors requires them to signify their acceptance by signing it within thirty days, and to release the debtor. The creditors being dissatisfied with its provisions agree between themselves and the debtor that they will not sign it, but two of them nevertheless sign it within the thirty days with the avowed purpose that it is for the benefit of all. Afterwards one of them comes into equity to enforce the deed for the benefit of himself and the other signer. A court of equity will not entertain his suit. *Phippen v. Durham*, 8 Gratt. 457.

Gambling Transactions—Partnerships Will Not Be Settled.—A court of equity will not lend its aid for the settlement and adjustment of a gambling partnership. Nor will it give relief of any kind to one partner against the other founded upon transactions arising out of such partnerships. *Watson v. Fletcher*, 7 Gratt. 1.

Same—Bond for Money Lost.—Where a bond was given to secure money for the purpose of gambling, and was therefore void under the statute against gaming, equity will not grant relief in a suit brought on such a bond. *Pope v. Towles*, 3 H. & M. 47.

Contract by Slave.—Although a contract has been fully performed on the part of a slave between him and his master, it is not competent for the court of chancery to enforce it. *Stevenson v. Singleton*, 1 Leigh 72.

Fraudulent Release of Mortgage—Restoration of Lien and Sale.—A release in equity procured by fraud

and misrepresentation will be vacated in equity, and the mortgage lien restored, and the property will be decreed and sold for the payment of the mortgagee. *Poore v. Price*, 5 Leigh 52, 27 Am. Dec. 582.

Fraudulent Acknowledgment of Gift.—A bill for relief against a writing purporting an acknowledgment of a gift of property by the complainant to the defendant, on the ground of its having been obtained by fraud, presented a proper case for equitable jurisdiction, though a suit at law, founded upon such writing, might be defeated without coming into equity. *Johnson v. Hendley*, 5 Munf. 219.

Illegal Contract of Board of Education.—A court of equity has jurisdiction of a suit by taxpayers of a school district to set aside a contract made by the board of education when the same is illegal, and creates a debt to be paid out of the school money of any subsequent year; there being no other adequate remedy. *Honaker v. Board of Education*, 43 W. Va. 170, 24 S. E. Rep. 544.

Illegal Tax Deed Set Aside.—A court of equity has jurisdiction to set aside an illegal tax deed. *Simpson v. Edmiston*, 23 W. Va. 675; *Forqueran v. Donnelly*, 7 W. Va. 114; *Jones v. Dils*, 18 W. Va. 759; *Orr v. Wiley*, 19 W. Va. 150.

Collusive Confession of Judgment.—Land is conveyed with general warranty of title, and a subsequent grantee is evicted. It is agreed between the latter and his grantor that the grantee shall bring an action at law for the benefit of both; but the grantee accepts a collusive confession of judgment for the amount of his loss. The grantor is entitled to relief in equity against the first grantor for the balance due from him on his covenant. *Jackson v. Turner*, 5 Leigh 119. See generally, monographic note on "Judgments by Confession" appended to *Richardson v. Jones*, 12 Gratt. 53.

Wrongful Conveyance at Tax Sale.—Where the land of the plaintiff has been wrongfully conveyed to a purchaser at a tax sale, a court of equity has jurisdiction at the suit of the owner in possession to set aside the deed which has been recorded. *Carroll v. Brown*, 28 Gratt. 791.

Illegal Act of Officer—Injunctions.—Equity has jurisdiction to enjoin illegal acts of an officer attempted to be done *colore officii*, and to enjoin actions under an invalid requirement. *Blanton v. Southern, etc., Co.*, 77 Va. 335; *Goddin v. Crump*, 8 Leigh 120; *Bull v. Read*, 13 Gratt. 78; *Eyre v. Jacob*, 14 Gratt. 423; *Redd v. Supervisors*, 31 Gratt. 697.

Unauthorized Tax—Collection by Municipal Corporation Enjoined.—The jurisdiction of a court of equity to restrain a municipal corporation and its officers from levying and collecting an unauthorized tax, or from creating an unauthorized debt, upon the application of one or more taxpayers of the corporation, who sue for the benefit of themselves, and all others similarly situated, is too well settled to admit of dispute. *Lynchburg, etc., R. Co. v. Dameron*, 95 Va. 545, 28 S. E. Rep. 951; *Bull v. Read*, 13 Gratt. 78; *Eyre v. Jacob*, 14 Gratt. 422; *Read v. Supervisors*, 31 Gratt. 695; *Roper v. McWhorter*, 77 Va. 214.

In Violation of Law for Public Good—Prohibited.—A court of equity, as well as a court of law, will interfere to prohibit the effect of contracts, made in violation of laws enacted for the public good. *Wilson v. Spencer*, 1 Rand. 76.

10. TRUSTS AND TRUST PROPERTY.

Case Involving Trust—Defence at Law.—In a case involving trust and confidence, in which it appears reasonable to allow the complainant the benefit of

the defendant's oath, relief may be given in equity, although the party neglected to make the proper defence at law. *Spencer v. Wilson*, 4 Munf. 180.

Enforcing Trust.—A court of equity will take jurisdiction of a trust, which is created by a wife joining her husband in the conveyance of her land on condition that the proceeds be applied to the payment of a debt binding her children's land, and will enforce it against the husband, although the bonds for said proceeds were made payable to him. *Barnes v. Trafton*, 80 Va. 524.

Charitable Bequests—General Jurisdiction.—The general jurisdiction of chancery embraces all questions arising upon legal bequests for charitable uses or otherwise, and if any error is committed in such case, it is an error in the exercise of jurisdiction, not in the assumption of an unauthorized jurisdiction. *Elcan v. Lancasterian School*, 2 P. & H. 53.

The original doctrine in Virginia in regard to the jurisdiction of chancery courts over charitable bequests, as laid down in *Gallego v. Attorney General*, 3 Leigh 450, 24 Am. Dec. 650, which was apparently overruled by some dicta in the cases of *P. Episcopal Soc. v. Churchman*, 80 Va. 718, and *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. Rep. 818, has been reaffirmed in the recent case of *Field v. Van Wyck*, 94 Va. 557, 27 S. E. Rep. 446. According to the present doctrine, charitable bequests which were too vague to be claimed by those for whom the beneficial interest was intended, could not independent of the statute 48 Elizabeth, be sustained by courts of equity in England; and that statute if it ever existed in Virginia was repealed in 1792, with the result that charitable bequests cannot be established by courts of equity in this state, except so far as they are made certain by statutory provisions, which are very limited. With the exception of the two cases mentioned above, the early doctrine first established in the case of *Attorney General and Gallego*, decided in 1832, has been followed by a long and unbroken line of decisions. See *Seaburn v. Seaburn*, 15 Gratt. 423; *Brooke v. Shacklett*, 18 Gratt. 301; *Kelly v. Love*, 20 Gratt. 124; *Janey v. Latane*, 4 Leigh 327; *Literary Fund v. Dawson*, 1 Rob. 403; *Bible Soc. v. Pendleton*, 7 W. Va. 79; *Knox v. Knox*, 9 W. Va. 124; *Carskadon v. Torreyson*, 17 W. Va. 43; *Brown v. Caldwell*, 23 W. Va. 187; *Wilson v. Perry*, 29 W. Va. 160, 1 S. E. Rep. 302.

The doctrine of *P. Episcopal Soc. v. Churchman*, 80 Va. 718, and *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. Rep. 818, which cases followed the case of *Vidal v. Girard*, 2 How. (U. S.) 137, is that the jurisdiction of chancery to enforce charitable bequests did not depend upon the statute of 48 Elizabeth, but that those courts had that jurisdiction at common law; that that statute was local to England, and was never in force in Virginia, and that if its operation was in some respects general, it was not repealed by the act of 1792, but was preserved by the saving clause of that act in those respects. And in any event that the act of 1830, validated and made enforceable gifts for such purposes, subject to certain restrictions. See monographic note on "Charities" appended to *Kelly v. Love*, 20 Gratt. 124.

Legal Claim against Property in Trustees' Name.—A court of equity will not under its general powers of administering trusts, enforce a mere legal demand for work and labor done on property standing in the name of the trustees. *Clark v. Oliver*, 91 Va. 421, 22 S. E. Rep. 176.

Claims to Personal Property—Trustees Claiming under Trust Deed.—Courts of law afford an adequate remedy for settling claims to personal property which possess no *pretium affectionis*, and equity will not take jurisdiction of the case, although one of the parties be a trustee claiming the property under a trust deed. *Moore v. Steelman*, 80 Va. 381; *Shepards v. Turpin*, 8 Gratt. 373.

Trustees—No Interference with Exercise of Discretionary Trust.—Where a trust is discretionary, or one of personal confidence, a court of equity has no jurisdiction to interfere with its exercise by the trustee so long as he acts in good faith, and cannot execute it, nor can any trustee appointed by it in his place do so. *Dillard v. Dillard*, 97 Va. 434, 34 S. E. Rep. 60; *Cowles v. Brown*, 4 Call 477; *Cochran v. Parish*, 11 Gratt. 348. See note appended to *Read v. Patterson* (N. J.), 6 Am. St. Rep. 377, as to controlling discretion of trustee.

Same—Supervisory Power over.—Whenever necessary, equity will compel a trustee to perform his duty, or will disregard the omission of that duty, under the rule that "equity will consider done which in good conscience ought to be done." *Atwood v. Shen.*, etc., R. Co., 85 Va. 966, 9 S. E. Rep. 748.

A court of equity has jurisdiction when its aid is invoked to instruct a trustee how to execute a trust, and to determine whether the purpose and prayer of the bill could be effectuated by the trustee. Trust estates, and especially those in which infants and married women are interested, are peculiarly within the cognizance and control of chancery. *Christian v. Worsham*, 78 Va. 100; *Faulkner v. Davis*, 18 Gratt. 677.

Same—Removal and Substitution.—A court of equity, independent of sec. 8 of ch. 274, Code 1873, as amended by Acts of 1874-75, p. 423, and § 6 of ch. 155 of the Code 1873, as amended by the Acts 1874, pp. 324-5, had ample authority to remove trustees in deeds of trust to secure creditors, and to substitute others in their places. In doing so the court but exercises the ordinary powers of a court of equity touching the administration of trusts. *Lewis v. Glenn*, 84 Va. 947, 6 S. E. Rep. 866.

Where the trustee in a deed of trust had gone beyond the jurisdiction of the court, it was proper for the plaintiff to come into equity, and under the prayer for general relief, it was competent for the court to aid in the execution of trust by the appointment of another trustee. *Woods v. Fisher*, 8 W. Va. 536.

Same—Sale of Trust Property—Retention of Jurisdiction.—Where there has been a sale of trust subject by the trustee, who receives the money and promises to pay the beneficiary, equity will nevertheless retain jurisdiction to enforce payment. *Nease v. Capehart*, 8 W. Va. 95.

Same—Same—Application of Proceeds to Trustee's Debts.—Where complainants seek to prove that land was purchased with trust funds belonging to them; that it was sold by the court, with knowledge of this fact, to pay the trustee's individual debts; and that purchasers at said sale had constructive information of said trust,—the claim is one of which a court of equity alone has jurisdiction. *Moorman v. Arthur*, 90 Va. 455, 18 S. E. Rep. 869.

Same—Auctioneers—Relief to One of Two Claimants.—Where auctioneers are stakeholders and trustees of proceeds of a sale made by them, and are bound to pay them to one or the other of two parties, upon conditions agreed upon, equity has jurisdiction to relieve one of the claimants against the auctioneers

and the other claimant. *Townes v. Birchett*, 12 Leigh 173.

Claims against Trust Subject.—Where a claim against a trust subject could not be enforced in a court of law but could only be enforced in equity, that court has jurisdiction. *Pumphry v. Brown*, 5 W. Va. 107.

Same—By Judgment Creditor.—It is a settled practice in Virginia to entertain the suit of a judgment creditor for relief in equity, when the debtor has conveyed his land in trust to the payment of debts after the judgment, or on other trusts authorizing the sale of the land. *Taylor v. Spindle*, 2 Gratt. 44.

Where the owner of a foreign judgment brought a suit in equity and issued an attachment, and had it levied on lands on which there existed a deed of trust, the trustee was justified in coming in a court of equity to have the trust enforced under its supervision, although the court at that time had no jurisdiction of attachments in equity for purely legal demands. *Lively v. Winton*, 30 W. Va. 554, 4 S. E. Rep. 451.

Same—Invasion of Legal Right of Adjacent Owner.—Where a trustee in conjunction with the *cestui que trust* a married woman, undertakes to improve the trust property, her separate estate, and in so doing they take away a recognized legal right of an adjoining land owner to the support of the adjacent and subjacent soil of the trust property, by failure to use proper care and skill, so that the adjoining land owner is damaged, equity has jurisdiction to ascertain the damages and to subject the trust property to its satisfaction because of the trust, or because of the separate estate involved. *Salamone v. Kelley*, 80 Va. 86.

Claims under Trusts.—The courts of chancery have jurisdiction in all cases where property taken in execution on behalf of the commonwealth is claimed by any person under a mortgage or deed of trust, and if they be found not to have been duly recorded, may decree the same to be void as against the claim of the commonwealth. *Moore v. Auditor*, 3 H. & M. 232.

Same—By Assignee of Bond Secured.—A man indebted by bond, executed a conveyance of all his property in trust for the payment of his just debts, for his own support, and for the benefit of his wife. He died without a will and without acquiring any property after the date of the conveyance. It was held that an assignee of the bond might obtain relief in equity without bringing any action at law, by a decree of a sale of the property in the hands of the trustee. *Taylor v. Ficklin*, 5 Munf. 25.

Bailment.—Bailment is not such a trust as gives a court of equity jurisdiction. *Thompson v. Whitaker*, 41 W. Va. 574, 23 S. E. Rep. 795.

11. LOST INSTRUMENTS.

Concurrent Jurisdiction—Affidavit.—Equity has jurisdiction whenever a lost instrument is to be set up, notwithstanding courts of law now exercise jurisdiction in the same cases. This jurisdiction was originally assumed because there was no redress at law in such cases. When the law courts afterwards assumed jurisdiction of these cases, the jurisdiction of equity was not ousted. Where equity takes jurisdiction it will adjudicate the whole merits of the case. In cases of this kind an affidavit of the loss is required in equity. *Lyttle v. Cozad*, 21 W. Va. 183; *Hickman v. Painter*, 11 W. Va. 386; *Mitchell v. Chancellor*, 14 W. Va. 22; *Kerney v. Kerney*, 6 Leigh 478, 29 Am. Dec. 213; *Hall v.*

Wilkinson, 35 W. Va. 167, 12 S. E. Rep. 1 118; *Shields v. Co.*, 4 Rand. 541; *Harrison v. Field*, 2 Wash. 136.

But in a case in equity involving relief from the loss of a bond, if it has jurisdiction upon other grounds, no affidavit is required of the loss of the bond. *Lyttle v. Cozad*, 21 W. Va. 183.

Lost Deed—Averments Essential.—Where a plaintiff asks relief in equity on the ground that a deed on which his claim depends has been lost or destroyed, the claim being one such that if he had the deed he would have complete remedy at law, the bill must distinctly aver the loss or destruction of the deed, and it must be shown that it could not be found upon due search; otherwise a court of equity has no jurisdiction of the case. *Tallaferro v. Foote*, 3 Leigh 58.

Vendor's Lien Represented by Bond.—A court of equity has jurisdiction to enforce a vendor's lien on land for the purchase money, though the bond which represents it has been lost, and though a copy of the deed cannot be produced by the vendor who is the plaintiff. *Moore v. Smith*, 26 W. Va. 379; *Robinson v. Dix*, 18 W. Va. 528.

Collateral Agreement to Note Sued on.—The written agreement between the maker and payee of a note, in relation to a contract in pursuance of which the note was made, having been lost at the time a judgment was recovered on the note, and without which agreement the maker could not make his defence at law, this will give a court of equity grounds to take jurisdiction of the case. *Vathir v. Zane*, 6 Gratt. 246.

12. CORPORATE AFFAIRS.

Management of Internal Affairs of Foreign Corporation.—It is well settled that courts of equity will not interfere with the management of the internal affairs of a foreign corporation. Such questions are to be settled by the tribunals of the state which created the corporation. Courts other than those of the state creating it, and in which it has its *habitat*, have no visitorial powers over such corporation, have no authority to remove its officers or to punish them for misconduct, nor to enforce a forfeiture of its charter. *Taylor v. Mut., etc., Life Assoc.*, 97 Va. 60, 33 S. E. Rep. 385.

Administration of Insolvent and Abandoned Corporation.—A court of equity has jurisdiction to entertain the suit of simple contract creditors who have no lien, brought for the purpose of administering the assets of an insolvent and abandoned corporation. *Nunnally v. Strauss*, 94 Va. 255, 26 S. E. Rep. 530; *Finney v. Bennett*, 27 Gratt. 365.

Cancellation of Subscription.—Equity has jurisdiction where the relief asked for involves the cancellation of stock subscription in a corporation. *Carey v. Coffee-Stemming Mach. Co.*, 20 S. E. Rep. 778, 1 Va. Dec. 863.

Stockholder Cannot Sue until Refusal by Corporation after Reasonable Demand.—A stockholder in a corporation cannot maintain an action in equity in relation to the corporate property without alleging the refusal of the corporation to sue after reasonable demand, or facts which excuse such demand. In such case the corporation is an indispensable party. *Mount v. Radford Trust Co.*, 93 Va. 427, 25 S. E. Rep. 244.

Preservation of Mortgaged Property of Railroad.—A court of equity having charge of the mortgaged property of a railroad company is authorized to do all acts that may be necessary to preserve the property for the benefit of its creditors and of the company, whose possession the court has ousted by

a receiver, and by taking into its hands the property and franchises of the company. Any act necessary for such preservation will be upheld and enforced by the courts if it is not in excess of the corporate powers. *Gibert v. Washington, etc., R. Co.*, 33 Gratt. 586.

Abuse of Power by Municipal Corporation.—Courts of equity have jurisdiction to prevent municipal corporations from abusing or exceeding their powers. *Christie v. Malden*, 23 W. Va. 667. See generally, monographic *note* on "Municipal Corporations" appended to *Danville v. Pace*, 25 Gratt. 1.

Ultra Vires Order of Board of Directors.—Equity has jurisdiction to declare null and void an order of the board of directors of a corporation that is *ultra vires*, and obstructs its rights to its property, though that order be void. *Ravenswood, etc., R. Co. v. Woodyard*, 46 W. Va. 558, 33 S. E. Rep. 285.

Ultra Vires Acts—Irremediable Injury.—It is not competent for a court of chancery to award an injunction to stay proceedings of a navigation company in the prosecution of its works, unless it be manifest that it is both *transcending* its authority given by its charter, and that the interposition of equity is necessary to prevent injury that cannot be adequately compensated in damages. *James River, etc., Co. v. Anderson*, 12 Leigh 278.

No Restraint on Legislative Franchise until Forfeiture of Charter at Law.—A court of equity has no jurisdiction to restrain a navigation company from collecting tolls, on the ground that it has forfeited its charter, as there is a plain remedy at law by a writ of *quo warranto*. A court of chancery can have no jurisdiction to stop a corporation from the exercise of its franchises conferred by the legislature, until the forfeiture of its charter has been declared by proper proceedings in a court of law. *Pixley v. Roanoke Navigation Co.*, 75 Va. 320.

Effect of General Railroad Law of 1836-7 on Jurisdiction.—By the thirteenth section of the general railroad law of 1836-7, ch. 118, the court of chancery is deprived of jurisdiction to enjoin a railroad company from proceeding to prosecute its work at its peril, upon the application of an elder canal company, which the road is projected to cross; the railroad company not thereby transcending its authority, and the injury, if any, to the canal being such as may be adequately compensated in damages. *Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co.*, 11 Leigh 42.

13. CONSTRUCTION OF WILLS.—When the title of all the parties' land in controversy depends on the construction to be given to a will, equity will entertain a bill to construe it and settle the rights of all the parties. *Withers v. Sims*, 80 Va. 651. See monographic *note* on "Wills."

Slaves—At Suit of Administrator.—An administrator *c. t. a.* having in his possession slaves of the testator, and being in doubt as to whether the will emancipated them, may come into equity and have the will construed, where he makes the necessary persons parties thereto. *Osborne v. Taylor*, 12 Gratt. 117.

Same—Recovery against Adverse Claimant.—In a suit to recover slaves against an adverse claimant the fact that the title to the slaves depends upon the construction of a provision in a will, is no ground of equitable jurisdiction. *Hale v. Clarkson*, 23 Gratt. 42.

14. ADMINISTRATION.

In Creditors' Suit.—In a creditors' suit a court of equity has the power to call in the assets from the hands of a personal representative and put them in

the hands of a receiver. In such suit the court becomes a personal representative and applies them in due course of *administration*. *Davis v. Chapman*, 83 Va. 67, 1 S. E. Rep. 472. See generally, monographic *notes* on "Creditors' Bills" appended to *Suckley v. Rotchford*, 12 Gratt. 60, and "Executors and Administrators."

Same—Double Security.—A bill brought to administer the estate of a decedent, and to have the assets first ascertained and then applied to the payment of a debt due to a creditor, was a creditors' bill in intention and fact and is maintainable in equity. The fact that the creditor had double security, the other of which might have been enforced at law, will not deprive him of his remedy in equity. *Carter v. Hampton*, 77 Va. 631.

Realty Liable for Damages from Breach of Ancestor's Covenants.—Where the complainants suffer damages from a breach of the covenant of an ancestor, they are entitled to come into equity for satisfaction out of the real assets in the hands of the heirs. *Haffey v. Bircbetts*, 11 Leigh 83.

At Suit of Creditor of Absent Debtor.—A creditor of an absent debtor, who is one of the heirs and distributees of a deceased intestate, may go into a court of equity for the purpose of having a division and distribution of the estate of the decedent and of procuring payment of his debt out of the shares of the absent debtor. *Moores v. White*, 3 Gratt. 130.

Enforcement of Decree against Executor.—A court of equity has jurisdiction to enforce a decree obtained against an executor in a former suit, against his sureties. *Hobson v. Yancey*, 2 Gratt. 73.

15. JUDGMENTS.—See monographic *note* on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

a. Enforcement.

Enforcement of Judgment Lien against Land.—Equity has jurisdiction to enforce a judgment lien against the land of the debtor, notwithstanding the judgment creditor has not exhausted his remedy at law. Thus, jurisdiction does not depend in any way upon the adequacy of the legal remedy to satisfy the judgment out of the personal estate, but it may always be resorted to regardless of the amount of personal estate of the debtor. *Price v. Thrash*, 30 Gratt. 515. See Va. Code of 1873, ch. 122, §§ 6 and 9, and Va. Code of 1887, § 3571. See also, *Hutcheson v. Grubbs*, 80 Va. 257; *Gordon v. Rixey*, 76 Va. 694; *Stovall v. Bank*, 78 Va. 191; *Moore v. Bruce*, 85 Va. 139, 7 S. E. Rep. 195. See *Morrison v. Wilkinson*, 1 Va. Dec. 772, 17 S. E. Rep. 787.

Same—Statutory Provisions in West Virginia.—Section 8, ch. 139 of the Code of 1868 of W. Va., provides that courts of equity shall have jurisdiction to enforce a judgment against the lands of the debtor at any time, without reference to whether he has personal property or estate out of which the judgment might be otherwise made. *Pecks v. Chambers*, 8 W. Va. 210; *Marling v. Robrecht*, 13 W. Va. 440.

Same—Need Not Revive Judgment at Law.—The right of a judgment creditor to bring his suit in equity against the personal representative and heirs or devisees of his deceased debtor before reviving his judgment at law has been generally recognized in the courts of this state. *James v. Life*, 92 Va. 702, 24 S. E. Rep. 275.

Same—Coextensive with Right to Execution.—The right of the plaintiff to file his bill in equity to enforce his judgment lien is coextensive as to time with the right to issue execution thereon. *James v. Life*, 92 Va. 702, 24 S. E. Rep. 275. See *Hutcheson v. Grubbs*, 80 Va. 251, and authorities there cited.

Personal Property—No Lien unless Levy before Return Day.—Where no levy was made upon personal property on or before the return day of the execution, the creditors had no lien by virtue thereof on personal property which had been conveyed in a deed of trust, and hence a court of equity had no jurisdiction to enforce payment of the creditor's judgment by administering the trust created by the deed in question. *Spence v. Repass*, 94 Va. 716, 27 S. E. Rep. 583.

Decree Need Not Be Revived against Administrator.—A decree against a debtor is a lien on his land and although it has not been revived against the administrator, and no execution has been issued on it, the creditor may come into equity to subject the land. *Burbridge v. Higgins*, 6 Gratt. 119.

Lien of Deed of Trust Valid although Debts Secured Barred by Limitation.—Where the property of a corporation, including its dues, has been conveyed to secure its debts, which are barred by the statute of limitations from being enforced at law, the debts are not thereby extinguished, and the lien of the trust deed may be enforced in equity until a sufficient length of time has elapsed to raise the presumption of payment. *Hamilton v. Glenn*, 85 Va. 901, 9 S. E. Rep. 129. See *Bowie v. Poor School Society*, 75 Va. 304.

Vendor's Lien—Judgment on Debt Barred at Law.—Equity will take jurisdiction and enforce a vendor's lien, although a judgment on the debt is barred at law, unless a sufficient time has elapsed to raise a presumption of payment. *Paxton v. Rich*, 85 Va. 378, 7 S. E. Rep. 531.

Mechanic's Lien.—When the object of a suit is to enforce an alleged mechanic's lien, the case is one of equitable jurisdiction. See § 2484; *Bailey Construction Co. v. Purcell*, 88 Va. 300, 13 S. E. Rep. 456.

Land Charged with Payment of Legacies—Conveyed to Third Person.—Where a devisee of land, which is charged with the payment of legacies, conveys it to a third person, who promises to pay the legacies out of the purchase price, the grantor may sue in equity to compel such payment and enforce the charge on the land. *Bird v. Stout*, 40 W. Va. 43, 20 S. E. Rep. 853.

Judgment against Surviving Partner.—A creditor of a firm obtains judgment against the surviving partner who subsequently dies. The creditor then files a bill against the administrators and the heirs of the surviving partner, and the representative of the deceased partner. The bill seeks a decree for the sale of land of which the surviving partner died possessed, some of which belonged to himself and some to the firm, and when this source shall be exhausted, then to charge the representative of the deceased partner. Equity has jurisdiction of the case. *Jackson v. King*, 8 Leigh 689.

b. Relief from.

(1) In General.

Chancery Acts on Parties Not on Judgment.—A court of chancery, under our system of jurisprudence, is invested with no power to set aside the verdict of a jury and order a new trial in an action at law, annulling the judgment on the hearing. It may act on the parties, but not directly on the judgment, or on the court which renders it. Such judgment by a court having jurisdiction cannot be vacated by some direct proceeding at law, either in the same court, or in some other court having jurisdiction. *Wynne v. Newman*, 75 Va. 811.

One County Court May Relieve against Judgment of Another County Court.—The court of one county may

on its equity side relieve against a judgment at law, rendered in another county court, by way of original jurisdiction. Although it cannot award a new trial in that court, yet it may direct the issue to be tried at its own bar. *Ambler v. Wyld*, 2 Wash. 26.

(2) Grounds of Relief.

Statement of Principles and Grounds.—The grounds upon which a court of equity will grant relief against a judgment at law are well defined and firmly established. It will not relieve a party against a judgment rendered in consequence of his default upon grounds which might have been successfully taken at law, unless some reason founded in fraud, accident, mistake, surprise or some adventitious circumstances beyond his control, be shown why the defence was not made. This proposition has been so repeatedly affirmed, that it has become a principle and maxim of equity, as well settled as any other. It has been acted upon and recognized in numerous cases in the Virginia courts. The principle is founded in wisdom and sound policy, and springs from the positive necessity of prescribing some period at which litigation must cease. Injustice alone does not entitle a party to relief, but he must show himself free from laches, and that he has done every thing that could reasonably be required of him. If a court of equity should relieve persons from the consequences of their own neglect, it would directly encourage such conduct. Diligence and vigilance would cease to be the rule, and all certainty in judicial proceedings would be destroyed. But they have always granted relief when it is shown that some good reason prevented a defence from being made at law. *Holland v. Trotter*, 23 Gratt. 136, and *note*; *Bierne v. Mann*, 5 Leigh 364; *Knapp v. Snyder*, 15 W. Va. 434; *Mosby v. Haskins*, 4 H. & M. 427; *Morgan v. Carson*, 7 Leigh 238; *Degraffenreid v. Donald & Co.*, 2 H. & M. 10; *Maupin v. Whiting*, 1 Call 224; *Hord v. Dishman*, 5 Call 279; *Ashby v. Kiger*, Gilmer 153; *Faulkner v. Harwood*, 6 Rand. 125; *Hendricks v. Compton*, 2 Rob. 192; *Mason v. Nelson*, 11 Leigh 227; *Polindexter v. Waddy*, 6 Munf. 418; *Ches., etc., R. Co. v. Pack*, 6 W. Va. 397; *Smith v. McLain*, 11 W. Va. 655; *Shields v. McClung*, 6 W. Va. 79; *Allen v. Hamilton*, 9 Gratt. 255, and *note*; *Moore v. Lipscombe*, 82 Va. 549; *Slack v. Wood*, 9 Gratt. 40, and *note* with exhaustive collection of authority. See also, *Wallace v. Richmond*, 26 Gratt. 67, and *note*.

Excuses for Failure to Defend at Law.—Relief will always be granted in equity when it is shown that the failure to successfully defend at law was because of the acts or representations of the opposite party, or agents, or the result of fraud, accident, surprise or some other adventitious circumstance beyond the control of the complainant. *Moore v. Lipscombe*, 82 Va. 546; *Dey v. Martin*, 78 Va. 1; *Knapp v. Snyder*, 15 W. Va. 434; *Mosby v. Haskins*, 4 H. & M. 427; *Degraffenreid v. Donald*, 2 H. & M. 10; *Hord v. Dishman*, 5 Call 279; *Faulkner v. Harwood*, 6 Rand. 125; *Mason v. Nelson*, 11 Leigh 227; *Polindexter v. Waddy*, 6 Munf. 418; *Smith v. McLain*, 11 W. Va. 655; *Shields v. McClung*, 6 W. Va. 79; *Rosenberger v. Bowen*, 84 Va. 600, 5 S. E. Rep. 697; *Slack v. Wood*, 9 Gratt. 40; *Louisville, etc., R. Co. v. Taylor*, 93 Va. 236, 24 S. E. Rep. 1013; *Brown v. Street*, 6 Rand. 1; *Kincaid v. Cunningham*, 2 Munf. 1.

But when the grounds given for relief in equity were available as defences at law, then no jurisdiction will be taken in equity. *Harnsbarger v. Kinney*, 13 Gratt. 511; *Harvey v. Fox*, 5 Leigh 444; *Mackey v. Mackey*, 29 Gratt. 158; *Allen v. Hamilton*, 9 Gratt.

255; *Hendricks v. Compton*, 2 Rob. 192; *Haden v. Garden*, 7 Leigh 157. And it is immaterial that the act preventing the defence was done in good faith and without fraudulent intent. *Thomas v. Jones*, 98 Va. 323, 36 S. E. Rep. 382.

Same—Erroneous Judgment.—But a court of equity cannot relieve against a judgment at law merely on the ground that it was erroneous, even though the plaintiff at law was not entitled to recover, or not entitled to recover in that form of action, and the judgment was obtained by default. To give jurisdiction in equity in such a case, there must be some suggestion of fraud or surprise, or some good reason assigned as an excuse for the failure to make a defence at law. *Turpin v. Thomas*, 2 H. & M. 139; *Auditor v. Nicholas*, 2 Munf. 31; *Chapman v. Harrison*, 4 Rand. 336; *Branch v. Burnley*, 1 Call 147; *Kincaid v. Cunningham*, 2 Munf. 1; *Turner v. Davis*, 7 Leigh 227, 30 Am. Dec. 503; *Allen v. Hamilton*, 9 Gratt. 255, and *note*.

Same—Course of Proceedings at Law.—When a defendant at law is precluded by a certain course of proceedings at law from defending the action, which by just set-offs would have extinguished the debt, he may be relieved in equity from the judgment, as that court has jurisdiction of the case. *Mann v. Drewry*, 5 Leigh 296.

Negligence of Party or Agent.—And it is generally held that where a party, through his own or his agent's or attorney's negligence, fails to avail himself of a defence which he might have made at law, he will not be relieved in equity. *Wallace v. Richmond*, 26 Gratt. 67; *Haseltine v. Walton*, 16 Gratt. 120; *Callaway v. Alexander*, 8 Leigh 114, 31 Am. Dec. 640; *Slack v. Wood*, 9 Gratt. 40; *Dey v. Martin*, 78 Va. 1; *Wray v. Davenport*, 79 Va. 26; *Holland v. Trotter*, 23 Gratt. 141; *Canada v. Barksdale*, 84 Va. 746, 6 S. E. Rep. 10; *Shields v. McClung*, 6 W. Va. 79; *Meem v. Rucker*, 10 Gratt. 506; *Donally v. Ginatt*, 5 Leigh 359; *Rich., etc., Co. v. Robinson*, 24 Gratt. 548; *Gentry v. Allen*, 33 Gratt. 257; *Ayres v. Morehead*, 77 Va. 589; *Black v. Smith*, 13 W. Va. 800; *Braden v. Reitzenberger*, 18 W. Va. 390; *Crumlish v. Shen. Valley R. Co.*, 40 W. Va. 627, 23 S. E. Rep. 90; *Green v. Massie*, 31 Gratt. 356; *Stanard v. Rogers*, 4 H. & M. 428; *Ross v. Reid*, 8 Gratt. 229.

Relief in equity against a judgment will not be granted where the complainant is not shown to have exercised proper diligence in making his defence at law, but the judgment is due to his inattention and laches. *Collins v. Jones*, 6 Leigh 530, 29 Am. Dec. 216; *Slack v. Wood*, 9 Gratt. 40, and *note* containing a full collection of cases.

Notwithstanding a judgment against administrators in an action of debt, and a subsequent judgment against them personally, relief in equity was granted them where the peculiar state of the assets made it difficult to plead at law in relation thereto, and because at the trial of the second action their counsel was absent, in consequence thereof they were wholly undefended, and a verdict was obtained against them contrary to justice without any negligence or default on their part. *Pendleton v. Stuart*, 6 Munf. 577.

Negligence of Officer.—Where the officer neglects to return the facts, so that they do not appear on the trial at law, a court of equity may grant relief. *Mosby v. Leeds*, 3 Call 439.

Where judgment is entered against an administrator at rules, and he instructs his attorney to set it aside at the next term and plead payment, and he instructs the clerk to set aside the judgment and

enter the plea, but he omits to do so, equity will direct that the pleas be received and the verdict certified to that court, and will then proceed to final decree. *Mayo v. Bentley*, 4 Call 523.

Newly-Discovered Evidence.—Thus, chancery will not relieve against a judgment at law on the ground of newly-discovered evidence, where there is no suggestion of fraud, accident, mistake or any other circumstance preventing the party from having made the defence at law. *Norris v. Hume*, 2 Leigh 334, 21 Am. Dec. 631.

Paupers, who have brought a suit at law for freedom and failed, may afterwards go in equity and obtain relief, when some were infants held in slavery, and the evidence now exhibited was not then in their power; some of the witnesses having determined to tell the truth since the trial at law. *Talbert v. Jenny*, 6 Rand. 159.

Judgments for Gaming Debt.—A court of equity has jurisdiction to relieve against a judgment founded on a gaming debt, although the party failed to defend himself at law, and gives no good reason for such failure. *Skipwith v. Strother*, 3 Rand. 214.

Same—Surprise—New Trial.—In an action at law on a promise founded on a gaming consideration, the defendant may come into equity for relief if he was surprised at the trial and the judgment was given against him, although he made no effort to obtain a new trial in the law court. *White v. Washington*, 5 Gratt. 645.

Estoppel.—The plaintiff went to trial at law in a case where he might have sued in equity, and a verdict by surprise was given against him. He cannot afterwards come into a court of chancery. *Tarpley v. Dobyns*, 1 Wash. 185.

(3) **By Injunction.**—See monographic *note* on "Injunctions" appended to *Claytor v. Anthony*, 15 Gratt. 518.

Defence Cognizable Only in Equity.—It is well settled that courts of equity will interfere by injunction, either pending an action or after judgment, where there is a distinct defence to the claim asserted by law, which is solely cognizable in equity. And it is equally well settled that where a court of equity has awarded jurisdiction for one purpose, it will ordinarily proceed to a final disposition of the cause. *Penn v. Ingles*, 83 Va. 65; *Walters v. Farmers' Bk. of Virginia*, 76 Va. 12; *Rust v. Ware*, 6 Gratt. 50.

Sale under Execution on Fraudulent Judgment.—A court of equity has jurisdiction to enjoin the sale of property under an execution upon a judgment; which the plaintiffs charge was obtained by fraud, and they are without adequate remedy at law. *McFarland v. Dilly*, 5 W. Va. 135; *Walker v. Hunt*, 2 W. Va. 492; *Morrison v. Wilkinson*, 1 Va. Dec. 772, 17 S. E. Rep. 787.

After-Discovered Evidence—Mistake of Jury.—A judgment at law will be enjoined on ground of mistake by the jury, ascertained by after-discovered evidence; and the subject of the action being an account, it will not direct a new trial but will itself give proper relief. *Rust v. Ware*, 6 Gratt. 50.

Same—Fraud.—The defendant in an action on an indemnifying bond for the benefit of a trustee in a deed of trust, after judgment against him, comes into equity on the ground of after-discovered evidence establishing fraud to some of the debts secured. The ground of equity jurisdiction being made out, the court will not direct a new trial, because it would not probably afford relief, but will retain the cause and allow the plaintiff to impeach the deed, notwithstanding his unsuccessful effort

to do so at law. *Billups v. Sears*, 5 Gratt. 81, 50 Am. Dec. 105.

Pending Action by Surety against Insolvent Principal.—A judgment on a forthcoming bond will be enjoined at the suit of the surety, where he has an action pending against the plaintiff in the judgment for a larger amount, and the plaintiff is insolvent. *McClellan v. Kinnaird*, 6 Gratt. 352.

Defect in Title of Property Sold Judicially—No Injunction.—A purchaser at a judicial sale can only obtain relief for defects in the title, or encumbrances on the property, by resisting the confirmation of the sale; and it is not competent for equity to enjoin a judgment for the purchase money on the ground of defect of title at the time of purchase. *Threlkelds v. Campbell*, 2 Gratt. 198, 44 Am. Dec. 384.

Proper Proceedings on Application for Injunction.—Where an application is made to a court of equity to enjoin a judgment at law and give a new trial, it is error to set aside the judgment, perpetuate the injunction and grant a new trial in the cause which had been terminated; and to finally dispose of the suit in equity. The injunction in such case should have been continued, and the proper issues directed, and upon the coming in of the verdict the injunction should have been perpetuated or dissolved according to the finding of the jury. The judgment was a security for anything the appellant should thereafter appear to be entitled to. *Knifong v. Hendricks*, 3 Gratt. 212, 44 Am. Dec. 385.

Writ of Right—Division of Land—Estoppel.—Where two adjoining proprietors agree to the line between them, by which a 12-acre tract of land is conveyed by one to the other, and it subsequently comes into the hands of a third party, who makes improvements; and the purchaser of the other tract recovers this 12-acre tract by writ of right, the first purchaser is entitled to an injunction in equity against the judgment. *Stafford v. Carter*, 4 Gratt. 63.

16. PROPERTY AND RIGHTS THEREIN.

a. Determination of Title, Boundaries and Possession.

Plaintiff Must Have Equity against Adverse Claimant.—A court of equity has no jurisdiction to settle the title or boundaries of land between adverse claimants, unless the plaintiff has an equity against the adverse claimants; an equity against other persons will not give the jurisdiction. A court of equity has no jurisdiction to try an adverse claim to land where the claimant is in possession under his deed. The question of their validity is proper to be tried in a court of law. *Steed v. Baker*, 13 Gratt. 380; *Stuart v. Coalter*, 4 Rand. 74; *Lange v. Jones*, 5 Leigh 192; *Johnston v. Jarrett*, 14 W. Va. 235; *Sulphur Mines Co. v. Boswell*, 94 Va. 485, 27 S. E. Rep. 24; *Collins v. Sutton*, 94 Va. 127, 26 S. E. Rep. 415; *Carrington v. Otis*, 4 Gratt. 235; *Cresap v. Kemble*, 26 W. Va. 603; *Hill v. Proctor*, 10 W. Va. 59; *Becker v. McGraw* (W. Va.), 37 S. E. Rep. 532; *Burns v. Mearns*, 44 W. Va. 744, 30 S. E. Rep. 112; *Bright v. Knight*, 35 W. Va. 40, 13 S. E. Rep. 63.

No Jurisdiction When Plaintiff in Possession with Legal Title.—It is well settled that a plaintiff in possession of land with a clear title, or a *prima facie* title, is entitled to an injunction against a trespasser, threatening irreparable injury, or often repeated trespass. But if the evidence shows that the right of the plaintiff is in doubt, and the title and boundaries of the land are really in issue, such a controversy cannot be settled in equity. *Callaway v. Webster*, 98 Va. 790, 37 S. E. Rep. 276; *Manchester Cotton Mills v. Town of Manchester*, 25 Gratt. 825.

Where plaintiff is in possession with legal title, equity will not settle rights as against adverse claimants. *Randolph v. Randolph*, 2 Leigh 540; *Overseers v. Hart*, 3 Leigh 1.

Dismissal at Hearing for Want of Jurisdiction.—When it appears at the hearing of a cause that the real object of a bill in chancery is to settle a controverted boundary of lands, it should be dismissed for want of jurisdiction. *Callaway v. Webster*, 98 Va. 790, 37 S. E. Rep. 276; *Jones v. Bradshaw*, 16 Gratt. 361; *Boston Blower Co. v. Carman Lumber Co.*, 94 Va. 94, 26 S. E. Rep. 390; *Collins v. Sutton*, 94 Va. 128, 26 S. E. Rep. 415; *Robinson v. Moses*, 3 Va. Dec. 686, 34 S. E. Rep. 48.

Apportionment of Water Line—Boundary Lines.—A court of equity has jurisdiction, and is the proper tribunal in which to apportion the water line between adjoining owners, and to determine and establish the boundary lines of coterminous owners. *Groner v. Foster*, 94 Va. 650, 27 S. E. Rep. 493; *Waverly, etc., Co. v. White*, 97 Va. 176, 33 S. E. Rep. 534.

Boundaries—Addition of Equity Necessary.—Courts of equity will not interpose to ascertain boundaries, unless in addition to the naked confusion of the controverted boundaries, there is some peculiar equity, which has arisen from the conduct, situation, or relation of the parties. *Collins v. Sutton*, 94 Va. 127, 26 S. E. Rep. 415; *Stuart v. Coalter*, 4 Rand. 74; *Lange v. Jones*, 5 Leigh 192.

Between Town and Corporation—Rights in Doubt.—In a controversy between a town and a corporation involving the title and boundaries of land, where the evidence left the rights of the parties in doubt, they could not be settled in a court of equity. *Manchester Cotton Mills v. Town of Manchester*, 25 Gratt. 825.

One Title May Be Legal, Other Equitable.—It is not necessary to entitle a party to go into equity that the titles of the claimant should be both purely legal. It is ordinarily sufficient, to found the jurisdiction, that one is legal and the other is equitable. *Oil, etc., Co. v. Gale*, 6 W. Va. 525.

Calling in Outstanding Title.—Where one invokes the aid of a court of equity to call in an outstanding title to property, in such case it will not, upon the plainest and best settled principles of equity, extend the required aid without compelling the applicant to do what is equitable under the circumstances of the particular case—"he who asks equity must do equity." *Kerr v. Kerr*, 84 Va. 154, 5 S. E. Rep. 89.

Establishing Title under Lost Deeds and Wills.—There can be no doubt that courts of equity have jurisdiction to set up lost deeds, and wills, and establish titles under them. *Building, etc., Co. v. Fray*, 96 Va. 559, 32 S. E. Rep. 58. See also, *Thomas v. Ribble*, 3 Va. Dec. 321, 24 S. E. Rep. 241.

Partition.—Where a division of land is sought, a court of equity has jurisdiction. *Castleman v. Velch*, 3 Rand. 598.

Same—At Suit of Tenant by Curtesy.—A court of equity will decree a partition of land, at a suit by the tenant by the curtesy, who has purchased the reversionary interest of one of three heirs, and another interest is held by infants. *Otley v. M'Alpine*, 2 Gratt. 340.

Same—Mutual Rights under Same Instrument—One Holding Adverse—No Jurisdiction.—The construction of the muniments of title, whether the same be deed or will, furnishes no ground of equitable jurisdiction. Where there are mutual rights under the same instrument in the same property, equity often takes jurisdiction to define and partition, but where

one holds adversely to the instrument, under which another claims, there is no jurisdiction in equity as a general rule. There is an adequate remedy at law. *Snyder v. Grandstaff*, 96 Va. 473, 81 S. E. Rep. 647.

Same—Questions of Law Affecting Legal Title—Statutory Provisions.—It was expressly provided by § 1, ch 120, Code of 1873, which authorized the partition of land, that in the exercise of such jurisdiction the courts of equity may take cognizance of all questions of law affecting the legal title that may arise in any proceeding. *Bradley v. Zehmer*, 82 Va. 685.

Same—Tenants in Common—Ouster—Limitations.—The fact that one tenant in common has been ousted by another, in sole possession, claiming the whole under conveyance of another cotenant will not debar a court of equity from jurisdiction in partition, so long as the right of entry is not barred by the statute of limitations. *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. Rep. 216.

Superior Equity Necessary to Disturb Legal Title.—A legal title to land ought not to be disturbed in favor of a party not having a superior right in equity to the identical land in question. *Depew v. Howard*, 1 Munf. 293.

Equitable Title Supports Jurisdiction.—Equity has jurisdiction to entertain a bill for the recovery of land, when the plaintiffs do not hold the legal title, but only an equitable one. *Ruffners v. Lewis*, 7 Leigh 720, 30 Am. Dec. 513.

Validity of Tax Deeds—Adverse Claimant in Possession.—In a controversy over land, where the adverse claimant is in possession under tax deeds, the question of their validity must be tried in a court of law, and equity has no jurisdiction. *Steed v. Baker*, 13 Gratt. 380.

Cloud on Title—General Jurisdiction.—The jurisdiction of courts of equity to remove clouds from titles where the party complaining has no adequate remedy at law is well settled. *Sulphur Mines Co. v. Boswell*, 94 Va. 480, 27 S. E. Rep. 24; *Va., etc., Co. v. Kelly*, 93 Va. 332, 24 S. E. Rep. 1020, and cases there cited.

Same—Owner—Must Be in Possession.—But a court of equity, as a general rule, in the absence of statutory authority, will not entertain a bill for the purpose of removing a cloud upon the title to land, unless the owner bringing the bill is in possession. The jurisdiction in such cases is founded upon the theory that there is no adequate remedy at law. If he is not in possession and has the legal title, he has ordinarily a complete remedy at law by ejectment. *Otey v. Stuart*, 91 Va. 714, 22 S. E. Rep. 513. See *Carroll v. Brown*, 28 Gratt. 791; *Stearns v. Harman*, 80 Va. 48; *Louisville, etc., R. Co. v. Taylor*, 93 Va. 236, 24 S. E. Rep. 1013; *Virginia Coal & Iron Co. v. Kelly*, 93 Va. 332, 24 S. E. Rep. 1020; *Steinman v. Vicars*, 99 Va. 595, 39 S. E. Rep. 237; *Kane v. Virginia, etc., Co.*, 97 Va. 329, 33 S. E. Rep. 627.

Same—By Conveyance of Underlying Minerals—What Possession Sufficient.—The actual possession of the surface of land under which are undeveloped minerals is sufficient possession to enable the owner of the surface to invoke the jurisdiction of a court of equity to remove a cloud created by the conveyance of the underlying minerals. *Steinman v. Vicars*, 99 Va. 595, 39 S. E. Rep. 227, 7 Va. Law Reg. 250.

Same—Bill to Remove—Necessary Allegations.—Where a bill filed to remove a cloud on the title of land, alleged that the plaintiff was the "owner" of the land, it was demurrable, because it failed to

allege that he had title to the land and was in possession. *Baker v. Briggs*, 99 Va. 360, 38 S. E. Rep. 277.

Same—Trust Property—Duty of Trustee—Impediments.—That it is the duty of a trustee to apply to a court of equity where there is a cloud upon the title of the property conveyed by a deed of trust, or where there is a doubt or uncertainty of the amount to be raised, or as to prior encumbrances of the trust subject, or where there is a conflict between the creditors, or in any case in which the aid of a court of equity is necessary to remove impediments in the way of a fair execution of the trust, are propositions which cannot be denied, and which have been repeatedly affirmed by the Virginia courts. *Muller v. Stone*, 84 Va. 834, 6 S. E. Rep. 223; *Lane v. Tidball*, Gilmer 130; *Gay v. Hancock*, 1 Rand. 72; *Miller v. Argyle*, 5 Leigh 460; *Wilkins v. Gordon*, 11 Leigh 547; *Miller v. Trevilian*, 2 Rob. 1; *Bryan v. Stump*, 8 Gratt. 241; *Rossett v. Fisher*, 11 Gratt. 492; *White v. Mech., etc., Ass'n*, 22 Gratt. 238; *Shurtz v. Johnson* 28 Gratt. 657.

Deficiency in Amount.—A court of equity has jurisdiction to decree compensation for a deficiency in the quantity of land sold, although the land has been conveyed by deed with general warranty and all the purchase money has been paid. *Kelly v. Riley*, 22 W. Va. 247. For the general jurisdiction of equity when there is a deficiency in quantity of land sold, reference is made to *Norfolk, etc., Co. v. Foster*, 78 Va. 413; *Castleman v. Veitch*, 3 Rand. 508; *Bedford v. Hickman*, 5 Call 236, 2 Am. Dec. 590.

Contracts of Hazard.—There is no ground for equitable relief from a "contract of hazard," which is a sale in gross without regard to quantity. *Yost v. Mallicote*, 77 Va. 610; *Sergeant v. Linkous*, 83 Va. 664, 3 S. E. Rep. 295.

b. Of Life Tenants and Remaindermen.

Slaves Recovered by Remaindermen after Death of Life Tenant.—If upon the death of the life tenant of slaves, the executor declines or neglects to recover the slaves, and sell them for a division, as the will authorized him to do, the remaindermen may sue in equity to recover and divide them among the parties entitled. *Tabb v. Cabell*, 17 Gratt. 160.

Same—Discovery.—Where the life tenant of slaves, with limitations over to another party, sold them to different purchasers one of whom was unknown, it was held that after the death of the life tenant, the remaindermen could maintain a suit in equity against the curatrix of the life tenant, and the known purchasers to recover the slaves or their value, and seek a discovery of the unknown purchaser. *Cross v. Cross*, 4 Gratt. 267.

c. Of Infants.—See monographic note on "Infants" appended to *Caperton v. Gregory*, 11 Gratt. 505.

General Jurisdiction.—It seems to be the rule in Virginia, that a court of equity has no authority, under its general jurisdiction as guardian of infants, to sell their real estate whenever it is for the advantage of the infants to do so. *Faulkner v. Davis*, 18 Gratt. 651; *Hoback v. Miller*, 44 W. Va. 638, 29 S. E. Rep. 1015.

Statutory Authority Necessary.—Courts of equity have no inherent power to sell the lands of infants, and can do so only as that power is given them by statutes. *Hoback v. Miller*, 44 W. Va. 638, 29 S. E. Rep. 1014.

Under Recent Statute.—By the provisions of § 2609 of the Va. Code, a court of equity will order a sale of a ward's realty, whenever it is made to appear that the proper maintenance and education or

other interests of the infant require that the proceeds of the real estate, beyond the annual income thereof, should be applied to these purposes. *Harkrader v. Bonham*, 88 Va. 247, 16 S. E. Rep. 159.

Under Acts 1853.—By the Session Acts of 1853, ch. 34, p. 29, and the previous acts on the subject, courts of equity had jurisdiction to sell lands in which infants had an interest, whether in possession or remainder, vested or contingent, if the proper parties could be brought before the courts. *Faulkner v. Davis*, 18 Gratt. 651; *Christian v. Worsham*, 78 Va. 105.

Liable for Support and Education.—A guardian placing his ward with a third person to be supported and educated, though he may undertake to pay the ward's expenses, does not thereby relieve the ward's estate, but the person with whom the ward is placed may proceed in equity to subject the profits of the ward's estate to the payment of the expenses. *Barnum v. Frost*, 17 Gratt. 398.

Same—Personal Property.—A court of chancery may authorize a sale of the personal property of infant *cestuis que trust*, in cases where such sale is absolutely necessary for their support. *Markham v. Guerrant*, 4 Leigh 279.

d. Prior Establishment of Rights at Law.

Claim Sounding in Damages.—A firm made a deed of trust to secure all its liabilities, many of which were recited, but nothing was said about debts merely sounding in damages. The plaintiff possessing a claim of the latter kind sought to enforce the deed, and to secure damages. It was held that the plaintiffs should have first established their damages at law, and that equity had no jurisdiction until they had done so. *Witz v. Mullin*, 90 Va. 805, 20 S. E. Rep. 783.

Invasion of Property Title to Which Unquestionable.—Where the rights of parties in property have been invaded, if their title thereto is unquestionable, they may go at once in equity to compel the removal of obstructions, without proceeding at law to establish their right. *Berkeley v. Smith*, 27 Gratt. 892.

Sureties of Personal Representative Cannot Be Sued until Devastavit Fixed on Principal.—The sureties of a personal representative cannot be sued in equity until a *devastavit* is fixed upon the principal, except in cases where from some inevitable necessity a creditor is obliged to come into equity against the principal in the first place; and then the sureties should be made parties to prevent a circuity of action. *Bachelder v. Elliott*, 1 H. & M. 10.

Usurious Bond and Deed of Trust—Part of Consideration Valid.—Where a bond and a deed of trust given to secure it are usurious and void, yet if part of the consideration of the bond was a pre-existing valid debt, which so continues, a court of equity will not compel the obligee to establish his claim at law before proceeding to enforce his security. *Bank of Washington v. Arthur*, 3 Gratt. 173.

Decision by Court of Law.—If a cause has been once fully decided by a court of common law, equity will not grant relief. *Terrell v. Dick*, 1 Call 546; *Turpin v. Thomas*, 2 H. & M. 139; *Morris v. Ross*, 2 H. & M. 408; *Syme v. Montague*, 4 H. & M. 180; *De Lima v. Glassell*, 4 H. & M. 369; *Kincaid v. Cunningham*, 2 Munf. 1; *Fenwick v. McMurdo*, 2 Munf. 244. See *Johnson v. Barham*, 99 Va. 305, 38 S. E. Rep. 136, where the question was as to title to an office, attempt to exercise the jurisdiction was restrained by a writ of prohibition.

Appeal—When Chancery Can Interfere.—Where a case is fully and fairly tried in a court of law, the

decision is so far binding, that it can only be examined by an appellate court and chancery cannot interfere. But chancery may interfere if the court of law refuses to decide points of law or to reserve them, but submits them to the jury and they decide them inequitably. *Picket v. Morris*, 2 Wash. 255.

e. Bills of Peace and Quia Timet.

Bill of Peace—Rights of Defendants Must Be Connected.—A bill of peace will not lie where the rights and responsibilities of the defendants do not depend upon, nor arise from, nor are in any way connected with each other. *Randolph v. Kinney*, 3 Rand. 394.

Bill Quia Timet—Plaintiff Must Be in Danger of Loss.—A bill *quia timet* will not lie unless there is danger that the plaintiff will be subjected to loss by the neglect, inadvertence, or culpability of another. *Randolph v. Kinney*, 3 Rand. 394.

Same—By Surety against Representative of Debtor.—A surety upon the death of his principal is entitled to come into equity by a *quia timet* against the debtor's executor and the creditor to compel the executor to pay the debt, where the debt is due. *Stephenson v. Taverners*, 9 Gratt. 398.

It was held in *Call v. Scott*, 4 Call 402, that where a mortgage was given by a debtor to indemnify his surety, a bill *quia timet* by the surety against a representative of the debtor would lie for a decree that he pay the debt and indemnify the surety.

Same—By Vendee against Vendor to Compel Payment of Liens.—On principles of *quia timet* chancery will entertain a bill by a vendee of land against his vendor to compel the latter to pay out his own land liens binding the lands of both, where the vendor is insolvent except to his land, and that may prove inadequate security. *Weekly v. Hardesty* (W. Va.), 35 S. E. Rep. 880.

Same—Conveyance by Adverse Claimant.—A court of equity has jurisdiction on the principle of *quia timet* to relieve an owner in the possession of land from an adverse claim of another party, who by mistake or fraud conveys the land to another. Jurisdiction lies in this case, because the owner being in possession could not bring ejectment against the adverse claimant not in possession. *Stearns v. Harman*, 80 Va. 48.

VII. WAIVER OF OBJECTIONS.—See *supra*, "General Jurisdiction," sec. X. 6. "Waiver of Objection."

1. SUBJECT-MATTER COGNIZABLE IN EQUITY.

Bill Answered and Merits Contested.—If the defendant answers the bill without objection to the jurisdiction, and contests the merits of the case, the court will entertain the bill if it be a proper one for equitable cognizance. But if the subject-matter is not cognizable in equity it will dismiss the bill. *Hickman v. Stout*, 2 Leigh 6; *Cresap v. Kemble*, 25 W. Va. 603.

A bill by a sole surviving trustee of a town, for the purpose of asserting the rights of the inhabitants in common to certain lands annexed thereto, was sustained, where the parties went to a hearing upon the merits, without objection to the jurisdiction. *Mayo v. Murchie*, 8 Munf. 358.

2. SUBJECT-MATTER NOT COGNIZABLE IN EQUITY.

Rule Stated.—Where a bill does not state a case proper for relief in equity, or if it is brought in the wrong jurisdiction, the court will dismiss it at the hearing, though no objection has been taken by the defendant in his pleadings. *Beckley v. Palmer*, 11 Gratt. 625; *Graveley v. Graveley*, 84 Va. 151, 4 S. E. Rep. 218; *Trout v. Trout*, 86 Va. 299, 9 S. E. Rep. 1123; *Green v. Massie*, 21 Gratt. 302, and *note*; *Jones v.*

Bradshaw, 16 Gratt. 361, and *note*; Hudson v. Kline, 9 Gratt. 379; Pollard v. Patterson, 3 H. & M. 67; Salamone v. Kelley, 80 Va. 86; Boston, etc., Co. v. Carman, etc., Co., 94 Va. 94, 26 S. E. Rep. 390.

Objections Made at Any Time.—A bill will be dismissed which does not state a proper case for equitable relief, although no objection is taken to the jurisdiction in the pleadings. Objection on that ground may be taken at any stage of the proceedings. Buffalo v. Town of Pocahontas, 85 Va. 232, 7 S. E. Rep. 233.

Same—In Appellate Court—Sua Sponte.—If a bill is without equity, although it was not demurred to in the lower court, the objection may be taken for the first time in the appellate court, and may be enforced by the court *sua sponte*, though not raised by the pleading nor suggested by counsel. Boston Blower Co. v. Carman Lumber Co., 94 Va. 94, 26 S. E. Rep. 390; Collins v. Sutton, 94 Va. 127, 26 S. E. Rep. 415.

Effect of Answer.—Where a want of equity appears on the face of the bill of the complainant, no relief will be granted though the defendant answers instead of demurring. Collins v. Jones, 6 Leigh 530, 29 Am. Dec. 216.

Same—When It Establishes Jurisdiction—Proof.—A bill which does not show on its face a proper case for equitable relief should be dismissed at the hearing, even though the defendant has not appeared or objected to the jurisdiction of the court, unless the case is shown to be within the jurisdiction by the answer and proofs. Graveley v. Graveley, 84 Va. 145, 4 S. E. Rep. 218.

C. CRIMINAL JURISDICTION.

See monographic *note* on "Courts."

I. OUSTER.

By Conviction of Misdemeanor on Indictment for Felony.—A court having jurisdiction of an indictment for felony is not ousted thereof by a conviction of a misdemeanor included in the felony, although it has no original jurisdiction of such misdemeanor. Reynolds v. Com., 94 Va. 816, 27 S. E. Rep. 427.

II. DIVESTITURE OF JURISDICTION.

Effect of Repeal of Statute.—Whenever a court is deprived of jurisdiction over any class of cases, by the repeal of a statute which gives the jurisdiction, and there is no provision made for the transfer of such cases to some other court which has or is given jurisdiction, and no reservation is made for the trial of pending cases in such courts, all such cases fall with the repealed statute. Dulin v. Lillard, 91 Va. 718, 20 S. E. Rep. 821.

Corporation Courts Not Affected by Act April 2, 1873.—Act of April 2, 1873, regulating the jurisdiction of county and circuit courts, does not divest corporation courts in cities and towns of any part of their jurisdiction. Tremaine v. Com., 25 Gratt. 987.

III. OFFENCES BY ACTS OF CONGRESS.

State Courts without Jurisdiction.—The courts of a state do not have jurisdiction to try offences created by acts of congress. Thus a state court has no jurisdiction to try a defendant charged with feloniously stealing from the mails of the United States, as that is an offence created by an act of congress. Com. v. Feely, 1 Va. Cas. 321.

IV. CONCURRENT JURISDICTION.

With Federal Courts—Counterfeiter.—A state court has jurisdiction to punish an act made an offence by the laws of the state, although the same act was

made an offence against the United States by an act of congress. Jett v. Com., 18 Gratt. 933.

Thus, although a counterfeiter be indictable in the courts of the United States for an offence against the laws of the United States, he is also indictable in the courts of Virginia for the offence against the laws of that state. Hendrick v. Com., 5 Leigh 707.

Same—Forger.—And a state court has jurisdiction to punish the offence of attempting to pass a forged note purporting to be a note of one of the national banks of the United States. Jett v. Com., 18 Gratt. 933.

V. JURISDICTION OF PERSON AND OFFENCE.

Alleging Act within Jurisdiction Sufficient.—Where the indictment made by the grand jury of the hustings court of a city charges the assault to have been made at the city, and within the jurisdiction of the said court of the said city, this is sufficient, and it is not necessary to state the exact place of the assault. Baccigalupo v. Com., 33 Gratt. 807.

Evidence Should Show Offence in Jurisdiction.—Where there is no evidence in the record to show that an offence is committed within the jurisdiction of the court hearing the case, it is an error if that court overrules a motion for a new trial. Hoover v. State, 1 W. Va. 335.

Court of Richmond Has No Jurisdiction of Offence in Essex.—The circuit court of Richmond issues a *capias* against a person then indicted for felony, which is directed to the sheriff of Essex, and by him served, and in Essex he wilfully permits the prisoner to escape. In such case a criminal prosecution against the sheriff cannot be maintained in the circuit superior court of Richmond, for this official malfeasance committed in Essex. Com. v. Lewis, 4 Leigh 664.

Convicts—May Be Tried Where Penitentiary Is Located.—When a convict kills a guard while hired out in a county other than the one in which the penitentiary is situated, in contemplation of law he is still in the penitentiary, and he may be indicted and tried in the county in which the penitentiary is located. Ruffin v. Com., 31 Gratt. 790.

Larceny—Out of State—Possession in State.—Where one steals property at a place beyond the jurisdiction of this state, and brings the same into this state, he cannot be lawfully convicted of larceny in our courts. Strouther v. Com., 92 Va. 789, 23 S. E. Rep. 852.

Same—In State—Possession in Another County.—If goods be stolen in one county, and carried into another the thief may be indicted in either, the offence being complete in both counties. Com. v. Cousins, 2 Leigh 708.

Wagers on Races in Another State.—The state of Virginia has a right to suppress and punish under its police power wagers made here on races to be run in West Virginia. The act takes place here, and over it and the actors this state has complete jurisdiction, it does not matter where the race is run. Lacey v. Palmer, 93 Va. 159, 24 S. E. Rep. 930.

Death in Another State from Stabbing in Virginia.—If a person be stabbed in Virginia, and die of his wounds in another state, the assailant cannot be tried for murder in any county in this commonwealth, but he may be examined, indicted, and tried for the felonious stabbing in the county where the blow was inflicted. Com. v. Linton, 2 Va. Cas. 205.

Selling Liquor without License—Offence Complete When Delivery Is Made.—No indictment will lie against a person for taking orders for liquor in a

county in which he has no license, to be delivered to the common carrier in a county in which he has a license. The contract being executory is only completed when delivery is made for transportation to the buyer. *State v. Hughes*, 23 W. Va. 748.

So when an order by mail for liquor was filled by delivering the package marked C. O. D., to an express company in a county where the dealer had a license, to be delivered to the consignee in a county where he had no license, it was held to be no violation of the law. *State v. Flanagan*, 38 W. Va. 53, 17 S. E. Rep. 792.

VI. CONSTITUTIONAL AND STATUTORY PROVISIONS.

Providing Examination for Felony before County Court.—Act of April 3, 1873, providing for the examination of persons charged with a felony before the county court, is not in violation of § 12, art. 8 of the Constitution, providing that the circuit courts shall have jurisdiction of all felonies and misdemeanors, as the jurisdiction conferred on the circuit courts is not exclusive. *State v. Strauder*, 8 W. Va. 686.

Giving County Court Jurisdiction of Felonies—Section 27 of art. 8 of the Constitution, which provides that the county courts shall have jurisdiction of all criminal cases beneath the grade of a felony, is not an implied prohibition against the legislature giving the county court jurisdiction in cases of felony; hence, an act giving county courts jurisdiction to examine persons charged with felonies, is not in violation of this provision. *State v. Strauder*, 8 W. Va. 686.

Creating City and Corporation Court—Offences Prior to Act.—An act incorporating a city, and creating a court therein, will not be presumed to give, by implication, that court jurisdiction of an offence committed before the passage of the act. *Ryan v. Com.*, 80 Va. 335.

VII. TRANSFER OF CAUSES.

By Consent—To Court Having Jurisdiction.—By mutual consent the parties may transfer an action for assault and battery from a county court to a district court, when the latter court has jurisdiction over the subject. *Parish v. Gray*, 6 Call 18. See Va. Code 1849, p. 657; Va. Code 1887, sec. 3315, as amended by Acts 1893-94, p. 751. See monographic note on "Removal of Causes."

Same—To Superior Court.—The removal of an indictment from a county to a superior court, by consent of the attorney for the commonwealth and the defendant, gives no jurisdiction to the superior court to try it. *Com. v. Brownwell*, 2 Va. Cas. 223.

Power of Superior Court—Treason and Felony.—The superior court has no power to change the venue, in any case of treason or felony, on application of defendant. *Com. v. Wildy*, 2 Va. Cas. 69.

Same—Misdemeanor.—A superior court of law has no power to change the venue in any case of misdemeanor. *Com. v. Rolls*, 2 Va. Cas. 68.

Power of District Court—Misdemeanor.—The district court has power to grant defendant's application for a change of venue, for good cause shown, in case of misdemeanors. *Com. v. Bedinger*, 1 Va. Cas. 124.

To Federal Court—Objection to Jury by Colored Man.—A colored citizen of West Virginia on trial for homicide is not entitled to have the case removed to the circuit court of the United States for trial on the ground, that by the law of the state only white men can sit on the jury. *State v. Strauder*, 11 W. Va. 745, 27 Am. Rep. 606.

Same—On Ground of Race Prejudice.—A citizen of

West Virginia on trial for homicide is not entitled to have the case removed into the circuit court of the United States for trial, on the ground that he is a colored man, and that such prejudices exist in the state against his race that he cannot get justice in the state courts. *State v. Strauder*, 11 W. Va. 745, 27 Am. Rep. 606.

To Circuit Court at Election of Prisoner—Should Elect on Arraignment.—Under Act of 1866-7, ch. 28, sec. 1, providing that a party on trial for a crime which is punishable with death may upon his arraignment demand to be tried in the circuit court, the accused should elect which court he will be tried in at the time of his arraignment. *Whitehead v. Com.*, 19 Gratt. 640.

Same—Motion to Remand.—The circuit court after acquiring jurisdiction to try a defendant by his election to be tried by it, cannot remand the case to the county court even on the prisoner's motion. *Nicholas v. Com.*, 91 Va. 741, 21 S. E. Rep. 364.

Same—Advice from Court or Clerk.—Section 4016 of the Code providing that a person may upon arraignment for a capital felony in a county court, demand trial in the circuit court, does not require that he be advised of his right by the court or clerk, if he has counsel. *Drier v. Com.*, 89 Va. 529, 16 S. E. Rep. 672.

Same—Duty of Clerk of County Court—Record.—Section 4016 of the Code which provides that where one indicted in the county court for a felony elects to be tried in the circuit court, the clerk of the former court shall transmit to the clerk of the latter court a transcript of the record in relation to the prosecution and copies of the indictment and recognizance and other papers connected with the case, does not require the record to show affirmatively that a *venire facias* was issued in summoning the grand jury. *Watson v. Com.*, 87 Va. 608, 18 S. E. Rep. 22.

No Transfer from Corporation to Circuit Court.—It was held in *Boswell v. Com.*, 20 Gratt. 800, that a prisoner indicted in a corporation court for murder was not entitled to elect to be tried in the circuit court. In this respect Acts 1866-67, p. 931, have been altered by Acts 1869-70, p. 35. See foot-note to this case.

Arrest after Transfer.—Where, after the commission of a felony, the jurisdiction of the offence is transferred from one court to another, and the prisoner is afterwards arrested, he should be sent to the latter court to be tried. *In re Ewing*, 5 Gratt. 701.

VIII. TERRITORIAL JURISDICTION.

Over Offences in Ohio River.—The jurisdiction of West Virginia is coextensive with the water of the Ohio river while confined within its banks, and in the proper county the state has jurisdiction of offences committed on a boat, which is afloat on the river, whether fastened to the bank or not. *State v. Plants*, 25 W. Va. 119.

In a prosecution for aiding in the escape of slaves from the state of Virginia, it appeared that defendants, citizens of the state of Ohio, after the canoe in which the slaves crossed the Ohio river to the Ohio shore was run upon the shore, stepped into the water above low-water mark, and aided the slaves in the removal of their effects from the canoe. It was held that the offence was not committed in the jurisdiction of Virginia. *Com. v. Garner*, 3 Gratt. 655.

Over Potomac River—Offence by Citizen of Maryland.—Under the compact between Virginia and Maryland (see pp. 110 and 111 of the Va. Code of 1873), pro-

viding that all laws necessary for the preservation of fish in the Potomac river shall be made with mutual consent of both states, a citizen of Maryland is liable to prosecution and conviction for the violation of §§ 18, 20, ch. 100, Code 1873 of Va., which were enacted with the consent of Maryland, relative to fishing in the Potomac river. *Hendricks v. Com.*, 75 Va. 934.

Offences in Bays, Rivers, High Seas, etc.—Judges of Admiralty.—By a statute passed in 1699, treasons, felonies, or piracies, committed not only on the high seas, but in any bay, river, etc., where the admiral had jurisdiction, were to be tried by judges of admiralty, under commissions of oyer and terminer. *Com. v. Gaines*, 2 Va. Cas. 172.

Of Hustings Court of Richmond.—The criminal jurisdiction of the hustings court of Richmond extends one mile beyond the city limits on the north side of the James river. *Jordan v. Com.*, 25 Gratt. 943.

IX. OBJECTION TO JURISDICTION.

On Motion of Prisoner—Felony Cases.—In prosecutions for felonies and other serious offences, the court will not on motion of the prisoner quash the indictment, unless where the court has no jurisdiction, where no indictable offence is charged, or where there is some other material and substantial defect. *Bell v. Com.*, 8 Gratt. 600.

Same—Being Question of Law Should Be Decided by Court.—Although a plea to the jurisdiction of the court tendered by a prisoner was informal and properly rejected, yet, the objection being a mere question of law, however made, whether by suggestion or motion *ore tenus*, should be considered and decided by the court. *Phillips v. Com.*, 19 Gratt. 485, and *foot-note*.

Change of Venue—Plea That Offence Was Committed in Former County.—When the venue is changed from one county to another, a plea that the murder was committed in the former county, and that, therefore, the court of the latter has no jurisdiction, is bad on demurrer. *Vance v. Com.*, 2 Va. Cas. 162.

X. WAIVER OF OBJECTION.

Not Waived by Pleading.—The objection that the county court, at which the indictment was found, did not consist of at least four justices, as required by Const. art. 6, sec. 5, goes to the jurisdiction of the court, and hence is not waived by pleading to the indictment and going to trial thereon. *Jackson v. Com.*, 13 Gratt. 795.

No Objection to Want of Arraignment and Plea after Removal.—It is no ground for an arrest of judgment that the defendant, after pleading not guilty in the county court elected to be tried in the circuit court under Acts 1877-78, ch. 17, sec. 1, and was not again arraigned and did not plead again, although that section provides that he shall be there arraigned and tried at the next term; the defendant not objecting to be tried without further plea. *Sutton v. Com.*, 85 Va. 128, 7 S. E. Rep. 323.

Charles v. Charles.*

January Term, 1852, Richmond.

(Absent CABELL, P.)

[56 Am. Dec. 155.]

1. Antenuptial Contracts—Bar to Marital Rights.†—
The rights of a husband to the property of his

*For monographic note on Curtesy, see end of case.

†Antenuptial Contracts—Bar to Marital Rights.—
Parties, when about to contract the relation of

intended wife, may be intercepted by his agreement to that effect. And where by express contract before and in contemplation of marriage, for which the marriage is a sufficient consideration, he agrees to surrender his right to the enjoyment of the property during the coverture, and his right to take as survivor, there remains nothing to which his marital rights can attach during the coverture, or after the death of the wife. In such case the wife is to all intents to be regarded as a *feme sole* in respect to such property; and there is no necessity that the marriage contract or settlement should limit the property to her next of kin upon her failure to appoint; but it will pass as if the wife died *sole* and intestate.

2. Administrators—Appointment—When Husband Not Entitled to.—If the husband has relinquished his marital rights to his wife's property, he is not entitled to administration upon her estate.

A marriage being about to take place between Henry H. Charles of the county of York, and Martha P. Wynne, widow of Richard Wynne deceased, a deed bearing date the 8th day of October 1835, was executed by the parties for the settlement of her property. This deed recited that it
487 had been agreed between the *parties that Mrs. Wynne should, after the marriage, receive and enjoy, during the

husband and wife, may, by agreement vary or wholly waive the rights of property which would otherwise result from the marriage. *Findley v. Findley*, 11 Gratt. 487, citing as its authority *Faulkner v. Faulkner*, 3 Leigh 255; *Charles v. Charles*, 8 Gratt. 486. To the same point, see the principal case cited with approval in *Beard v. Beard*, 22 W. Va. 138. In this case, there was a marriage settlement in which the contracting parties agreed that "all the property, both real and personal, owned by them shall remain separate and under his or her control and each in his or her own name the same as if they had never been married; and that none of the property of either one shall be subject to the debts of the other; and that they relinquish all claim, title or interest in each other's property that might rest in them under the law by reason of their expected marriage." The wife died intestate and without issue, the husband surviving her, and it was held that he was entitled to the whole of the wife's personal estate to the exclusion of her next of kin, the court saying that there was nothing in the marriage contract indicating clearly that he intended to release his interest accruing by reason of her death intestate but only such interest as accrued by reason of the marriage, that is, his marital right during the existence of the coverture to take possession of and hold as his own all her personal property.

In *Hinkle v. Hinkle*, 34 W. Va. 142, 11 S. E. Rep. 992, an antenuptial contract was entered into by a woman on the eve of her marriage by which she agreed to waive and relinquish forever all such right, title, or interest in and to any part of the estate, both personal and real, or the proceeds of the sale of either or both, of which her intended husband was then or might thereafter come in possession or acquire; never to claim at law or otherwise, as she would be entitled to in the estate of the intended husband after intermarriage with him, any part of his property or estate by reason of the solemnization of the marriage between them; that she should never in the future acquire any

joint lives of the said Wynne and Charles, the interest and occupation of her personal estate; and also that the same, and the interest and profit thereof, from and after the deceased of such of them as should first happen to die, should be at the sole and only disposal of the said M. P. Wynne, notwithstanding her coverture. And that it had been also agreed, that in case the said Charles should, after the marriage, happen to survive the said M. P. Wynne, that he should not claim any part of the real or personal estate whereof the said M. P. Wynne should be seised or possessed or entitled to, at any time during the coverture; and that the said real and personal estate of the said M. P. Wynne should be in no wise under the control of said Charles, nor in any manner or at any time subject to his debts.

The deed then proceeds to convey in the name of M. P. Wynne to James Kirby, sr., with the consent and approbation of Charles, which is witnessed by his sealing the deed, all her property both real and personal, in trust for Mrs. Wynne until the marriage, then upon trust that Kirby will permit her to enjoin the sole, separate and exclusive use of the said property for her own separate and special use; and upon the further trust that the trustee will permit the said M. P. Wynne to dispose of the said prop-

erty, rights, etc., to any part of the estate of the intended husband further than he might convey to her by gift or will; and further, that he should, at all times during his life have the right to convey any part of his real estate without her consent. The court, basing its opinion on the case of *Beard v. Beard*, 22 W. Va. 130, held that this contract did not either expressly or by necessary implication cut off and bar her right of dower should she survive the husband. *LUCAS, J.*, delivering the opinion of the court, said that a contract relinquishing all material rights, made by a man in contemplation of marriage, would undoubtedly be enforced, citing the principal case as his authority. Continuing, he said: "But as against the woman, there being no similar case as yet reported in Virginia or this state, I should be very unwilling to establish such a precedent. * * * I should conclude, therefore, that because the man may accept the marriage as a consideration sufficient to sustain his agreement to renounce and waive all right in his wife's property during coverture, and of survivorship, should he outlive her, nevertheless, it by no means follows that the weaker vessel, who has been induced to betroth herself in marriage, can, without any other consideration whatever, and in the absence of all reciprocal engagements, on the part of the man, and without any provision whatever for jointure, bind herself by an antenuptial agreement not to claim any of the rights of survivorship in his property should she survive him. I think such a contract would be adverse to the spirit, if not in direct contravention, of our statute. And such an opinion, were it necessary to decide the point, would be abundantly sustained by the highest authorities."

See further on this subject, monographic note on "Husband and Wife" appended to *Cleland v. Watson*, 10 Gratt. 159.

erty by deed, will or otherwise, as she shall think proper; and that he will convey a legal title to the person or persons to whom she may convey the property. This deed was executed by Charles, Mrs. Wynne and the trustee, and duly admitted to record: And the marriage took place.

In December 1849 Mrs. Charles died, leaving her husband surviving her, without having disposed of her estate either by deed or will, or otherwise. She left no child surviving her or descendant of a child, though she had had children by her two former marriages; but they had died before her marriage with Henry H.

488 *Charles. Her distributees, if her husband was not entitled to her personal estate, were her nieces, descendants of sisters, of whom one was married to William H. Charles.

The slaves belonging to Mrs. M. P. Charles at the time of her marriage, never went into the possession of the trustee, but always remained in the possession and enjoyment of Henry H. Charles, during the coverture.

At the April term 1850 of the Circuit court of York county, Henry H. Charles moved the Court to be permitted to qualify as the administrator of his late wife, Martha P. Charles; which motion was opposed by William H. Charles, who asked for the administration for himself, on the ground of his marriage with one of the nieces of Martha P. Charles, entitled, as he insisted, to a portion of the estate. These motions came on to be heard together in April 1851, when the Court overruled the motion of Henry H. Charles, and granted the administration to William H. Charles. And thereupon an exception was taken to the opinion of the Court, and Henry H. Charles applied to this Court for a supersedeas, which was awarded.

Morson, for the appellant.

It is submitted that the decision of the Circuit court was erroneous and prejudicial to Henry H. Charles, and ought to be set aside and reversed. He must by operation of law be entitled to the property, unless the deed has intercepted the rule of law, and by substituting a rule of its own and a rule intended to apply to the emergency which has occurred, has clearly not only taken the property from him, but given it to others. For where, upon a given state of facts, the rule of law turns property over to one man, it cannot be turned over to another by any compact, agreement or declaration of any party or parties which stops short of clearly giving, and manifesting an intention to give it to such other.

489 *Heirs cannot be disinherited by the strongest declarations in a will that they shall not take: the will must go further and designate others who shall take. *Boisseau v. Aldridges*, 5 Leigh 222. By similar reasoning, husbands cannot be deprived of their rights of property arising "jure mariti" by a deed which shall even declare that they should not have

them, unless the deed further provided that they should go to others. If they be not by the deed, in the event that has occurred, turned over to any body, then it is not a "casus foederis," not a case which the deed has provided for, but a "casus omisus," one for which a rule must be found not in the deed, but in the general principles of the law. And these general principles give the property to the husband; enable him to qualify as the wife's administrator, and afterwards to keep possession absolutely for his own benefit, subject only to the payment of her debts. See 1 Lomax's Ex'rs 135, 136, 310, 311; Tate's Dig. 394-5, § 7. See also Code of Virginia of 1849, p. 541, § 4.

Even should it be held, then, that the words of the deed manifested an intention to take the subject from the husband upon the contingency that has happened, they failed to give it to others and only authorized the wife so to give it; and this she has never done. Of consequence neither the deed nor the wife has ever yet given the subject to others; and if given to others it can only be by operation of law. But there certainly is no rule of law which, under the circumstances, can give the property to others; though there is the general rule of law which does give it to the surviving husband.

It is worthy of remark, that in the recital of the deed, as well as in the express declarations of trust, while great care is evinced to secure the property to the separate use of the wife, and to give her the power to dispose of it, there is an utter absence of any expression or provision

to point out how it is to go in case of

490 *her making no such disposition. The trustee, "his executors, administrators and assigns," are to permit the feme [studiously omitting, apparently, her executors or administrators], to enjoy the separate use of the property, and to dispose of it by deed, will or otherwise; and they are required to convey the legal title to the person or persons to whom she may convey the property. Now this omission is very strong to shew, [made as it was in a deliberate deed,] that as against the husband, the only parties intended to be preferred, certainly the only parties expressly preferred, were the feme and her appointees; and it is unnecessary to dwell upon the essential distinction between such appointees and the present antagonists of the husband. Indeed, it can scarcely be doubted, that in the case of Bray v. Dudgeon, 6 Munf. 132, the introduction of expression, where here there is omission, was the turning point of the adjudication. There, the deed expressly provided, that upon the failure of the wife to appoint, "her proper and legal heirs" should take; and it is manifest that it was this provision which excluded the husband alike from the administration and the property. A similar commentary obviously occurs in reviewing the case of Ward v. Thompson, 6 Gill & John. 349, in which the rights of

the husband were held to be extinguished by the stipulation that without his interference in any manner the trust subject should be under the exclusive and entire management and control of the wife, "her heirs, executors, administrators or assigns," who, it was agreed, should "receive and enjoy the rents, issues and profits." The case of Marshall v. Beall, 6 How. S. C. R. 71, is explicable in the same way. And the governing principles applicable to the present case, and similar cases, are very luminously illustrated by Chancellor Kent in Stewart v. Stewart, 7 John. Ch. R. 229, 245, 246, 247, a case which takes what seems to be the true ground, that the marital

491 rights of the husband, *over the property of his wife, can only be extinguished by plainly and clearly giving that property to others, or by conferring on the wife, or her representatives, other than the husband, the power to make and accomplish such gift, and an execution by her or them of such power. Besides, it is submitted, that the true construction of the recitals in the deed, does not authorize the inference that they are intended to deprive the husband entirely, at all events, and upon every contingency, of all rights of property in the trust subject. That passage in the recital, [omitted in the declaration of trusts,] which provides that the husband, in case of surviving the wife, should not claim any part of the trust subject, ought to be taken in connection with the rest of the deed: and so taken cannot properly be made to do more than stipulate that the husband, as against the claims of the appointees under the wife, [so appointed in conformity with the deed,] should not assert any conflicting or repugnant rights. This would reconcile all parts of the deed. Anything else would bring them in conflict. But should such conflict be brought on, the recital would have to give way to the declarations of trust. Mere matter of introduction could not over-ride the solemn provisions in the conveyance and the declarations of the trust therein. Stewart v. Stewart, 7 John. Ch. R. 229; Sheph. Touch. ch. 5, p. 75, 76, note 62, 78, 77, 88, in 30 Law Libr.

If not precluded from taking the property, of course he is entitled to the administration.

Meredith, for the appellee.

The whole question is, who is entitled to the estate of Mrs. Charles? On the question who is entitled to administration there has been some vacillation in the decisions on the English statutes; but when the case came up between the husband and the

492 next of kin, it *was decided in favour of the husband; but he took the administration because he was entitled to the property; and only when entitled. Fielder v. Hanger, 5 Eng. Eccl. R. 265; Watt v. Watt, 3 Ves. R. 244; Bailey v. Wright, 18 Ves. R. 49; Fettiplace v. Gorges, 1 Ves. jr. 46; 1 Wms. Ex'ors 244; Toller's Ex'ors 85, 116; Cutchin v. Wilkinson, 1 Call 1; Hen-

dren v. Colgin, 4 Munf. 231; Bray v. Dudgeon, 6 Munf. 132; Thornton v. Winston, 4 Leigh 152. These cases shew that the person entitled to the property is entitled to administration on the wife's estate.

The enquiry then is, what interest did Henry H. Charles take in his wife's estate. And this depends on the construction of the deed of the 8th of October 1835, executed by the parties. Pending the treaty of marriage the husband covenanted that she should have her own estate; and that he would not claim any interest in it if he survived her. The property of the wife was not property in possession, in which the title of the husband was perfected by marriage; or there would have been no necessity for administration on her estate. But the legal title was in the trustee and the beneficial interest was in the wife; and as there must be a joint interest, in order that one may take as survivor, there could be no title by survivorship in the separate property of the wife.

It is insisted by the counsel on the other side, that though it is true that the husband excludes himself, he should have gone further and pointed out some one else to take the property in the event of the intestacy of the wife. And Boisseau v. Aldridges, 5 Leigh 222, is relied on for the proposition. But there the son was no party to the instrument; here the husband is a party to the deed; and he in consideration of the marriage covenants that he will not take anything either during the marriage or if he survives the wife. This is all the husband could do. He had no right to

493 say how the *property should go; nor had he any interest which he could convey. All that he had was such an interest as he could only release and only release to her; and that he did, and thereby her title became perfect. King v. Bettsworth, 2 Strange's R. 1118; 2 Story's Equ. Jur. § 1382. This last authority and the cases there cited, shew that all the husband has to do, to exclude himself, is to create a separate estate in the wife, and that excludes him.

It is said that the wife should have made an appointment; and that it is only her appointee who can exclude the husband. The wife here stands as a feme sole, and has the power and the estate of a feme sole; and an appointment is unnecessary to pass her property. Here Mrs. Charles had a separate estate on which there was no limitation as to time; and therefore she had the power to dispose of it without regard to the power of appointment. Tappenden v. Walsh, 1 Eng. Eccl. R. 100; Fettiplace v. Gorges, 1 Ves. jr. 46; 2 Story's Equ. Jur. § 1389, 1390, 1394. In such a case it is not necessary that the deed or marriage agreement should direct who shall take the estate after the death of the wife without making an appointment. Bradley v. Westcott, 13 Ves. R. 445, 451; Barford v. Street, 16 Ves. R. 135; Anderson v. Dawson, 15 Ves. R. 532; Gackenback v. Brouse, 4 Watts & Serg. 546.

ALLEN, J., delivered the opinion of the Court.

The deed of marriage settlement duly executed by the parties and their trustees before marriage, recited amongst other things that it hath also been agreed, that in case the said Charles should after the intended marriage happen to survive the said Martha, that he should not claim any part of the real or personal estate whereof the said Martha should be seised or possessed or entitled to at any time during the coverture between them; and that the said real

and personal estate of said Martha
494 *should be in no wise under the control of the said Charles, nor in any

manner or at any time subject to his debts. The deed then proceeds to grant the property of the intended wife to the trustee, and by the declaration of trust the separate and exclusive use of the property is secured to the wife; the trustee was to permit her to dispose of it by will or otherwise and to convey the property to such appointee or alienee: but in the declarations of trust there is no express provision excluding the husband in the event of his surviving, and in default of any appointment or disposition by the wife. And it is contended that by operation of law the husband surviving is entitled in virtue of his marital rights, to take the property, as she did not dispose of it or appoint the uses to which it should be applied after her death. The rights of the husband to the property of his intended wife may be intercepted by his agreement to that effect; and where by express contract, for which the marriage is a sufficient consideration, he agrees to surrender his rights to the enjoyment of the property during the coverture, and his right to take as survivor, there remains nothing to which his marital rights can attach during the coverture or after the death of the wife. In such case the wife is to all intents to be regarded as a feme sole in respect to such property; and there would seem to be no necessity for any limitation over to her next of kin in the event of a failure to appoint during her lifetime. The husband having by contract for a good consideration released his rights as survivor, the property must pass as though she had died sole and intestate. That such was the intent of the parties in this case is clear from the deed. The contingency of his surviving was foreseen, and the agreement as recited in the deed signed by all the parties provided for it. By that agreement so recited, he bound himself not to claim the property should he happen to survive his wife. There is nothing to indi-

495 cate *an intention to restrict the claim as against the appointees of the wife. The expressions refer not to persons against whom he would not claim, but to the subject as to which in that contingency he released all claim; and to show more clearly that such was the intent of the agreement, it is furthermore recited that the property was not to be under his control, or in any manner or at any time

subject to his debts, not restricting the time to the continuance of the coverture.

Having thus by contract intercepted the marital rights of the husband either to enjoy during coverture or to take by survivorship; and this intention appearing on the face of the deed, it was only necessary that the declarations of trust should provide for the control and authority of the wife during the coverture. And the property, if not disposed of, passed to her personal representative for the benefit of her next of kin, as if no marriage had ever taken place, and she had died sole and intestate.

The right of the husband to administer depending on the question whether in virtue of the marital right he is entitled to the property, and as by the agreement recited in the deed of settlement he relinquished and renounced such rights, his motion to administer was properly overruled, and the administration granted to the appellee, one of the distributees of the deceased. The order should be affirmed.

CURTESY.

I. Definition.

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Cross Reference to Monographic Note.

Dower, appended to Davis v. Davis, 25 Gratt. 587.

I. DEFINITION.

"When a man takes a wife seized during the coverture of an estate of inheritance, legal or equitable, such as that the issue of the marriage may by possibility inherit it as heir to the wife, has issue by her born alive during the coverture, and the wife dies, the husband surviving has an estate in the land for his life, which is called an estate by the curtesy. 2 Bl. Com. 126." Breeding v. Davis, 77 Va. 689; 2 Min. Inst. (4th Ed.) 114.

"Curtesy is the estate to which by common law a man is entitled, on the death of his wife, in the lands or tenements of which she was seized in possession in fee simple, or in tail during their coverture, provided they have had lawful issue born alive which might have been capable of inheriting the estate." Breeding v. Davis, 77 Va. 689.

West Virginia.—Under the present (1899) Code of West Virginia, "if a married woman die seized of an estate of inheritance in lands, her husband shall be tenant by the curtesy in the same. An estate by the curtesy in the lands of which a married woman

may hereafter die seized, shall exist and be held by her husband therein, whether they had issue born alive during the coverture or not." W. Va. Code 1899, ch. 65, § 15, p. 666; Alderson v. Alderson, 46 W. Va. 242, 88 S. E. Rep. 228. But the former statute, W. Va. Code 1868, ch. 65, § 15, as amended by Acts 1872-3, ch. 207, § 2, providing that "if a married woman die seized of an estate of inheritance in lands, her husband shall be tenant by the curtesy in the same," did not dispense with any of the four common-law requisites of curtesy: marriage, seisin of the wife, issue born alive and death of the wife, but was only declaratory of the common law. Winkler v. Winkler, 18 W. Va. 455; Fulton v. Johnson, 24 W. Va. 95.

II. REQUISITES.

A. IN GENERAL.

Curtesy Initiate.—The requisites of curtesy initiate are marriage, seisin of the wife during coverture and birth of issue alive. Breeding v. Davis, 77 Va. 689, 46 Am. Rep. 740; Porter v. Porter, 27 Gratt. 599.

Curtesy Consummate.—In order to entitle the husband to an estate by the curtesy consummate, the above requisites must exist and the death of the wife in the husband's lifetime must also occur. Breeding v. Davis, 77 Va. 689, 46 Am. Rep. 740; Muse v. Friedenwald, 77 Va. 57; Carpenter v. Garrett, 75 Va. 129; Porter v. Porter, 27 Gratt. 599.

B. SEISIN OF THE WIFE.

Necessity for Actual Seisin.—Seisin in law of the wife is not sufficient to invest the husband with an estate as tenant by the curtesy. Nothing short of seisin in fact or actual seisin will effect this. Carpenter v. Garrett, 75 Va. 129; Fulton v. Johnson, 24 W. Va. 95; Stuart v. Stuart, 18 W. Va. 675.

By virtue of a decree of confirmation of a judicial sale of vacant and unoccupied lots or lands, the purchaser has, by construction of law, such possession as amounts to such seisin in fact as will entitle the husband of the purchaser to curtesy in the lots or land. Seim v. O'Grady, 42 W. Va. 77, 24 S. E. Rep. 994.

Where real estate is devised to trustees for the use of the wife and family of the testator's son, and to his heirs forever, and the son ceases to have a family, he is not thereby entitled to any curtesy in his wife's interest in the property in case of her death before their youngest child attains majority, the wife never having in fact been seized of the land during the coverture. Stuart v. Stuart, 18 W. Va. 675.

Distinction between Seisin in Fact and Seisin in Law.

—"Seisin in fact or in deed, as Lord Coke calls it, or actual seisin, means possession of the freehold by the *pedis positio* of one's self or one's tenant or agent, or by construction of law, as in case of a commonwealth's grant, a conveyance under the statute of uses, or doubtless of grants or devise, where there is no actual adverse occupancy. Seisin in law is a right to the possession of the freehold, when there is no adverse occupancy thereof, such as exists in the heir after descent of lands upon him before actual entry by himself or his tenant." Carpenter v. Garrett, 75 Va. 129; Seim v. O'Grady, 42 W. Va. 77, 24 S. E. Rep. 994; 2 Min. Inst. (4th Ed.) 123.

Hence, under Va. Code 1819, ch. 107, § 2 (see Va. Code 1887, § 2274), allowing the widow to remain on the premises until the assignment of her dower, free of rent, where the widow thus remains in possession, she is seized of the premises; and if her daughter, one of the heirs of her husband, marries, has issue born alive and dies in her mother's life-

time, the husband of the daughter is denied curtesy because of the lack of actual seisin during coverture. *Carpenter v. Garrett*, 75 Va. 129; *Pitzer v. Williams*, 2 Rob. 241.

C. BIRTH OF ISSUE—WEST VIRGINIA.—Since the Act of 1882, W. Va. Code 1899, ch. 65, § 15, the birth of issue is no longer a requisite to curtesy in West Virginia, it being provided by said section that "an estate by the curtesy in the lands of which a married woman may hereafter die seised shall exist and be held by her husband therein, whether they had issue born alive during the coverture or not." See *Alderson v. Alderson*, 46 W. Va. 242, 33 S. E. Rep. 228. But W. Va. Code 1868, ch. 65, § 15, as amended by Acts 1872-3, ch. 207, § 2, providing that "if a married woman die seised of an estate of inheritance in lands, her husband shall be tenant by the curtesy in the same," did not dispense with the requisite as to birth of issue, but was merely declaratory of the common law. *Winkler v. Winkler*, 18 W. Va. 455.

III. NATURE AND INCIDENTS.

A. CURTESY INITIATE.

In General.—After the birth of issue a husband, as tenant by the curtesy initiate, is seised of a freehold estate in the wife's land in his own right, and the interest of the wife is a mere reversionary interest, depending upon the life estate of the husband. *Breeding v. Davis*, 77 Va. 639.

Liability for Debts.—Where, prior to the adoption of the W. Va. Code of 1868, the husband by marriage and the birth of issue alive had become tenant by the curtesy initiate of the freehold property of his wife, the life estate of the husband in such estate is liable for the payment of his debts, notwithstanding the provision of ch. 66 of the said Code, and of the W. Va. Constitution of 1872. *Wyatt v. Smith*, 25 W. Va. 813.

How Present Value Computed.—See Va. Code 1887, § 2281; W. Va. Code 1899, ch. 65, § 17, p. 606. See also, monographic *note* on "Dower" appended to *Davis v. Davis*, 25 Gratt. 587.

Effect of the Married Woman's Act on Curtesy Initiate.—The Married Woman's Act, Acts 1876-77, pp. 333-4 (see Va. Code 1887, § 2284 *et seq.*) giving the wife the power to possess, enjoy and devise her separate estate as if sole, destroys the tenancy by the curtesy initiate; but if the wife dies without having alienated the lands, the husband's curtesy attaches. *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740.

Under the Married Woman's Act, the husband's inchoate tenancy by the curtesy, and the right to reduce into his possession his wife's choses in action are destroyed, neither being vested rights. *Alexander v. Alexander*, 85 Va. 353, 7 S. E. Rep. 335.

Under the Married Woman's Act, the husband has only a modified tenancy by the curtesy, dependent upon a contingency, and no estate vests in the husband during the life of the wife. This is rather a shadowy estate. It is an interest which may possibly ripen into something tangible in the uncertain future. Previous to the act, it could be sold on execution against the husband. Now the wife has the sole control of her real estate during her life, and the husband has no interest until her death. This estate at best is now a bare possibility, dependent on his surviving his wife. *Breeding v. Davis*, 77 Va. 639.

Liability for Debts under Married Woman's Act.—Since the passage of the Married Woman's Act, the husband's curtesy initiate in his wife's lands cannot

be sold to pay his debts. *Welsh v. Solenberger*, 85 Va. 441, 8 S. E. Rep. 91.

Where property which constituted a wife's separate estate was conveyed by a deed in which the husband united, a judgment against him did not constitute a lien on the husband's estate by the curtesy in such property, since during the wife's life the husband had no interest in the property to which the judgment could attach. *Bankers', etc., Co. v. Blair*, 99 Va. 606, 39 S. E. Rep. 231, 7 Va. Law Reg. 253.

B. CURTESY CONSUMMATE.—The death of the wife is one of the requisites for curtesy. During the wife's life, after issue born alive, the husband is said to be tenant by the curtesy initiate. Upon her death only, is he tenant by the curtesy consummate. *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740.

A wife seised of a separate estate of inheritance in coal lands leased the same for the purpose of mining and removing coal, in consideration of a royalty to be paid by the lessee, but no mine was actually opened until after her death. *Held*, that the husband is entitled to curtesy in the royalties arising from said lease, and that the mine is to be considered as open at the time of the wife's death. *Alderson v. Alderson*, 46 W. Va. 242, 33 S. E. Rep. 228.

Where lands which a married woman has inherited from her father have been applied by the executor to the payment of her father's debts, her husband is entitled, as tenant by curtesy, to be reimbursed out of the father's personal estate by an amount equal to the rents and profits which the executor has misapplied. *Taliaferro v. Burwell*, 4 Call 331.

Distinguished from Dower.—Dower requires to be assigned; curtesy needs no assignment, but takes effect immediately upon the wife's death. 2 Min. Inst. (4th Ed.) 183; 8 Am. & Eng. Enc. Law, 518.

Distinguished from Marital Right.—"Although the tenancy by the curtesy is ordinarily, to appearance, a mere prolongation of the tenancy by the marital right, enabling the husband to hold for his own life what otherwise would terminate with the life of the wife, yet the tenancy by the marital right attaches to some estates to which the tenancy by the curtesy cannot attach, though there should be issue of the marriage, as, for example, estates for life—even estates *pur autre vie*. And to other estates it cannot attach, in which there may be curtesy, as, for example, estates held for the separate use of the wife. In such estates, under some circumstances, there may be curtesy; but it is of their very essence not to be subject to the marital right." *Porter v. Porter*, 27 Gratt. 599.

Liability for Debts.—The husband's estate by the curtesy consummate exists in the wife's lands unalienated by her during her lifetime, though devised by her will. Such estate is subject to the liens of the husband's creditors acquired during the coverture, in preference to the general liens of her creditors upon her real estate. Acts 1876-7, pp. 333-4; Acts 1877-8, p. 248; *Browne v. Bockover*, 84 Va. 424, 4 S. E. Rep. 745.

Effect of Judgment against Husband.—The husband has no interest, during the lifetime of the wife, in the real estate acquired by her as a separate estate under the act of April 4, 1877, as amended by the act of March 14, 1878. If the wife dies intestate and the husband is entitled to curtesy, a judgment against the husband during the coverture will attach to his estate by the curtesy, but in subordination to a deed

of trust made by the husband and wife during the coverture. *Campbell v. McBee*, 92 Va. 68, 23 S. E. Rep. 807.

Ascertainment of Tenant's Interest—Right to Minerals.—A tenant by curtesy, agreeing to take a gross sum in the proceeds of the sale of realty in lieu of a life estate therein, is entitled to the value of his deceased wife's interest in the realty, with a deduction for the value of the coal therein, where the land was chiefly valuable for the coal, and the mines had not been opened, as a life tenant has no interest in unopened mines or right to open or work the same. *Bond v. Godsey*, 99 Va. 564, 39 S. E. Rep. 216, 7 Va. Law Reg. 264, and *note*, p. 268.

Same—Right to Timber.—In ascertaining the value of the interest of a tenant by the curtesy in realty, the value of the timber on the land should not be deducted, where the value of the land is increased by the cutting of such timber. *Bond v. Godsey*, 99 Va. 564, 39 S. E. Rep. 216, 7 Va. Law Reg. 264.

IV. ESTATES SUBJECT TO CURTESY.

A. IN GENERAL—MUST BE ESTATE OF INHERITANCE.—There can be no curtesy except in a fee-simple estate in land. *Muse v. Friedenwald*, 77 Va. 57.

At common law the husband was entitled to curtesy in all the real estate of which the wife died seised, whether such estate was separate estate or not. *Winkler v. Winkler*, 18 W. Va. 455.

B. DETERMINABLE ESTATES.—A wife, owning an estate in lands and personal property determinable upon her death under age and without issue, had issue, which died immediately, and then died under age. *Held*, that her husband was entitled to curtesy in the lands, but had no interest in the personal property. *Taliaferro v. Burwell*, 4 Call 321. See also, *Jones v. Hughes*, 27 Gratt. 560.

C. WIFE'S EQUITABLE SEPARATE ESTATE.—The husband, if he survives his wife and the common-law requisites exist, is entitled to curtesy in any real estate held by her as her equitable separate estate, which may remain at her death undisposed of by her during the coverture, or by will, under a power to that effect vested in her by the instrument creating the separate estate, just as in any other real estate of inheritance owned by her, unless his marital rights are excluded by such instrument. Whether they are excluded or not depends upon the intention of the grantor. This may appear from the instrument creating the separate estate in the wife, or may result from the nature of the transaction. Where the separate estate is created by a stranger, the intention to exclude must be plain and unequivocal, or the husband will be entitled to curtesy. *Burk's Separate Estates*, 14-15; *Jones v. Jones*, 96 Va. 749, 32 S. E. Rep. 463; *Chapman v. Price*, 83 Va. 392, 11 S. E. Rep. 879; *Mitchell v. Moore*, 16 Gratt. 275; *Nixon v. Rose*, 12 Gratt. 425; *Charles v. Charles*, 8 Gratt. 486.

An estate by the curtesy in the separate estate of the wife remains in the husband, unimpaired by statutes for the better securing of the property of a married woman, which declare that she shall hold the property to her sole and separate use, and that it shall not be subject to the disposal of her husband, or be liable for his debts. *Alderson v. Alderson*, 46 W. Va. 242, 33 S. E. Rep. 228.

Same—Not Affected by Married Woman's Act.—The Married Woman's Act, Acts 1877-'78, p. 248, after providing for the curtesy of the husband and the dower of the wife to be unaffected by the act, provides

further, "that the sole and separate estate created by any gift, grant, devise or bequest shall be held according to the terms and powers, and be subject to the provisions and limitations thereof, and to the provisions and limitations of this act, so far as they are [not] in conflict therewith." *Held*, that the word "not," as inserted in brackets, was omitted by inadvertence and its insertion is necessary to carry out the intention of the legislature. *Hutchings v. Commercial Bank*, 91 Va. 68, 20 S. E. Rep. 950, overruling *Hutchings v. Commercial Bank* (Va.), 17 S. E. Rep. 477.

Under the Married Woman's Act, as construed above, where property is conveyed to a trustee for the separate use and benefit of the wife, free from the debts and liabilities of her husband, there is created an equitable separate estate, which must be governed by the provisions of the instrument creating the same, and the wife may devise such estate to others than her husband. *Hutchings v. Commercial Bank*, 91 Va. 68, 20 S. E. Rep. 950.

Same—Where Created by Husband.—But where the equitable separate estate is created by the husband, the intention to exclude is presumed or results from the transaction itself, except so far as he may have reserved his marital rights in the instrument creating such estate. The law attaches to every absolute conveyance complete alienation of the entire interest of the grantor, so far as the alienation is permitted by the principles of law and equity. Upon this principle, the law presumes that a husband, by an absolute conveyance creating an equitable separate estate in the wife, intended to vest in her entire interest in the subject conveyed, including all his marital rights, present and future, and the conveyance is so construed. Consequently, a husband has not an estate as tenant by the curtesy in land conveyed by him in such a manner as to create an equitable estate in his wife, whether the conveyance be made directly to her or to another person for her, in the absence of a reservation in the conveyance of his right thereto at her death. *Burks' Separate Estates*, 16; *Sayers v. Wall*, 26 Gratt. 354; *Irvine v. Greever*, 32 Gratt. 411; and *Dugger v. Dugger*, 84 Va. 130, 4 S. E. Rep. 171; *Jones v. Jones*, 96 Va. 749, 32 S. E. Rep. 463.

Where a husband conveyed all his real property to his wife, it was held that, though the deed was void at law, it was valid in equity and the husband was not entitled to curtesy in the property. *Sayers v. Wall*, 26 Gratt. 354, 21 Am. Rep. 303.

A separate estate created by the gift, conveyance or settlement of the husband to or for his wife, whether directly or through a trustee, presumptively excludes the husband from tenancy by the curtesy in such estate. A gift from the husband to his wife is construed to be for her separate use. *Dugger v. Dugger*, 84 Va. 130, 4 S. E. Rep. 171.

A husband is not entitled to curtesy in an equitable separate estate of the wife, created by him, although all the common-law requisites for curtesy exist. He is excluded by the nature of the transaction. *Jones v. Jones*, 96 Va. 749, 32 S. E. Rep. 463.

D. WIFE'S STATUTORY OR LEGAL SEPARATE ESTATE.—It is provided by statute in West Virginia that the husband shall be entitled to curtesy in the wife's separate estate. *Winkler v. Winkler*, 18 W. Va. 455.

Where a father gives his married daughter land "to have and to hold in her own right, free from any claims or demands from her husband or any person or persons claiming under, through, or against him

in any way, now or at any time hereafter," she has a sole and separate estate therein, which she can dispose of by will free from the right to curtesy which the husband would otherwise have. *Chapman v. Price*, 88 Va. 392, 11 S. E. Rep. 879.

Whether a separate estate is an equitable separate estate or a statutory separate estate must be determined from the language and provisions of the instrument to be construed in each case. If the instrument grants powers or imposes restrictions not granted or imposed by the statute, but which are consistent with the rules and principles of equity, the estate will be construed to be an equitable and not a statutory separate estate, and that which, prior to the passage of the "Married Woman's Act," was held to be an equitable separate estate, retains that character, is controlled by the provisions of the settlement by which it was created, and is governed by the rules and principles applicable to such estate. *Dezendorf v. Humphreys*, 95 Va. 473, 28 S. E. Rep. 880; *Jones v. Jones*, 96 Va. 749, 32 S. E. Rep. 463.

At common law, in the grant of an estate of inheritance to a married woman, the husband's right to curtesy could not be excluded; but the husband may be deprived of his curtesy in the married woman's "separate estate," where the intention so to do is plainly manifested in the instrument creating such estate. *Chapman v. Price*, 88 Va. 392, 11 S. E. Rep. 879.

V. HOW CURTESY DEFEATED.

A. BY DIVORCE.—A divorce *a mensa et thoro*, where there is a decree for the perpetual separation of the parties, has the same effect upon the rights of property which either party may acquire after the decree as a divorce *a vinculo matrimonii* would have. Va. Code 1887, § 2264; *Marshall v. Baynes*, 88 Va. 1040, 14 S. E. Rep. 978.

A divorce *a vinculo matrimonii*, although for a supervenient cause, or for a cause which, while it existed at the date of the marriage, is yet by statute specially declared to dissolve the marriage only from the time of the sentence, operates as a bar to dower or curtesy. *Porter v. Porter*, 27 Gratt. 509; *Harris v. Harris*, 81 Gratt. 18; *Cralle v. Cralle*, 79 Va. 182; *Cleek v. McGuffin*, 89 Va. 324, 15 S. E. Rep. 896. See 2 Min. Inst. (4th Ed.) 137.

Upon decreeing the dissolution of a marriage, whether from the bond of matrimony or from bed and board, the court may make such further decree as it may deem expedient in regard to the estate, etc., of the parties. Va. Code 1887, § 2263. See *Cralle v. Cralle*, 84 Va. 198, 6 S. E. Rep. 12; *Cralle v. Cralle*, 79 Va. 182; *Francis v. Francis*, 81 Gratt. 233; *Harris v. Harris*, 81 Gratt. 18; *Porter v. Porter*, 27 Gratt. 509; *Carr v. Carr*, 22 Gratt. 168; *Bailey v. Bailey*, 21 Gratt. 43.

Curtesy and dower are barred by a decree of divorce *a vinculo matrimonii*; and the same principle applies to maintenance, in the absence of any provision in the decree as to the property rights of the parties. *Cralle v. Cralle*, 79 Va. 182.

Deeds of Separation.—As to the validity of deeds for the voluntary separation of husband and wife and their effect upon the marital rights of the parties, see *Dooley v. Baynes*, 86 Va. 650, 10 S. E. Rep. 974; *Harshberger v. Alger*, 31 Gratt. 53; *Switzer v. Switzer*, 26 Gratt. 574, and *note*.

A husband and wife separated by agreement, setting apart to the wife one-third of the land descended to her from her father, free from all claims of the husband, but stipulating nothing as to

remainder whereon he continued to reside. *Held*, that he continued to be a tenant by the curtesy. *Dooley v. Baynes*, 86 Va. 644, 10 S. E. Rep. 974.

B. BY DESERTION.—Where a husband wilfully deserts his wife and such desertion continues until her death, he is thereby barred of all interest in her property as tenant by the curtesy. Va. Code 1887, § 2296; W. Va. Code 1899, ch. 65, § 16, p. 666. As to what constitutes desertion, see *Thornburg v. Thornburg*, 18 W. Va. 522; *Bailey v. Bailey*, 21 Gratt. 43.

C. BY ANTENUPTIAL CONTRACT.—Where a husband by an express contract before and in contemplation of marriage agrees to surrender his right to the enjoyment of the property during coverture and his right to take as survivor, there remains nothing to which his marital right can attach during the coverture, or after the death of the wife. *Charles v. Charles*, 8 Gratt. 486.

A deed of marriage settlement will not divest the marital rights of the husband to a greater extent than the terms of the instrument clearly require. *Mitchell v. Moore*, 16 Gratt. 275; 2 Min. Inst. (4th Ed.) 126.

D. BY HUSBAND'S JOINING IN WIFE'S CONVEYANCE.—A husband's right to curtesy in the statutory separate estate of his wife is defeated by the execution of a deed by her in which he united. *Bankers' Loan and Investment Co. v. Blair*, 99 Va. 606, 7 Va. Law Reg. 253, 30 S. E. Rep. 231; *Campbell v. McBee*, 92 Va. 68, 23 S. E. Rep. 807; *Breeding v. Davis*, 77 Va. 639.

E. BY INSTRUMENT CREATING WIFE'S ESTATE.—The husband has no curtesy in his wife's estate, where it is plainly manifest from the terms of the instrument creating such estate that it was the intention of the settler that the husband should not take curtesy therein. See *supra*, "Estates Subject to Curtesy."

F. BY WIFE'S DEVISE.—Prior to the statute, Va. Code 1849, ch. 122, § 8; Va. Code 1887, § 2513, a married woman having an equitable separate estate in fee could not dispose of it by will, unless the power to make such disposition was expressly conferred by the instrument creating the estate, such power not being an incident of the estate. *West v. West*, 3 Rand. 378.

"But, at the general revision of the laws in 1849, the rule of *West v. West* was changed, so as to allow a married woman to dispose of her equitable separate fee by will. Code of 1849, ch. 122, sec. 8, which provision was carried, without change, into the present Code. Sec. 2513. The effect of this was to enlarge the powers of the woman and to give her the right to dispose of her equitable separate fee by will, though the power was not expressly conferred (and was not denied) by the instrument creating the estate. Such was the construction placed on the statute in the summary of the law, in *Justis v. English*, 30 Gratt. at p. 571, and such seems to have been the construction of JUDGE LOMAX also. See 3 Lomax's Dig. (2d Ed.) p. 11, note 1." *Note to Kiracofe v. Kiracofe*, 2 Va. Law Reg. 530.

Under Va. Code 1887, § 2513, a married woman owning an equitable separate estate in fee may, unless prohibited by the instrument creating it, devise the same, and thereby deprive her husband of curtesy therein. The power to make such devise is given by statute and has the same effect as if incorporated into the instrument creating the estate, unless such instrument restrains the power. *Kiracofe v. Kiracofe*, 93 Va. 591, 25 S. E. Rep. 601, 3 Va. Law Reg. 527; *Hutchings v. Commercial Bank*,

91 Va. 68, 20 S. E. Rep. 950; *Chapman v. Price*, 83 Va. 392, 11 S. E. Rep. 879. See article by Professor R. C. Minor, of the University of Virginia, in 1 Va. Law Reg. 651 *et seq.*, criticising the decisions of the court in *Chapman v. Price* and *Hutchings v. Commercial Bank*.

Although it is provided by W. Va. Code 1887, ch. 78, § 11, that unless the husband shall renounce any provision made for him by the wife's will he shall have no other interest in her estate than is given him by the will, a failure on his part to renounce such provision will not deprive him of curtesy, unless he has agreed to accept the provision in lieu thereof, such agreement being the only mode by which curtesy can be barred under W. Va. Code 1887, ch. 65, § 16. *Cunningham v. Cunningham*, 80 W. Va. 599, 5 S. E. Rep. 189; *Beirne v. Von Ahlefeldt*, 83 W. Va. 603, 11 S. E. Rep. 46.

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January Term, 1852, Richmond.

(Absent CABELL, P., and DANIEL, J.*)

1. **Marshaling Assets—Bond and Simple Contract Debts—Payment of Bond Out of Personalty—Rights of Simple Contract Creditors.**†—D being the endorser of C on several notes discounted at bank, and it being expected that he will endorse other notes for C, the latter executes a bond binding his heirs to D, with a condition that he will, when required by the bank or D, pay off all such notes, and thus indemnify and save D harmless. C dies whilst D is his endorser on several notes, which by an arrangement with the bank, D takes up by the discount of his own note: and subsequently the administrator of C pays up the whole amount of the notes, principal and interest, out of the personal estate. HELD: That this bond was a valid security to D, binding the heirs of C; and that the notes, to the extent of the penalty, having been paid out of the personal assets, the simple contract creditors of C are entitled to have the assets marshaled, and to be substituted to the extent of the penalty of the bond, to the rights of D upon the real estate, in the hands of the heirs of C.

2. **Same—Sale of Lands at Suit of Simple Contract Creditors—Discretion of Court—Failure to Ascertain Claim—Effect.**‡—Upon a bill by simple contract creditors to marshal assets, it is competent for the Court in its discretion, to decree a sale of the real estate in the hands of the heirs, some of whom are infants, for the payment of the debts: But it is premature to decree a sale before adjudicating the claims of the creditors, and so ascertaining the amount of indebtedness chargeable upon the lands of the decedent.

*JUDGE DANIEL had been counsel in the cause in the Circuit court.

†**Marshaling Assets.**—On this subject, see principal case cited in *Hudkins v. Ward*, 80 W. Va. 207, 3 S. E. Rep. 601. See generally, monographic *note* on "Marshaling Assets" appended to *Carrington v. Didier*, 8 Gratt. 200.

‡**Chancery Practice—Decree to Sell Land—Failure to Ascertain Claims of Creditors—Effect.**—It is premature to decree a sale of a decedent's real estate for the payment of debts before adjudicating the claims of the creditors, and so ascertaining the amount of indebtedness chargeable upon the lands. For this proposition the principal case is cited and approved in the following cases: *Simmons v. Lyles*, 27 Gratt.

3. Judicial Sales—Premature—Confirmation—Effect.§—

Though such a decree for a sale of land has been prematurely made, yet if the sale is made and confirmed, the Court will not set the sale aside on the petition of the purchasers, if upon the hearing it appears that the sale is beneficial to the infants.

4. Same—Application of Purchaser to Set Aside—Petition.—

The application of the purchasers, in such a case, to have the sale set aside, should be by petition in the cause. And if they proceed by bill to enjoin the collection of the purchase money,

497 *and have the sale set aside, the bill should be treated as a petition in the cause, and be brought to a hearing with it.

5. Same—Sequestration of Rents of Other Lands—

When Error.—The Court having made the decree for a sale of the real estate, on the petition of the adult heirs, and with the assent of the creditors, it is erroneous to proceed to sequester the rents of the other real estate in the hands of the heirs for the payment of the debts, before deciding upon the claim of the purchasers to have the sale set aside.

This was a suit in the Circuit court of Lynchburg, by John G. Meem and others, simple contract creditors of John J. Cabell deceased, against his administrator and heirs, to marshal the assets, and have payment of their debts out of the real estate of the deceased. The bills after setting out the debts of the plaintiffs, and the qualification of Thomas R. Friend as the administrator of John J. Cabell, stated that he had disposed of all the personal estate, and had exhausted it in payment of debts, many of which bound the heirs of his intestate: and that he had rendered no account of his transactions. That among the claims which should be regarded as binding the real estate, and which had been discharged by the administrator out of the personal assets, were sundry negotiable notes made by John J. Cabell in his life time, and endorsed by Henry Davis. That to secure himself from loss Davis had taken from Cabell a bond binding his heirs in the penalty of 10,000 dollars, with condition to pay off and discharge these notes, when required by Davis or by the bank at which they were made payable, so as to save harmless and indemnify Davis from loss or damage on his endorsements. That after the death of Cabell these notes were protested for non-payment, and subsequently discharged by the admin-

920, and *note*; *foot-note* to *Kendrick v. Whitney*, 28 Gratt. 646; *Dangerfield v. Smith*, 83 Va. 90, 1 S. E. Rep. 599; *New v. Bass*, 22 Va. 389, 23 S. E. Rep. 747; *Wiley v. Mahood*, 10 W. Va. 226; *Livesay v. Jarrett*, 3 W. Va. 284; *Marling v. Robrecht*, 18 W. Va. 461; *Tracey v. Shumate*, 22 W. Va. 474; *Payne v. Webb*, 23 W. Va. 563; *Saddler v. Kennedy*, 26 W. Va. 642. See generally, monographic *note* on "Judicial Sales" appended to *Walker v. Page*, 21 Gratt. 636.

§**Judicial Sales—Confirmation—Effect.**—See principal case cited in *Cooper v. Hepburn*, 15 Gratt. 568. See monographic *note* on "Judicial Sales" appended to *Walker v. Page*, 21 Gratt. 636.

Chancery Practice—Bill Treated as Cross Bill and Answer.—See principal case cited in *foot-note* to *Mettert v. Hagan*, 18 Gratt. 231; *Gregg v. Sloan*, 76 Va. 502.

istrator out of the personal assets, to an amount exceeding the penalty of the bond.

The prayer of the bills is for a settlement of the accounts of the administrator, and that the assets may be marshalled so as to subject the real estate descended to
498 *the heirs to the payment of the outstanding simple contract debts; and for general relief.

The administrator, widow and heirs answered the bill, and called for proof of the complainants' debts. They admitted that John J. Cabell was largely indebted at the Bank of Virginia and the Farmers Bank at Lynchburg, by notes endorsed by Henry Davis, and that Davis held the bond referred to in the bill; but they denied that the condition of that bond had been broken; the notes on which Davis was endorser having been paid by the administrator, so that Davis had sustained no loss or damage by his endorsements.

They admitted that Cabell died seised of a large real estate which was then held by his widow and heirs; and they asked that if it should be held that it was liable for the payment of the debts of the complainants, the defendants might be allowed to select such parts of the estate as they may desire to be disposed of, so that the satisfaction of the plaintiffs may be attended with as little injury to them as practicable.

In October 1837 a commissioner was directed to settle the accounts of the administrator, designating the grade and dignity of debts paid by him, and also to state an account of the real estate of which John J. Cabell died seised, the annual value thereof, and in whose possession it was at the time of the decree; and also an account of the debts due to the respective plaintiffs.

The report of the commissioner was made, and was recommitted for the purpose of correcting some errors in the calculation of interest on the complainants' debts, and was again returned to the June term 1839. At this term of the Court Richard K. Cralle, who had married one of the daughters of John J. Cabell, then deceased leaving children, the widow of John J. Cabell and S. W. Ward a daughter, the two first in

their own right and as guardians of
499 some of the infant heirs, filed *a petition in the cause, in which, after referring to the debts of the complainants, they say, they have no reason to doubt that their debts are really due; and that they at all times anticipated that a resort to John J. Cabell's real estate for their payment, would become necessary, and they had therefore in their answers prayed that when a decree should be made subjecting the real estate, they might be permitted to designate the portion thereof to be so subjected, and the manner and mode of doing it.

They stated that a division of the real estate, (except a tract of land in Bedford owned jointly by Cabell and Leftwich,) had been made among the heirs at law and widow, under an order of the Hustings court of Lynchburg, but had not been confirmed, owing to the pendency of this suit;

but that since the division, the several heirs had held and enjoyed their respective portions thereof. That there was a tract of land lying on the Kanawha river containing one thousand acres, which was divided into equal portions of two hundred and fifty acres, to each one of the heirs of John J. Cabell, each part being regarded as of equal value. That this land though deemed very valuable, was not productive in rents or profits to the heirs, and could be sold without affecting the division of the balance of the estate among them. That the other property divided, yielded a large rent, which they were compelled to apply to purposes of present support. That the debts to be paid were of such magnitude that if the Court should sequester these rents and annual profits for the payment of the debts, that the petitioners would be wholly deprived of their resources for living for an indefinite period, and thereby be subjected to serious inconvenience. They pray that the Court will decree a sale of the Kanawha land upon such a credit as will ensure the greatest possible price, and that the proceeds may be applied to the
500 payment of the debts of the com-

plainants. *They think such a sale would be beneficial to all concerned; and will be entirely agreeable to Thomas R. Friend, who was then absent, and who had married a daughter of John J. Cabell, then deceased leaving three children, all of whom were infants. This petition was accompanied by an affidavit of Richard K. Cralle verifying the facts therein stated.

The infant defendants to the bills were made parties defendants to this petition, and an answer was filed for them by a guardian ad litem.

Upon the filing of the petition and the answer, the cause came on to be heard, when the Court pronounced its opinion, declaring that when the parol contract creditor is decreed to have satisfaction out of the real assets of his deceased debtor's estate, he is but substituted to the right of some creditor whose debt bound such real assets: that these rights by substitution cannot be greater than the originals for which they are substituted; and that in either case the land ought not to be sold if the debt can otherwise be paid in a reasonable time: and it appearing to the Court from the report of the commissioner, that the rents arising from the real estate would, in all probability, be sufficient to discharge the respective demands of the several simple contract creditors aforesaid in a reasonable time, the Court accordingly was about to proceed to sequester the rents of the real estate, with a view of applying the same to the payment of said debts; but the defendants, the heirs at law and distributees of the said John J. Cabell deceased, thereupon presented to the Court their petition, with the answer of the infant heirs, by their guardian ad litem thereto, praying, for certain reasons therein set forth, a sale of a portion of the lands whereof the said John J. Cabell died seised and possessed, in sat-

isfaction of said debts, in lieu of the payment of the same out of the rents. And the Court, on consideration of said petition and of the answer thereto, together with
 501 an exhibit *(the report of the commissioners for the division of the estate among the heirs), and the affidavit of Richard K. Cralle, filed therewith, is of opinion from the facts therein disclosed, that it would be most conducive to the interest of said heirs and distributees, some of whom are infants, to proceed to sell the real estate designated in said petition, rather than to sequester the rents, since by the latter proceeding, said heirs and distributees would be deprived of their property, and consequently of their chief means of support, until said debts should be paid, which in all probability could not be effected for some three or four years. And not at that time deciding upon any other matter, the Court with the assent of the plaintiffs, decreed that Richard K. Cralle and Samuel Hannah, either of whom might act, should proceed to sell at public auction upon the premises, the said Kanawha land, on a credit of one, two, three and four years, in equal payments, taking from the purchasers bonds with good personal security for the purchase money, and retaining the lien as a further security; subject to be resold if default should be made in the payment of the bonds as they fell due; and report their or his proceedings to the Court. And liberty was reserved to the infant defendants to shew cause against the decree at any time within six months after they should respectively attain the age of twenty-one years.

At the May term of the Court for 1840 Richard K. Cralle returned his report of the sale of the Kanawha land, by which it appeared that he had sold one undivided moiety of the Kanawha land for 18,000 dollars, to Joseph Friend and Thomas R. Friend. One of these purchasers, Thomas R. Friend, was the owner of one fourth of this tract of land by purchase from Mrs. Ward one of the daughters of John J. Cabell, and he held another fourth in right of his deceased wife, who was another daughter of said Cabell; and by agreement
 502 with *the commissioner before the sale of the undivided moiety, they were to take the one moiety at the price the other should bring. At the same term of the Court this report was confirmed; and the report of the commissioner upon the accounts was recommitted with the exceptions thereto, to a special commissioner, who was directed to call in all the outstanding creditors of John J. Cabell.

In October 1841, on motion of the plaintiffs, and by consent of the counsel of all the parties, Cralle and Hannah, or either of them, were directed to collect the outstanding bonds given for the Kanawha lands, then due and in arrear, and the other bonds as they should fall due, and after paying all the costs of the suit, to deposit the residue in one of the Savings banks in Lynchburg. In June 1842 the report of the

special commissioner was recommitted with the exceptions thereto, to one of the commissioners of the Court. And again on the motion of the plaintiffs the Court directed Cralle and Hannah forthwith to proceed to collect the bonds then due for the purchase money of the Kanawha land, and to pay the money arising therefrom into one of the banks at Lynchburg to the credit of this cause.

In May 1844 commissioner Davis returned his report, to which there were various exceptions by the administrators and heirs of Cabell. Some of these exceptions were to particular debts reported as due from John J. Cabell; and to all of them for the mode in which the commissioner charged interest upon them. The only exceptions however which it is necessary to notice, refer first to the notes secured by the bond mentioned in the bill as having been executed by John J. Cabell to his endorser Henry Davis for his security. This bond bears date the 15th of August 1821, and is in the penalty of 10,000 dollars. The condition is set out at length in the opinion of the Court. The

503 facts connected with this exception were, that at the time of the *death of John J. Cabell, which occurred between the 6th and the 20th of August 1834, Henry Davis was his endorser on three notes which had been discounted at the Bank of Virginia at Lynchburg for 2500 dollars, 5000 dollars, and 3000 dollars; and on one which had been discounted at the Farmers Bank for 3000 dollars. On the 20th of August 1834 the directors of the Bank of Virginia made an entry upon their minutes, that "on the application of Henry Davis he is permitted to assume the payment of John J. Cabell's note endorsed by him for 2500 dollars, and due at this day; he the said Davis giving his note for the same amount at sixty days, endorsed by Peter Dudley, and further securing the payment of the same by the deposit of the notes aforesaid of the said Cabell, (protested,) and an indemnifying bond executed to him by the said Cabell in the penalty of ten thousand dollars." Subsequently the same arrangement was made as to the other two notes discounted at that bank. It does not certainly appear what arrangement was made by Davis with the Farmers Bank; but he took up the note at that bank by a discount of his own with Peter Dudley as endorser, leaving Cabell's note with the bank as collateral security.

The arrangement with the Bank of Virginia was executed; the note of Cabell being taken up after it was protested by the proceeds of the note of Davis endorsed by Dudley; and the notes of Cabell and his bond were deposited with the bank as collateral security: the endorsement of Dudley being considered as merely nominal, and only intended to put the note in form. And it was the understanding between the bank and Davis that he could not be coerced to pay his notes until Cabell's means were exhausted. The discount on Davis's notes were paid by him from time to time as they were renewed, until they were paid off by

Thomas R. Friend, the administrator of Cabell, out of the personal assets of the estate. Friend paid on the first note 504 *784 dollars 20 cents on the 24th December 1834; and he paid on the second note 500 dollars on the 19th of November of the same year. On the 13th of February 1835 Friend deposited in the Bank of Virginia bonds amounting to 14,391 dollars, proceeds of the personal estate of his intestate, for the purposes following: the proceeds of such as should be first paid, were to be applied to the extinguishment of a note of 3000 dollars, which Dr. Cabell owed the Farmers Bank at Lynchburg, endorsed by Henry Davis, and assumed by him at Cabell's death, with all discounts and charges on the same. The proceeds of such as should be next collected were to be applied to the extinguishment of the three notes which Cabell owed to the Bank of Virginia at Lynchburg, endorsed by Henry Davis, and by him assumed as they severally fell due after Cabell's death, with all discounts and charges thereon. And if anything should remain after satisfying these claims with all discounts and charges, it was to be applied to the payment of a debt of 379 dollars 9 cents due from Cabell to Davis. These bonds were collected and the debts for which Davis was bound as endorser, with all discounts and charges thereon, were paid in December 1835 and January 1836. Previous thereto, viz., in November 1834, judgments were recovered by Davis, suing for the benefit of the banks, against the administrator of Cabell upon the notes which had been protested as they fell due after Cabell's death.

It appears that the only payments made by Davis as endorser for Cabell, except by the discount of his note, were the discounts upon the first making and the renewal of his notes; and these advances had been repaid at the times and in the manner hereinbefore stated.

Another exception referred to a note of 5000 dollars, made by John J. Cabell and endorsed by Richard E. Putney. On the 9th of March 1834, Cabell and Putney entered into a covenant binding their 505 heirs each to *pay to the other the sum of 10,000 dollars, or so much as would secure him for his endorsement for the other. This covenant is set out in the opinion of the Court. At the time of Cabell's death Putney was his endorser on a note for 5000 dollars, dated the 6th of August 1834; but it does not clearly appear from the evidence that this was for the same debt for which Putney was Cabell's endorser at the date of the covenant. The Bank of Virginia at Charleston sued Putney upon his endorsement, and in October 1834 he confessed a judgment: And thereupon the bank agreed to suspend execution of this judgment for two years from that time, upon his executing his bond with David Ruffner as his surety, with condition for the payment of the judgment, interest and costs at the end of the two years. This bond was executed; and the debt was

afterwards paid by the administrator of Cabell out of the personal estate.

Pending the proceedings in this cause Joseph Friend and Thomas R. Friend in September 1842 filed their bill in the same Court for an injunction to restrain the collection of the purchase money of the Kanawha land. After referring to the suit of the creditors of John J. Cabell against his administrator and heirs, and the proceedings therein up to the time of filing their bill, they state that the accounts ordered, except the administration account, had not been taken, and especially that the order directing the account of the debts due the complainants had not been completed, but was then in progress of execution; nor as they believed, had any account been taken of the real estate or its annual rents.

They referred to the petition filed by Richard K. Cralle and others and the proceedings therein, and the sale of the land made by Cralle to themselves, and the confirmation of that sale by the Court.

506 *They further represent that at the time of their purchase they made no enquiry into the title to the land, or the authority under which it was offered for sale. That since the sale they have come to the knowledge of facts which they are advised renders their title worthless and unavailing, at the election of the infant heirs of John J. Cabell, when they shall attain full age. That the sale was made for the payment of simple contract debts, which had not as yet been proved and established so as to authorize a sale of the real estate. That the admission of the justice of the debts by the petitioning heirs did not give any additional validity to the sale; as among them Mrs. Sally W. Ward was the only adult heir, and she had previously sold her interest in the land to the complainant Thomas R. Friend. That the other petitioners were infants of very tender years, who could not, as the complainants were advised, be bound by their express assent, and much less by the merely negative admissions of their guardians or next friends.

They further represent that from the best information they had been able to obtain, the debts to which John J. Cabell's estate may be subjected cannot exceed five or six thousand dollars; and that the real estate would in ordinary times yield an annual rent of 7000 dollars, which would, if applied under the directions of the Court, in a short time discharge all the debts which bound the land. And they further represent that a tract of land lying in Bedford county, belonging in the greater part to the estate of John J. Cabell, had since his death been sold by commissioners under a decree of the County court of Bedford, for a large sum of money, which had been applied or was in a course of application to the payment of the debts binding the heirs of Cabell. That notwithstanding all this Richard K. Cralle acting under an order of the Court, had instituted actions at

507 *law upon the bonds of the complain-

ants against them and their sureties, in the Circuit court of Kanawha county, where the same were then pending.

And making the heirs of John J. Cabell and the complainants in the creditor's suit, defendants, they ask that the decree of the 7th of June 1839, for the sale of the Kanawha land and all proceedings had under it, may be set aside, rescinded and annulled; that their bonds for the purchase money may be delivered up to be cancelled; that Cralle as commissioner of the Court may be enjoined from proceeding to collect the amount of said bonds; and for general relief. The injunction was awarded.

Richard K. Cralle, Mrs. Ward and Henry Ann Cabell the youngest daughter of John J. Cabell, and who had then attained the age of twenty-one years, answered the bill. They insisted upon the necessity of the sale of the land, and that it was advantageous to the infant heirs, and should be enforced. A number of the creditors also answered, insisting upon the validity of the sale, and that it should be enforced; and testimony was taken on both sides to sustain their pretensions.

On the 21st of November 1846, the case of the creditors of John J. Cabell against his administrator and heirs was brought on to be heard, upon the papers formerly read and the report of the commissioner Davis, with the exceptions thereto, when the Court being of opinion that the simple contract creditors of John J. Cabell, upon the principle of marshalling assets, have the right to occupy the shoes of Henry Davis and Richard E. Putney, who held two securities, each binding as well the personal assets as also the heirs, which were paid off and satisfied by the defendant Thomas R. Friend administrator of John J. Cabell, out of the personal assets of his intestate's estate: And being further of opinion, that the creditors should not longer be hindered and

508 delayed by the sale of the Kanawha land, made upon the petition of the heirs of John J. Cabell, for their own

easement, under the decree of the 7th of November 1839, though it appears on the face of said decree that it was made with the assent of the plaintiffs after the Court had pronounced its opinion, and was in the act of sequestering the rents and profits of the said John J. Cabell's real estate, which had descended upon them; which rents and profits before this time would probably have paid off and satisfied all the debts: And this is the more equitable, because the validity of that sale, and the title to the land sold under it, being questioned by one or more injunctions in this Court between the alleged purchasers of the lands and Cabell's heirs, (the record of which injunctions is filed among the papers in this cause,) and they having made no movement in it, the Court will leave this family matter to be settled among themselves, and will now restore the creditors to the position they occupied at the date of the decision in June 1839. Wherefore the Court doth adjudge and decree that the rents and profits

of all the lands and tenements of which the said John J. Cabell died seised and possessed, save the Kanawha and Bedford lands, which have been sold by the procurement of the adult heirs, be sequestered to create a fund as well for the payment of the simple contract creditors in the proceedings mentioned, to the extent that they may be entitled by marshalling the assets, as for the payment of the bond debts proper.

The decree then proceeded to appoint a receiver with power by distress or otherwise, to collect all the rents then due or to become due upon the real estate remaining unsold as aforesaid, and to rent out the property from year to year, and collect the rents; and after paying all the taxes, costs, charges and necessary repairs, to deposit the residue in one of the Savings Banks in Lynchburg to the credit of the cause.

509 *The decree further ordered that one of the commissioners of the Court should take an account of the moneys arising from the sales of the Bedford lands aforesaid, shewing what had become of the same; and that he should examine and report upon the exceptions taken to the administrator's account; and make any changes in the report of commissioner Davis warranted by the proofs in the cause; and also that he should take a further account of the simple contract creditors. From this decree the heirs of John J. Cabell, except the children of Mrs. Friend, applied to this Court for an appeal, which was allowed.

Stanard and Bouldin, for the appellants.

One of the questions in the cause, and the principal one, is that arising upon the effort to charge the real estate, upon the principle of marshalling assets, with the amount of the bond executed by Dr. Cabell to Davis, and upon the covenant between Cabell and Putney.

First. Did the bond from Cabell to Davis constitute a claim upon the real estate of Cabell in the hands of his heirs, of which under the circumstances of this case, the simple contract creditors may avail themselves? By the act of 1831, Sup. Rev. Code, p. 220, the notes endorsed by Davis ranked with specialties in the administration of the assets of Dr. Cabell's estate, and the notes with all costs and charges were paid by Cabell's administrator out of these assets. The question then is, has the bond been forfeited so as to enable Davis or any one else, to maintain an action upon it: And if it has been so forfeited, what is the extent of the damages which can be recovered in such an action? And the further question is, whether by means of this bond the simple contract creditors can claim on the real estate of Cabell; Davis himself never having been subjected to loss?

Let us try this question of forfeiture as if in a Court of law; and let us en- 510 quire whether there has been a *forfeiture of the bond which would have given Davis a right of action upon it.

Before a forfeiture can be established

two facts must be made out. First. That Cabell or his administrator was requested to pay the notes on which Davis was bound as Cabell's endorser. And, second. That being requested they failed to pay, so that Davis suffered loss.

To sustain an action at law on the bond, it would have been necessary to aver and prove a special request. The Court will observe the language of the bond; and will observe that the request may be made by Davis or his representative, but it is to be made to Cabell alone. But passing by this, it is clear the request should have been made to the administrator of Cabell, as it should have been made to himself in his lifetime. Now where a request is required to do a collateral act, especially to create a forfeiture, it must be a special request. Otherwise if a note for fifty dollars had not been paid, Cabell or his administrator might have been sued. This then is a case in which a precedent request is necessary and must be averred. *Birks v. Trippet*, 1 Wms. Saunds. 36; *Hill v. Wade*, Cro. Jac. 523; *Bowdell v. Parsons*, 10 East's R. 359; *Carter v. Ring*, 3 Camp. R. 459.

If the demand was necessary, was it made? It may be said the note was protested: But this was no demand. The protest is sufficient to charge an endorser on a note; but to forfeit a bond the demand must be personal. 5 Viner's Abr. 207, P. B.

It may be said that Davis was compelled to renew the notes, and pay the discounts upon the renewals; and that this was a forfeiture of the bond. But the condition of the bond is to pay the notes when thereto required. Davis did not require the payment of the notes by the administrator: And if he chose to have the notes renewed and to pay discounts upon them, 511 without *giving notice to the administrator, and requiring him to pay them, that was his own act for which he can blame no one but himself.

It will be said, however, that suits were brought upon the notes. It seems that some time after the arrangement was made with the bank by Davis, there was a judgment by confession by the administrator, in a suit brought in the name of Davis for the benefit of the bank. But whenever an actual request is necessary a suit is not sufficient. In some cases where the condition of the bond is to pay money, a suit has been held sufficient; but where a collateral act is to be done an actual request is necessary. If the bank had sued Davis on the notes, it might have been a question whether that created a forfeiture of the bond. But before notice to the administrator, the bank agreed with Davis that they would not sue him until their remedies against Cabell's estate was exhausted: And as a part of the consideration for that agreement Davis deposited with the bank Cabell's bond. Davis therefore, had no right of action against Cabell's administrator until all the notes were paid. What could he have averred and proved? What

damage could he have laid? Could he aver he had been sued? No. Could he aver that he was liable to be sued? No. Could he say he had sustained damage? No. Would it not have been a complete defence even after the judgments on the notes, that the administrator was prepared to pay, and had paid, the whole amount of these debts?

There was then but one state of facts under which Davis was entitled to sue upon the bond of Dr. Cabell: And that was that the bank had been unable to make the money out of Cabell's estate upon the notes. If the bank had failed to make the money by proceedings against the administrator upon the notes, and had required Davis to pay, and he had paid it, then he might have required the bank to return to 512 him the bond, that *he might hold Cabell's heirs liable to him. But until he had paid off the whole amount to the bank, he was not entitled to the bond. Then in the state of things as they really existed, Davis could not sue upon the bond. The bank could not have sued upon it; because it was not given to them or for their indemnity. And yet although no person had a right to sue upon the bond, and no steps were ever taken to forfeit it, this is now attempted by these simple contract creditors, through the agency of a Court of equity. But in the case of *Webster v. Bannister*, Doug. R. 393, it was held that even if an actual forfeiture has occurred the parties may waive it; and it cannot be enforced by third persons; and that especially by the aid of a Court of equity.

If as we contend, a demand was necessary to entitle Davis to the benefit of the bond, the question arises when should that request be made. The suits on the notes were brought after they had all fallen due. It is true generally that a suit is a demand; but here the demand is a condition precedent which must be complied with strictly modo et forma. Davis or the bank might claim upon the notes or the bond, but if he intended to claim upon the bond, then he must comply with the condition.

But if the suits upon the notes is a demand so as to enable Davis to sue on the bond, this right of action gave only the right to recover for the amount of actual damages sustained. This is not a bond for money, but with a collateral condition; a bond of indemnity. This condition is to pay the notes so as to indemnify and save Davis harmless: And if the notes with all the costs and damages actually incurred by him are paid before a suit is brought upon the bond, no action can be sustained upon it. To shew that this is a bond of indemnity, I refer to *Pond v. Warner*, 2 Verm.

R. 532; *Douglass v. Clarke*, 14 John. 513 R. 177; *St. Albans v. Curtis*, 1 D. Chip. R. 164: And the condition being for the benefit of the obligor shall be construed favourably. 2 Lomax Dig. 113. Let us suppose that Davis had brought a suit on the bond after the suits against the administrator upon the notes, what damage could he have averred that he had sustained?

Will it be said he was damnified by being fixed for his liability as endorser? The bond does not protect him from that damnification. And moreover his giving his own note was voluntary on his part without notice to the administrator. And so too was his payment of discounts upon the notes.

Again, Davis could not have sued before December 1835; that being the time when the suits were brought against the administrator; and in December 1834 the administrator had deposited five hundred dollars in the bank; and he deposited much more in January and February 1835; indeed more than enough to pay all the discounts. Davis never paid Cabell's note. The bank never surrendered that or intended to do it. The giving his own note did not pay it, because one security will not extinguish another of the same grade. *Manhood v. Crick*, Cro. Eliz. 716; *Norwood v. Grype*, Id. 727. This is the state of things if Davis had sued upon the bond. But he did not sue upon it, and has not claimed the benefit of the forfeiture. And if he could and did not, how can third persons insist upon enforcing it in equity.

If a Court of equity could take jurisdiction to enforce the forfeiture of the bond, it could not be acted on without pleadings and a jury. Cabell's heirs had a right to the verdict of a jury and judgment of a Court on the question whether the condition of the bond was forfeited; and also on the extent of the damages. If the suits on the notes was a demand the judgments may have been confessed upon the express condition that the suits should not be so considered. Upon a plea stating the

514 *facts it would have been a good defence at law; and will a Court of equity undertake to decide the question upon an exception to a commissioner's report. If the Court will take jurisdiction of this question, all it could do would be to direct an issue of quantum damnificatus, or an issue as to the forfeiture of the bond.

Again. These plaintiffs come here upon the ground of marshalling assets. But in this case they cannot come to marshal assets without violating the principle, that a Court of equity will never actively aid in enforcing a penalty or forfeiture. 2 Story's Equ. Jur. § 1319, p. 551. But if this penalty had been actually incurred, might not the heirs have come into equity to be relieved from it, by paying the notes and the damages sustained by Davis.

As to the covenant with Putney, that only applies to the notes in being at the time of its execution, without any provision as to their renewal. And these plaintiffs seek to charge Cabell's heirs on account of a note for 5000 dollars, endorsed by Putney, dated the 6th of August 1834, after the date of the covenant. This particular note was certainly not in existence when the covenant was executed; and there is neither a provision in the covenant for the renewal of the notes, nor proof that this note was a renewal of any note in existence at the

time the covenant was executed. It might have been renewed twice at sixty days. *Hurlstone on Bonds*, p. 94, 9 Law Libr.; *Union Bank v. Ridgely*, 1 Har. & Gill 324.

The Court below clearly erred in making a decree for the sequestration of the rents, after having decreed a sale of a part of the lands, not only at the request of the heirs but with the concurrence of the plaintiffs: and after too that sale had been made and confirmed; and orders had been made on the motion of the plaintiffs, directing the commissioner to proceed to collect the purchase money. The Court in its decree says, 515 it was *about to make a decree to sequester the rents, when the heirs applied to have a sale of a part of the lands. If the Court was about to make such a decree it was about to do what it had no right to do. For the Court will not sequester the rents where a sale of a part of the land will pay the debts. And in this case the sequestration was certainly improper until the Court had decided whether that sale should stand.

Robinson, for the creditors.

It is very clear that the heirs had not intended to raise the first and second questions discussed by the counsel, in 1839, when they filed their petition for the sale of the land.

At the death of Dr. Cabell, Davis was his endorser on four notes; and it is beyond all question, that if Cabell's administrator failed to pay these notes, and Davis paid them, that Davis would have a remedy against Cabell's heirs upon his bond. We say both facts are shewn to have occurred.

First. Cabell's administrator failed to pay the notes and they were regularly protested. But it is argued that a special request is necessary to give Davis a right of action on the bond; and that none was made. I need not go beyond 2 Lomax Dig. 113, to shew that any words evincing an intention to make the request is sufficient. The condition of the bond is that payment should be made when required by the bank or Davis. And we say he was required to pay exactly in the mode contemplated by the parties. Of course they contemplated that the demand of payment was to be made in the mode applicable to such a case. Here there was a demand of payment, protest and notice, which was the usual and regular mode of making the demand in such a case. All this doctrine, therefore, about a special request, is beside the case. We have an action and a judgment; and the

latter is an adjudication of the fact 516 *that the administrator of Cabell had been required to pay and had not paid the notes on which Davis was Cabell's endorser.

It is said Davis was not sued. The object of the bond was to prevent his being sued. But Davis paid the notes; and from that moment he had a right of action on the bond. Counsel asks what Davis could have averred in an action on the bond. He could have averred that the administrator

had not paid off the notes when required, and that they had been paid by himself: And he could have proved his case as easily as he could plead it. The protest would have shewed both demand and refusal to pay; and the production of the notes by Davis would have proved his payment of them: And the true measure of damages would have been the whole amount of the notes not paid by the administrator, and paid by Davis. Upon the proof of these facts the recovery would have been certain. Could it have been prevented by shewing that Davis had paid the amount of the notes by the proceeds of his own notes. Of what consequence is that. It is every day's mode of payment by an endorser called on suddenly to take up a note. Nor can it make any difference that the bank was informed when it discounted Davis's note that the proceeds would be applied to pay Cabell's note; or that they were informed that they should have the security of Cabell's notes and the bond. It is said that Davis at no time had possession of Cabell's notes. They belonged to him, and he only transferred them back to the bank as collateral security. And then it is asked how Davis could maintain an action on the notes when he was not entitled to them. The best answer is that he did maintain an action against the administrator on the notes; and the judgment decided that he had the right of action upon them. And if he had a right of action on the notes he

517 had a right of action on the bond: because he could *not have a right of action on the notes unless upon demand and neglect to pay, and payment by Davis: And these would entitle him to sue on the bond. The right to sue upon the bond is so clear that I presume no question would have been made of Davis's right to sue if he had found it necessary to sue the heirs; but the administrator paid him, and therefore rendered a suit by him unnecessary.

It is said that when the administrator paid the notes he was entitled to them and the bond. That is true. But that is the case always; every administrator is entitled to a bond when he pays it. But that cannot impair the right of the simple contract creditors to come into equity to marshal the assets: And we have but the common case of the bond creditor having two funds and the simple contract creditor having but one; and the first taking that which was subject to satisfy the last, the last is entitled to go against the other fund.

The next question is as to the effect of the covenant with Putney. Putney was on a note of Cabell's which was protested, and Putney was sued; and then gave security for the payment of the amount. It is in proof that the debt evidenced by the note on which Putney was endorser had been contracted some time before that note was made; and construing the covenant according to the intention of the parties, the Court will construe it to include the renewed notes. It is true that it does not positively

appear that the debt was in existence when the covenant was executed, but the Court will not require strict proof when the question was not made in the Court below. If, however, the Court has any difficulty as to the fact, it will direct that when the case goes back there may be an enquiry upon this point. In truth all that the Court below has done is to decide that the simple contract creditors have the right to stand in the shoes of Davis and Putney to the extent they have been paid out of the personal assets.

518 *It is said that by agreement the obligee may waive the forfeiture. But here he has taken pains to exclude the conclusion that he had waived it. So it is said that the plaintiffs have no right to come into equity to enforce a forfeiture. A Court of equity will enforce the forfeiture of a mortgage; and this is like that case. So in the case of a bond binding the heirs a Court of equity will enforce a payment out of the real estate: And now by the late statute the only remedy on a bond against the heirs is in equity. It is said further that the doctrine of marshalling assets is the creature of equity; and that equity will not do injustice. But I would enquire what injustice there can be in compelling these parties to pay the debts of their ancestor out of his large estate.

It will be seen that the Court below was about to sequester the rents of the real estate in the hands of the heirs when they asked for a sale of a part of it, and selected the part that they preferred to have sold. After the sale the purchasers filed their bill objecting to the sale, on the ground that there were infant heirs, whose lands were improperly sold, and for other irregularities. The injunction was an irregular proceeding, and the purchasers should have proceeded by petition in the cause. The creditors had gotten nothing, though the decree for the sale was made in 1839. What then were they to do? The debts bind the whole estate; and if there is any difficulty in subjecting one part of it they may resort to another part. The heirs are no worse off if they are allowed to have the benefit of the sale. It would have been improper to set aside the sale because the heirs may wish to enforce it. And the Court only says this sale was made at your instance, and you may enforce it; but creditors are not to be delayed in the recovery of their debts.

519 *Patton, for Friend and his children.

Mr. Robinson says the heirs had no intention to raise the question arising on the bonds of Cabell to Davis, and on his covenant with Putney when they filed their petition in the cause. But their answer filed before the petition, expressly denies the liability of the real estate under this bond: And this is the great question of controversy. There are infant parties too, and therefore there could be no waiver or admission of the liability of their estate under this bond and covenant. As to Put-

ney's covenant, no bill claims to subject the real estate on account of this covenant; and it is only brought into the cause by the commissioner's report.

The argument of the counsel for the creditors is, that the bond became forfeited whenever there was a failure to pay when demand of payment of the notes was made at the banks. But this argument is in utter disregard of the terms, objects and stipulations of the bond. The stipulation is to pay when required, so as to indemnify and save harmless Henry Davis from loss or damage. If the demand at the bank for payment of the note was all that was necessary, why was Henry Davis to make a demand of Dr. Cabell. The demand at the bank was certainly usual; but the demand provided for in the bond was to create a new and original obligation. This will be manifest by a single enquiry, Was the bond forfeited by a demand at the bank, or by a demand by either Davis or the bank on Dr. Cabell? No demand was necessary to fix Dr. Cabell's liability on the note; that is only necessary as to endorsers. Suppose the note had been demanded and protested, and even sued upon, not only against Dr. Cabell's estate but Davis, and judgment had been rendered against Davis, would this bond be forfeited? Certainly not. It cannot be forfeited until Davis has sustained actual damage by payment.

520 *The necessity of a demand in this case is a rule of law, and is founded in reason and justice. The bond was not necessary as a security in the lifetime of Dr. Cabell: He was bound to pay his notes and all his property was liable. The bond was only necessary after his death, to provide for the contingency of his dying without leaving personal assets sufficient to pay his debts: And he gave the bond in which he binds his whole estate to guard his surety from loss, provided the surety gave him notice. The bond was not given to bind Cabell to pay the note at maturity, but to guard his surety from loss.

As the law then was, the heirs of Cabell were not bound to pay the notes on which Davis was endorser; and they had a right to have the notice and demand before they should become bound. Their interest is entitled to the same protection and security as if they held by an independent title; and they are therefore entitled to have the protection provided for them by the bond.

The counsel for the creditors says it has been adjudged that the demand made by the suit was all that was necessary. But the question is not whether there had been a demand made upon the note; for no such demand was necessary: Dr. Cabell was bound without a demand. It is the bond which provides for and requires a demand in order to raise the obligation therein provided for, and it is that demand, for the proof of which we ask, and the proof of which is wanting.

It is further contended that Davis had paid these notes, and that he is therefore entitled to hold Dr. Cabell's estate bound

on the bond. The actions were brought on the notes as subsisting liabilities against Dr. Cabell's administrator, and judgments were rendered upon them. As to all the parties to these suits, therefore, that was an adjudication that the notes had not *been paid: And this is what is made out by the proof. Indeed every thing that was done was to hold Dr. Cabell's estate liable, and give them time to pay the debt. The counsel refers to the note of Davis endorsed by Dudley, and discounted at the bank, as a payment of Dr. Cabell's notes by Davis. But we are looking not to the form but the substance of things; and all the proofs shew that the notes of Dr. Cabell were not paid or intended to be paid by that arrangement. We insist that nothing but actual payment can operate as a forfeiture of a bond which stipulates to protect the party from all loss and damage from the endorsement; and when there is a forfeiture it extends only to the amount of the damage sustained. If then we shew that there has been no actual payment of the notes, and only payment of one or two discounts upon his own note, we shew at the same time that this is the extent of his loss and damage.

Formerly on the forfeiture of a bond, the penalty was all payable; and the obligor could only be relieved by a resort to a Court of equity, which would relieve him on its own principles. Now this is changed, and by our statute the plaintiff in an action on a bond for the non-performance of covenants or agreements, is only entitled to a verdict and judgment for such damages as he may prove he has sustained. 1 Rev. Code of 1819, p. 509, § 82. This is the doctrine now, and no other sum can be recovered than what will indemnify the plaintiff for his actual loss. Sedgwick on Measure of Damages, p. 415, 416. In this case Davis's loss is what he has actually paid. Even where a surety has been taken into custody, yet he can only recover to the extent of the injury he has sustained, and not to the amount of the debt unless he has paid it. Rodman v. Hedden, 10 Wend. R. 498. In that case it was said that if the surety give a negotiable note in satisfaction of the debt so as to discharge the principal, he may recover *the amount of the debt. But to authorize him to do this he must discharge the principal, and his note must be taken as payment. But the giving a negotiable note as a collateral security will not entitle him to sue for the amount of the debt for which he was surety.

There is a distinction taken in the books between cases where there is a condition to pay at all events, and a condition to indemnify and save harmless. Our case falls within the latter class: And in such a case there is no forfeiture until damage is sustained. If any other authority is wanted in the case, the Court is referred to Hopewell v. Cumberland Bank, 10 Leigh 206; and May v. Boisseau, 12 Leigh 512. But the cases of the first class are not conform-

able to principle. Sedgwick on Measure of Damages, p. 311. Indeed the doctrine that a surety may sue whilst the principal remains bound cannot be carried out in this first class of cases without great enormity. The bond is to the surety, and according to these cases the surety may sue upon it directly there is a failure to pay. The creditor may sue on the obligation or note executed to him. And thus the principal debtor may be compelled to pay twice. But on a covenant to indemnify and save harmless, the damages must be proved to have been sustained. Sedgwick, p. 312.

We submit then that actual loss must be proved; and that the recovery by the surety can only be to the extent of that loss. And to entitle the surety to recover he must prove payment. What then is payment? In Sedgwick on the Measure of Damages, p. 317 and onwards, it will be seen that neither bond nor note nor judgment nor security on land will amount to a payment. It is said that a negotiable note is an exception; but there is no ground for this distinction either in law or common sense. Though a bond or note or conveyance of real estate is not damage, yet if taken in satisfaction of the debt it is payment
523 or damage; and will *authorize the surety to sue. So a negotiable note if taken as a discharge or extinguishment of the principal's liability, will authorize the surety to sue; and only when so taken. And this must be so. There can be no remedy on an indemnifying bond until the first is discharged. They cannot both exist at once; and it is only the extinguishment of the one which brings the other into existence. And this is the result of the authorities as stated by Sedgwick, p. 319. The reason given for holding the giving a negotiable note a payment is that it is treated as money. But that is not the true reason. The true reason is that the debt for which it is given has been thereby discharged; and it matters not in what way or by what means the debt is discharged, that is a payment.

To constitute a negotiable note a payment it is essential that it shall be given and accepted in full payment of the debt. Sedgwick on Measure of Damages, p. 326. If this be so there is an end of the question in this case. Here there was no satisfaction of Cabell's notes; but it was agreed by both Davis and the bank that the notes were not to be discharged; and by the act of the bank and Davis actions were brought against the administrator of Cabell upon these notes as subsisting securities; and judgments were recovered and the money paid upon these judgments by the administrator.

The counsel for the creditors seems to admit that upon the record as it now stands, the heirs cannot be subjected upon the covenant with Putney. In truth no additional proof can subject them. Not a cent was paid by Putney upon the note on which he was endorser. The covenant is to indemnify against loss; and all the surety did

was to give a bond with security to pay the debt in two years. The debt was in fact paid by the administrator of Cabell.

It certainly is a matter too plain for argument that after the Court has sold property to more than is needed
524 *to pay all the debts of the estate, and the proceeds are under the control of the Court, then to sequester the rents and profits of all that remains in the hands of the heirs, is erroneous. Besides there was a tract of land sold in Bedford county; and in the decree sequestrating the estate a direction is given to enquire as to the proceeds of this land. And whilst there are these two tracts of land sold, and before a dollar has been ascertained to bind the heirs, this sequestration was ordered.

It has been suggested that the Court may put the injunction suit out of the way. But that is an independent suit, and is not in this Court; therefore this Court cannot judicially know whether the injunction is proper or improper; or what disposition should be made of it. It is said the application to suspend the collection of the purchase money should have been by petition in the cause. The reason for that is not perceived. Suits were brought on the bonds for the purchase money of the land, the sale having been confirmed; and the only mode of protecting themselves left to the purchasers was by injunction. That suit not having been acted on by the Court below, and not being here, this Court cannot act on it, and cannot know whether the injunction was proper or improper.

Bouldin, for the appellants, on the last point considered by Mr. Patton.

There having been a sale of the land reported and confirmed in this cause, and there being no objection to it by the heirs, but the sale being proved to be favourable to them; and a copy of the injunction cause being filed, it was competent for the Court to direct the collection of the purchase money of the land sold. The injunction cause being ready the Court below should have acted on both causes at once, and should have dissolved the injunction and directed the payment of the money. And

this Court will direct the Court below
525 to *dispose of the injunction case before any steps are taken against the heirs. And the plaintiffs in the injunction being heirs in part, and parties in this suit, their bill will be considered as a petition, and may be treated as a proceeding in the cause.

BALDWIN, J., delivered the opinion of the Court.

The bond with collateral condition executed by Dr. Cabell to Davis may be treated as a covenant, and its purpose seems mainly to have been to provide a security which, in the event that has happened of Cabell's death, would subject his real as well as personal assets. The covenant was of comparatively little value in the lifetime of Cabell, inasmuch as legal proceedings against his person and property could not

be materially affected by the dignity of the demand, and would be substantially the same whether it were evidenced by specialty or by simple contract. But the security afforded by a specialty binding his heirs might become all important upon the occurrence of his death. It appears that Davis had incurred responsibilities to a large amount as his endorser in bank, and that renewals of the notes, and other future liabilities of the like kind, were contemplated. The death of Cabell without having discharged these debts, would, without a specialty binding his heirs, leave Davis exposed to the hazard of loss by the inadequacy of the decedent's personal estate, though the owner of real property of great value.

The condition of the obligation is as follows: "Whereas the above named Henry Davis hath endorsed sundry notes which have been discounted for the accommodation of the said John J. Cabell, at the office of discount and deposit of the Bank of Virginia in Lynchburg, and it is in contemplation to renew said notes, from time to time, according to the custom of said bank; now therefore in case the said John J.

526 Cabell shall, whenever thereto required by said bank, or *by said

Henry Davis, or his legal representative, well and truly pay and discharge all such notes as now are or hereafter may be endorsed for his accommodation by said Henry Davis, whether the said endorsement be made for the renewal of the notes already endorsed, or for obtaining from said office of discount and deposit, or elsewhere, further loans for the accommodation of the said John J. Cabell, on either notes, bills or otherwise, so as fully to indemnify and save harmless the said Henry Davis and his legal representatives, from all loss or damage on account of the said endorsements, then the above obligation to be void, else to remain in full force and virtue."

This was not a covenant of mere indemnity, but a covenant to pay the notes &c. whenever required by the bank or by Davis. It was not in the alternative either to pay the notes, or to indemnify and save harmless, but a direct and positive engagement to pay, and by that means indemnify and save harmless: and thus in effect it was a stipulation that by payment of the debts Davis should be relieved from all responsibility as surety therefor. Nor was any formal demand or notice from the bank or from Davis necessary to give effect to the covenant. It is not pretended that the bank was bound by any contract with Cabell to extend to him credit beyond the period stipulated in the notes, nor that Davis was so bound to continue his endorser. By the uniform usage and custom of banks, and the universal understanding of those who deal with them, notes negotiable and payable there must be paid at maturity, or within the three days of grace thereafter. And the failure to obtain such extension of credit, or the disapproval of the person offered as endorser, would be the most de-

cisive requisition of payment that could be made by the bank. And so the withholding by Davis of a renewed endorsement would be equally a requisition on his part that the notes should be paid by Cabell.

527 *It is clear therefore that the covenant would have been broken by the failure of Cabell in his lifetime to pay the notes at maturity, and that Davis could in that event have maintained an action at law against him upon his obligation. The only difficulty, if any, in such an action would have been in regard to the extent of the recovery. It being incompetent for the legal forum to enforce a specific execution of the contract, a question might have arisen as to the quantum of damages, if the notes had not been paid by Davis, or had been paid by Cabell, before verdict. That is a subject which we need not consider, there having been no breach of the covenant in the lifetime of Cabell (the notes not having reached maturity until after his death,) and it serving to throw no light upon the present suit in equity.

The covenant of Cabell to pay the notes not only devolved at his death upon his personal representative, but also descended upon his heirs at law, and the latter became as much bound to pay them out of the real assets as the former to pay them out of the personal assets. And the death of Cabell, and the arrival of the notes at maturity without payment thereof out of his estate, constituted by inevitable necessity a breach of the covenant, as well on the part of his heirs as on the part of his administrator. It will be seen from the condition of the bond that it was not in the contemplation of the parties to renew the notes after the death of Cabell; there was no authority on the part of his administrator or his heirs to renew them in their representative character; and in point of fact they were not renewed. On the contrary they were taken up at maturity by Davis the endorser, which he could not have failed to do but at the expense of his credit and the harassment of a suit.

It appears that by an arrangement with the banks Davis obtained the means
528 of relieving himself from his *liabilities to them as Cabell's endorser. This was accomplished by his giving his own notes with a nominal endorser, and pledging as collateral securities the notes of Cabell and his obligation aforesaid. Davis's notes were discounted by the banks, and the proceeds applied to the credit of Cabell's notes, and the banks consented to indulge Davis upon his notes so discounted until the collateral securities were exhausted. This transaction was perfectly fair and legitimate, and conformable to the rule of equity by which a creditor is entitled to avail himself of any counter bonds or other securities given by the principal debtor to those bound with him as sureties; and the principle is not varied by his consenting to take the surety as his principal debtor, with a transfer of such securities so previously acquired. We need

not consider whether this adjustment was equivalent to a payment to the banks of Cabell's notes by Davis the endorser; for the result as it affects the merits of this suit is the same either way. The full amount of the notes was afterwards paid by Cabell's administrator out of the personal assets of the estate, and whether in reimbursement of Davis, or in satisfaction of the banks, who stood in his place and held his securities is wholly immaterial.

The merits of the case, however, do not depend upon the enquiry, when or by whom the notes of Cabell have been actually paid, or whether they have been paid at all; but upon the force and obligation of the covenant and the condition of the assets. The counter bond of Cabell by which he bound himself and his heirs to pay off his notes in bank, to the exoneration of Davis his endorser, placed the latter in the position of a specialty creditor, entitled to performance of the obligation from the heirs as well as the administrator. He had two funds for the satisfaction of his demand, the real assets in the hands of the heirs,

and the personal assets in the hands
529 of the administrator: the simple *contract creditors had but one, the personal assets only. The well established and familiar rules of equity, derived from considerations of natural justice, required a resort by the specialty creditor to that fund to which the simple contract creditors could not look, or if he should exhaust the personal assets, in the whole or in part, that they should be placed in his stead, and relieved out of the real assets to the same extent. And in a suit for marshalling the assets, it matters not whether the debts binding the heirs have been actually paid or remain to be satisfied, or whether they are evidenced by direct obligations or collateral covenants, or whether the former have not yet fallen due, or the latter have not yet been broken. These are all matters of detail in the arrangement, application and distribution of the assets by the equitable forum, and do not in any wise impair the principles belonging to the subject.

The right of the plaintiffs as simple contract creditors to marshal the assets, and obtain satisfaction of their demands out of the realty in the hands of the heirs in relation to the covenant with Putney, stands upon the same footing and is governed by the same principles as in regard to the covenant with Davis. The contract between Cabell and Putney is in the following words: "Memorandum of agreement between R. E. Putney and John J. Cabell, all of the county of Kanawha, Virginia: That whereas the said John J. Cabell is endorser for the said Putney in a large sum at the Bank of Virginia, and being desirous to secure said Cabell as endorser, hereby binds himself, his heirs, &c., to pay to the said Cabell the sum of 10,000 dollars, or so much as the said Putney may be in default to the said bank: and whereas the said Putney is endorser for the said John J. Cabell in a like large sum at the Bank of Virginia at

Charleston, Kanawha, and the said Cabell being desirous of securing said Putney in the aforesaid undertaking as endorser,
530 hereby binds himself, his *heirs, &c., in the sum of ten thousand dollars, or so much as the said Cabell may be in default to the said bank, to be paid to the said Putney whenever such default shall happen."

The covenant on the part of Cabell with Putney varies from his covenant with Davis only in point of form, except that the former stipulates in the event of Cabell's default with the bank, to make payment thereupon to Putney; and the effect of the two covenants respectively in regard to the real assets of the covenantors, and the consequent equities of the simple contract creditors, is essentially the same. The only difficulty in relation to the covenant with Putney is from the absence of direct evidence to prove that Cabell's note for 5000 dollars, subsequently made, endorsed and discounted, falls within its provision. The presumption, however, is that said note was not made for a new consideration originating after the covenant, but for the renewal of a note of that amount made by Cabell, with Putney as endorser, and discounted at the bank prior to the covenant. It is a matter, however, which can in all probability be reduced to a certainty one way or the other upon a reference to a commissioner, and such an enquiry ought to have been directed by the Court below.

In proceeding to give relief to the plaintiffs as simple contract creditors entitled to marshal the assets, the Court below had competent authority to decree, at the proper time, a sale of the real estate in the hands of the heirs, so far as requisite for that purpose: But it was premature to do so before adjudicating their several demands, and so ascertaining the amount of indebtedness chargeable upon the lands of the decedent. It is true that the sale which the Court directed of land in Kanawha was upon the petition of the adult heirs and by consent of the plaintiffs; but no such consent could be given on the part of the

531 infant heirs, and their rights *and interests were under the protection of the Court. A sale however was had under the decree, which was reported to and confirmed by the Court, and an order made for the collection of the proceeds; and although it was competent for the Court, these proceedings being interlocutory, to set them aside in the further progress of the cause, upon its appearing that they were prejudicial to the interests of the infants, yet, on the other hand, if appearing to be beneficial to them, there could be no good reason for disturbing them in behalf of any other party. But a bill was filed in the same Court by the purchasers at the sale, praying an injunction (which was granted) to judgments recovered on the bonds given by them for the purchase money, and seeking to set aside the decree for sale, and the proceedings under it, on the ground that the same being irregular and unwarranted

as against the infant heirs, and subject to future impeachment by them, they the purchasers were exposed to the hazard of great loss, if compelled to pay up the purchase money.

To this bill of the purchasers the numerous creditors, the heirs of Cabell as well adults as infants, and other persons, were made defendants. Some of the defendants answered, and evidence was taken pro and con upon the question, whether the land was sold at a price prejudicial or advantageous to the heirs, and that case is still pending and undetermined. The proceeding was, however, irregular and improper as a separate suit, and the bill ought to have been treated by the Court as a mere adjunct of the original cause, and in the nature of a petition, and to have been brought to hearing therewith. And if so treated, it would have presented to the consideration of the Court the enquiry whether the sale made under its decree was advantageous or injurious to the infant heirs.

Instead of taking this course, the original suit was again brought to a separate hearing, and the Court *without adjudicating any of the demands of the creditors, or making any disposition of the proceeds of sale of the Kanawha land, but leaving the injunction which had been granted to the purchasers in full force, and the land itself in their possession, and the objections which had been made to the sale thereof unadjudicated, rendered another interlocutory decree, by which the whole rents and profits of all the other real estate of the decedent were sequestered.

And the Court is of opinion that there is no error in so much of the decree of the Circuit court as declares the principles upon which the assets real and personal of the intestate ought to be marshalled, but that it is erroneous in not directing the injunction bill of the purchasers of the Kanawha land and the proceedings thereupon to be heard together with and as a part of the proceedings of this suit, and in not adjudicating the question whether the sale of the Kanawha land ought to be established or set aside, and in not adjudicating and marshalling the respective claims of the creditors, and in all other respects wherein it conflicts with the principles above declared. It is therefore adjudged, ordered and decreed, that so much of the decree of the Circuit court as is above declared to be erroneous be reversed and annulled, and that the residue thereof be affirmed with costs to the appellants. And the cause is remanded to the Circuit court to be proceeded in conformably to the principles of this opinion and decree, and upon such further proofs as may be adduced by the parties.

533 *Schofield v. Cox & als.

January Term, 1852, Richmond.

(Absent CABELL, P.)

1. Bonds—Secured by Deed of Trust—Assignment—Case at Bar.—A owns a tract of land on which there is a

deed of trust to secure a large debt. A sells two thirds of the land to B, and for the purchase money takes from B eleven bonds payable at successive periods, and a deed of trust upon the property sold to secure them: A assigns to C the fifth, sixth and seventh bonds due; and B pays to A either before the assignment, or afterwards without notice of it, rather more than enough to discharge the first four bonds: and then A and B become insolvent. HELD:

1st. Same—Same—Same—Rights of Assignee.*—That C as assignee of A, is entitled as between him and A, to the benefit of the deed of trust given by B to secure the payment of his bonds.

2d. Same—Same—Same—Same—Marshalling.—That C is entitled to have the one third of the land not embraced in his security, applied in the first place to satisfy the first incumbrance, to the relief of the two thirds of the land conveyed by B to secure his bonds.

3d. Same—Same—Same—Same.—That the payments beyond the amount of the first four bonds, made by B to A without notice of the assignment, having been made on account, are not to be treated as applicable to the first bond assigned to C; but to the bonds held by A.

2. Foreign Attachment—Assignment—Case at Bar.—

A living out of the state, D sues out a foreign attachment against him, and attaches the one third of the land which was not sold to B, and also the debt due from B to A; the attachment being issued after the assignment to C. HELD:

1st. Same—Same—Priority.—As between the attaching creditor and the assignee the latter has the preference.

2d. Sale of Land Subject to Lien—Order of Payment—Case at Bar.—The whole land being sold together, the one third and so much of the two thirds of the purchase money as is necessary, will be applied to discharge the first incumbrance; and the balance will be applied to pay the assignee.

3d. Foreign Attachments—Right to Personal Decree.†—The attaching creditor proving his debt, is entitled to a personal decree against his absent debtor, though the property attached may be adjudged to the assignee.

534 *This was a proceeding by foreign attachment, commenced in July 1841, in the Circuit court of Jefferson county, by Jesse Schofield against Luther J. Cox as an absent debtor, and Benjamin Ford and Daniel Snyder home defendants, having estate of the absent debtor in their hands. In

*Choses in Action—Assignment—Order of Payment.—Where bonds or other choses in action secured by a lien on land are assigned, the order of payment out of the proceeds of a sale of the land is determined by the *order of time of assignment*, and not by the *order in which the bonds fall due*, unless otherwise provided expressly, or to be plainly inferred from the transaction. *Thomas v. Linn*, 40 W. Va. 180, 20 S. E. Rep. 881, citing as authority the principal case. For other cases in point, see monographic *note* on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409.

†Foreign Attachments—Right to Personal Decree.—See *Williamson v. Gayle*, 7 Gratt. 152, and *foot-note*, where the principal case is cited. See also, monographic *note* on "Attachments" appended to *Lancaster v. Wilson*, 27 Gratt. 624.

the progress of the cause, J. & A. H. Herr were, on their petition, admitted as parties defendants, and claimed the fund in the hands of Ford & Snyder, under an assignment from Cox. The facts are as follows:

Cox being seised of certain mill property subject to an incumbrance for 11,537 dollars, sold and conveyed two undivided thirds of it, free from incumbrance, to Snyder & Ford for 21,466 dollars 71 cents, payable in eleven instalments; two of which were for 2333 dollars 34 cents each, and payable on the 28th of March in the years 1841 and 1842, with interest from the date, which was on the 28th of November 1840; and the other nine were for 1866 dollars 67 cents each, and payable at 2, 4, 6, 8, 10, 12, 14, 16 and 18 months after date. To secure the payment of these instalments, Snyder & Ford executed their bonds and a deed of trust on the said two thirds of the property. On the 13th of April 1841 Cox assigned three of the intermediate bonds, to wit, the bonds payable at 8, 10, and 12 months after date, amounting together to 5600 dollars, to J. & A. H. Herr. After the assignment, to wit, in July 1841, Schofield, to whom Cox was indebted in the principal sum of 2317 dollars 89 cents, instituted a foreign attachment suit therefor against Cox, who was a nonresident of the state; and attached Cox's remaining one third of the property, and the debts due him by Snyder & Ford for the other two thirds. Snyder & Ford paid to Cox the two first instalments of 1866 dollars 67 cents each, and made various other payments at different times between the 18th of January and 27th of

November 1841 inclusive, to the
535 amount of 5630 dollars *15 cents, making the aggregate of payments made by Snyder & Ford to Cox 9363 dollars 49 cents, of which 4733 dollars 34 cents appear to have been paid before, and 4630 dollars 15 cents after the assignment. Nothing appears to have been paid on account of the assigned bonds. Cox, Snyder & Ford became insolvent, and the whole of the property was sold to satisfy the prior incumbrance. The amount of the sale was 14,000 dollars; of which, after paying expenses and satisfying the prior incumbrance, a surplus remained of 2037 dollars 38 cents, to be paid to the assignees or the attaching creditors, according as the Court should be of opinion that the one or the other was entitled to the same.

The cause came on to be heard in June 1844, when the Court being of opinion that the assignees J. & A. H. Herr were entitled in preference to the plaintiff, dismissed his bill, whereupon he applied to this Court for an appeal, which was allowed.

Cooke, for the appellant.

A. Hunter, for the appellees.

MONCURE, J., after stating the case, proceeded:

The Court below was of opinion that the assignees were entitled, and dismissed the bill of the attaching creditor. I think the Court below was right.

Let us enquire, first, How the case stands between Cox and his assignees? And secondly, How it is affected by the intervention of the attaching creditor?

First. How does the case stand between Cox and his assignees? There appears to have been no agreement between Cox and Snyder & Ford for the payment of the prior incumbrance by the latter out of the purchase money; though Cox may have looked to that as the source from which he was to derive the means of making such payment; and Snyder & Ford had a
536 *right to rely upon it as their indemnity against such incumbrance. But

Cox on the one hand was bound to discharge the incumbrance, and (dependent on that obligation) Snyder & Ford on the other were bound to pay off their bonds as they became due; and there was a lien by the deed of trust on two undivided thirds of the property to secure the payment of these bonds as they become due to Cox or his assigns. *Gwathmeys v. Ragland*, 1 Rand. 466. Of the eleven bonds given by Snyder & Ford to Cox, four amounting together to the sum of 7933 dollars 35 cents, became due before the three bonds assigned to J. & A. H. Herr became due; and four amounting together to the same sum became due afterwards. Snyder & Ford having, as before stated, paid to Cox 9363 dollars 49 cents, had more than extinguished the four bonds which became due before the three bonds assigned to J. & A. H. Herr. So that at the time of the sale of the property under the prior incumbrance, two undivided thirds of it were as between Cox and his said assignees, bound in the first place for the payment of the three assigned bonds; and if Cox had discharged his obligation by paying off the prior incumbrance, the three assigned bonds would have been fully paid out of the proceeds of the sale of the said two thirds.

The case then stood thus. The prior incumbrancer had a lien on the whole property. The assignees had a lien on two thirds of it: And the property was insufficient to satisfy both liens. In this state of things a Court of equity, on the familiar principle of marshalling securities, would charge the prior incumbrance first upon the third of the property on which the assignees had no lien, and then upon the other two thirds; so that the property left, after satisfying the prior incumbrance, would be property on which the assignees had a lien and would be applicable to its discharge. And

if, as was the case here, the whole
537 property was sold *and the proceeds applied to the payment of the prior incumbrance, the surplus would be considered as arising from the sale of the subject on which the assignees had a lien, and be therefore applicable to the payment of the assigned bonds. Cox certainly could not object to this mode of marshalling the securities for the benefit of his assignees. He was bound to indemnify not only them but the obligors against the prior incumbrance.

It is contended by the counsel for the appellant that J. & A. H. Herr must recover as assignees of the bonds at 8, 10 and 12 months, or not at all; and that the record shews that the greater part of these three bonds was paid by Snyder & Ford to Cox without notice of the assignment. I do not think so. The two bonds at two and four months were discharged. The other payments amounting to 5630 dollars 15 cents appear not to have been applied to any particular bonds. If they were applicable to the bonds as they became due, they would still leave due the whole of two and part of the third of the assigned bonds; which would greatly exceed the amount of the surplus in controversy; and the right of the assignees to such surplus would therefore not be affected. But while it might be proper, so far as the obligors are concerned, to apply their payments to the bonds in the order in which they became due, without regard to the assignment of any of them, supposing they had no notice of such assignment, it would not be proper, as between the assignor and the assignees, to apply any of the payments to the assigned bonds. And if such application were made for the benefit of the obligors, the assignees would be entitled to be indemnified out of the bonds remaining in the hands of the assignor.

But secondly, How is the case affected by the intervention of the attaching creditor? I think not at all. It is well settled that the attaching creditor stands on no better footing as to the thing attached than 538 that on *which his debtor stood at the time of the attachment. 2 Rob. Pr. 207, and the cases cited by the counsel for the appellees. It is this case therefore the attaching creditor Schofield can no more object than can his debtor Cox to the marshalling of the securities for the benefit of the assignees as before stated.

I think the decree ought to be affirmed; at least so far as it gives priority to the assignees over the attaching creditor. But instead of dismissing the bill of the latter, the Court should have given him a personal decree against the absent debtor, according to the case of *Williamson v. Gayle*, 7 Gratt. 152.

ALLEN and DANIEL, J's, concurred in the opinion of Moncure, J.

BALDWIN, J., did not see the opinion, but concurred in the decree; which was as follows:

The Court is of opinion, that on the principle of the decision of this Court in the case of *Williamson v. Gayle & al.*, 7 Gratt. 152, there is error in the decree appealed from in this case as between the appellant and the appellee Cox, in dismissing his bill as to the said Cox, instead of giving him a personal decree against that defendant for the amount of his demand and his costs in the Circuit court; but that there is no error in the residue of the said decree. It is therefore decreed and ordered, that so much of the said decree as is above declared

to be erroneous, be reversed and annulled, with costs to the appellant against the appellee Cox; and that the residue of the said decree be affirmed with costs to the appellees J. & A. H. Herr. And this Court proceeding to render such decree as the said Circuit court ought to have rendered in lieu of so much of the decree aforesaid as is above declared to be erroneous, it is further decreed and ordered that the appellant do recover against the appellee Cox the 539 sum of two thousand *three hundred and seventeen dollars and eighty-nine cents, with interest thereon from the 11th day of November 1840 till paid, and his costs by him expended in the prosecution of his suit in the said Circuit superior court.

Archer v. Archer's Adm'r.

April Term, 1852, Richmond.

(Absent CABELL, P., and BALDWIN, J.)

1. **Pleading and Practice—Plea of "Non Damnificatus"—When Proper.***—The plea of "*non damnificatus*" is a good plea, only where the condition is to indemnify and save harmless. The plea should go to the right of action, not to the question of damages.
2. **Same—Same—Equivalent to Conditions Performed—Refusal to Allow Both—Effect.**—Wherever the plea of "*non damnificatus*" is a good plea, it is equivalent to the plea of "*conditions performed*." And if this last mentioned plea has been filed in a cause, it is no error to refuse the application at a subsequent term, to file the former.
3. **Devise of Tract of Land for Payment of a Debt—Liability of Legatee on Refunding Bond—Case at Bar.**—A testator devises a tract of land for the payment of a particular debt, and the land is sold; but the creditor receives only the first payment of the purchase money, and refuses to take the balance, which is applied to the payment of other debts of the testator. Whether the land was the primary fund for the payment of the particular debt, or not, that debt was in fact the debt of the testator's estate, for which a legatee was responsible under his refunding bond.

***Pleading and Practice—Pleas—Non Damnificatus—Conditions Performed.**—On a bond merely conditional for indemnity, where a plea of *non damnificatus* would be proper, a plea of conditions performed answers the same purpose. *Poling v. Maddox*, 41 W. Va. 779, 24 S. E. Rep. 999, citing *Archer v. Archer*, 8 Gratt. 539.

In *Elam v. Commercial Bank*, 86 Va. 95, 9 S. E. Rep. 498, it is said: "The plea of *non damnificatus* is usually equivalent to *conditions performed*; therefore the plea of *conditions performed* having been previously pleaded in the case, the defendants could not be prejudiced by the refusal of the court to allow them to file its equivalent. 4 Minor's Inst., 988, 1004; *Archer v. Archer*, 8 Gratt. 539; *McClure v. Erwin*, 3 Cow. R. 332." The principal case is cited in *Guarantee Co. v. Bank*, 95 Va. 490, 28 S. E. Rep. 909; *foot-note* to *Board v. Dunn*, 27 Gratt. 608; *foot-note* to *Fant v. Miller*, 17 Gratt. 47; *Central Land Co. v. Calhoun*, 16 W. Va. 376.

In *Altizer v. Buskirk*, 44 W. Va. 259, 28 S. E. Rep. 790, it is said: "The plea of conditions performed answers the whole cause of action in the declaration mentioned, and controverts the plaintiff's

4. **Exceptions—Admission of Evidence—What Bill Must State—Case at Bar.**—In an action by an executor upon a refunding bond, he offers in evidence the record of the cause in which the decree was rendered against him, on account of which his action is brought: and he then offers in evidence the execution which had issued on the decree, and the return thereon; which were objected to by the defendant, but were admitted by the Court. To the admission of the evidence the defendant excepted, but the exception did not contain the execution. **Held.** That the relevancy of the evidence *being obvious without an inspection of the execution, it was not essential that it should be contained in the bill of exceptions.

This was an action of debt instituted in the Circuit court of Chesterfield county in June 1838 by William S. Archer against John Archer. The declaration merely set out the bond on which the action was instituted, without referring to the condition. The defendant appeared at the March term for 1841, craved oyer of the bond and condition, and pleaded "conditions performed."

The bond was executed by John Archer with a surety to William S. Archer administrator of John Archer deceased of Amelia, who was one of the acting executors of John Archer of Bermuda Hundred, in the county of Chesterfield, in the penalty of 2600 dollars, with a condition that the obligor John Archer who was one of the distributees of John Archer of Bermuda Hundred, and who had received his due proportion of the said estate from John Archer of Amelia, should refund his due proportion of all sums of money which might, at any time thereafter, be recovered of or against the said William S. Archer, his executors or administrators, in manner as aforesaid.

The plaintiff replied and set out three assignments of breaches, all of which were intended to present the same subject matter. That was that in July 1837, a debt which John Archer of Bermuda Hundred had owed in his lifetime, to Judith Archer, in her lifetime, amounting to 2148 dollars 7 cents, with interest at five per cent. on 1272 dollars 96 cents, a part thereof, from the 31st of December 1820 till paid, and 139 dollars 5 cents costs, had been recovered by the administrator of Judith Archer against the

right to any recovery at all; in short, puts the plaintiff upon proof of all the facts necessary for his recovery except the execution of the bond. *State v. Hays*, 30 W. Va. 108, 8 S. E. Rep. 177; *Archer v. Archer's Adm'r*, 8 Gratt. 539."

†**Exceptions.**—In *McDowell v. Crawford*, 11 Gratt. 206, it is said: "But the only reason for inserting the document in the bill of exceptions is to enable the appellate court to see whether it is relevant evidence. If its relevancy otherwise sufficiently appears upon the record, its insertion in the bill of exceptions is not necessary. *Archer v. Archer's Adm'r*, 8 Gratt. 539. In this case I think the relevancy of the evidence which was excluded is sufficiently apparent on the record."

plaintiff, as the administrator of John Archer of Amelia, who in his lifetime had been the executor of John Archer of Bermuda Hundred, by the decree of the Circuit court of Henrico, of which the defendant had notice and had been requested to pay his proportion, which was one fifth of the amount so recovered.

At the November term 1842, the defendant tendered a plea of "non damnificatus," in addition to the plea previously pleaded; but it was objected to by the plaintiff and rejected by the Court. The defendant then tendered a rejoinder to the plaintiff's replication, which was also objected to by the plaintiff, but the Court overruled the objection. The defence set up in the rejoinder was, that the debt which was decreed to be paid by the plaintiff as the administrator of John Archer of Amelia to the administrator of Judith Archer, was not a debt at the time of pronouncing said decree, due from the estate of John Archer of Bermuda Hundred, but was a debt from the said John Archer of Amelia, to the estate of Judith Archer. Upon this rejoinder there was an issue.

The cause came on to be tried at the March term for 1843, when the defendant took two exceptions, one for the admission of testimony, and the other for the refusal of the Court to give an instruction to the jury. The facts in relation to both the subjects of exceptions are stated in the opinion of Judge Moncure. There was a verdict and judgment for the plaintiff for the sum of 673 dollars 82 cents, with six per cent. per annum interest thereon, from the 3d day of January 1838 until paid. Whereupon the defendant applied to this Court for a superseas, which was awarded.

Stanard & Bouldin and Cooke, for the appellant.

Taylor, Macfarland & Rhodes, for the appellee.

MONCURE, J. Two errors are assigned in this case. The first is the rejection of the plea of non damnificatus. Did the Circuit court err in rejecting that plea? The condition of the bond was for the payment of one *fifth of all sums of money which might at any time thereafter be claimed or recovered of, or against, the said William S. Archer &c. According to the rule laid down in *Stephen on Pleading*, p. 386, that a general mode of pleading is often sufficient where the allegation on the other side must reduce the matter to a certainty, the plea of "conditions performed," generally, was an admissible plea in this case. But not the plea of non damnificatus. As was said by the Supreme court of New York, in the case of *McClure v. Erwin*, 3 Cow. R. 313, 332. "This is a good plea in all cases where the condition is to indemnify and save harmless; because it answers the condition in terms. But it is good in that case only. The plea should go to the right of action, not to the question of damages. The plaintiff, so far as it depends upon the pleadings,

shews his right to recover by setting forth the bond with its condition, and alleging a breach of that condition, either general or special as the case may require. If the defendant by his plea admit that the condition has been broken, he concedes the plaintiff's right to recover; and, by not denying the breach assigned, but instead of doing this, interposing the general plea of non damnificatus, he, in effect, admits the breach."

But if the plea of non damnificatus had been originally admissible in this case, the Court was right in rejecting it at the time it was offered. On the 27th of March 1841 the defendant plead "conditions performed," to which the plaintiff replied specially, by three several assignments of breaches. On the 1st of November 1842 the defendant tendered the plea of non damnificatus, in addition to his former plea of "conditions performed," which was objected to by the plaintiff and rejected by the Court. And thereupon the defendant rejoined to the replication to his former plea. Now wherever the plea of non damnificatus is a good plea, it is because

543 it is in the nature of a plea of performance; *"'being used," as Stephen on Pleading, p. 388, says, "where the defendant means to allege that the plaintiff has been kept harmless and indemnified, according to the tenor of the condition." Where then the plea of non damnificatus is a good plea, it is equivalent to the plea of "conditions performed." And the latter plea having been put in more than eighteen months before the former was tendered, there could have been no necessity for the former. If the former had been also put in, the replication and issue thereon would have been the same as on the plea of "conditions performed." The defendant has had every benefit under the issue made up on the plea of "conditions performed," which he could have had under the same issue made up on the plea of non damnificatus. The question involved in the issue was whether the debt decreed to be paid by William S. Archer as administrator of John Archer of Amelia, to the administrator of Judith Archer, was, at the time of pronouncing the decree, a debt due from the estate of John Archer of Chesterfield, or a debt due from the estate of John Archer of Amelia. If the former, then it is certain not only that the condition was broken, but that the plaintiff was damnified to the extent of one fifth of the amount of the said decree.

The other error assigned, is the refusal of the Court to give the instruction asked for on the trial of the cause. That instruction was "that as John Archer of Chesterfield devised a tract of land for the payment of the debt due Judith Archer, that debt did not create a lien on the personal estate of the testator, unless the land proved insufficient for that purpose." I think that the question involved in that instruction was an abstract one, and its solution by the Court was not necessary to

a proper decision of the case, and might have embarrassed the jury. The only issue was, whether the debt decreed to Judith Archer was, at the time of the 544 decree, *due from the estate of John Archer of Chesterfield, or from the estate of John Archer of Amelia. It was at one time, undoubtedly, the debt of the former. When and how did it cease to be so? The defendant contended that the land devised was the primary fund for the payment of this debt; that it was sold and the proceeds received by the executor; and that when the proceeds were so received, pro tanto at least, the debt to Judith Archer became the debt of the executor. On the other hand, the executor contended that he had paid the first instalment of the purchase money of the land to Judith Archer, but she refused to receive the other two instalments; and he had accordingly applied them to the payment of other debts of his testator's estate; had credited them in his executorial account, on which there was a balance due to him by the estate; and that thus the residue of the debt to Judith Archer was in fact the debt of his testator's estate; whether the land was the primary fund for the payment of said debt or not. In support of his pretensions, the defendant exhibited the record in the case of Archer's adm'r v. Robinson &c., reported in the name of Robinson v. Archer, 5 Rand. 319. That was a suit brought by William S. Archer, administrator of John Archer of Amelia, against the legatees of John Archer of Chesterfield, to recover a balance alleged to be due by the estate of the latter to the estate of his executor John Archer of Amelia; and to obtain indemnity against any outstanding claims against the said testator's estate. In that suit the executorial account was settled; the proceeds of the sale of that land devised for the payment of Judith Archer's claim were credited, and the payment of the first instalment on account of that claim was debited to the estate; and a balance was ascertained to be due to the executor of 3061 dollars and 13 cents; for proportionable parts of which and interest, a decree was rendered against the legatees respectively. From

545 *that decree an appeal was taken, and this Court dismissed the bill as to every purpose, except for the purpose of having proper refunding bonds taken from the legatees or their representatives, to indemnify the estate of John Archer the executor against any sums which had been or might be recovered against the estate of John Archer of Chesterfield since the death of the executor. The Court in its opinion said that the most certain way of obtaining justice in this case is to consider all matters between the executor and legatees, so far as relates to actual receipts and disbursements by the executor up to the time of his death as finally closed" &c. In the account of these receipts and disbursements, we have seen that while the whole purchase money of the land was credited to the estate, the amount of the first instal-

ment only was charged as having been paid to Judith Archer. The balance of her claim was reported as an outstanding claim against the estate, and no other outstanding claim was reported. The effect of the decision of this Court was to confirm the settlement of the executorial account, (except that the balance reported to be due by the estate to the executor was extinguished;) and of course to leave the balance due to Judith Archer an outstanding debt of the estate. The main, if not the only, object of requiring a refunding bond doubtless was to provide indemnity against that debt, for which a suit was then pending, and, ten years thereafter, a decree was rendered against William S. Archer administrator of John Archer of Amelia. There is nothing in that decree which can prejudice the right of William S. Archer to recover on the refunding bonds of the legatees of John Archer of Chesterfield. The Court declined giving a decree over against them, expressly on the ground that the remedy was at law on the refunding bonds.

The counsel for the appellant also contended that the opinion of the Circuit
546 court set forth in the second *bill of exceptions taken on the trial of the case was erroneous. After the plaintiff had offered in evidence the bond on which the suit was instituted, and the record in the case of Archer's adm'r v. Archer's adm'r & als.; and the defendant had offered in evidence the record in the suit of Archer's adm'r v. Robertson & als.; (which bond and records are inserted in the bill of exceptions;) the plaintiff offered in evidence an execution and the return thereon, issued in the former suit; to which execution going in evidence to the jury the defendant objected; but the Court overruled the objection and permitted the execution to go as evidence to the jury; to which opinion of the Court the defendant excepted. The execution is not inserted in the bill of exceptions. It is true, as a general rule, that when an exception is taken to the admission of evidence, its admissibility must appear upon the record, or the judgment will be reversed. And it is also true that where the evidence is documentary, the insertion of the document in the bill of exceptions is generally the best mode of shewing its admissibility. But the insertion of the document in the bill of exceptions is not necessary, if its admissibility otherwise appears upon the record. The case of Hairston v. Cole, 1 Rand. 461, was relied on in the argument. But that case materially differs from this. The opinion of the Court in that case is very short, and is in these words, "the statement in the bill of exceptions that a manuscript purporting to be a copy of an act of the general assembly of Virginia, entitled an act &c., is too imperfect to enable the Court to pronounce any opinion thereon, it not being stated that the said copy was authenticated and how authenticated, nor is the said transcript set out in the bill of exceptions. The

judgment is therefore reversed and the cause remanded for a new trial." There it did not appear on the record that
547 the manuscript purporting to be *a copy &c., was duly authenticated. If it had so appeared, it is obvious from the language of the Court, that the said manuscript would have been considered admissible evidence. Its relevancy to the matter in controversy, seems not to have been questioned; and was probably apparent on the record. Whether it was a duly authenticated copy or not, appears to have been the only question on which its admissibility depended. But here the original execution and return thereon, and not a copy, much less a manuscript purporting to be a copy, were offered in evidence, and the only question on which their admissibility depended was as to their relevancy. Were they relevant? I think they were. The suit was brought by a personal representative, on a refunding bond, for a just proportion, being one fifth of a debt of John Archer of Chesterfield that had been recovered against the plaintiff. The record of the suit in which the recovery had been obtained was offered in evidence by the plaintiff, without objection from the defendant. The execution on the decree rendered in that suit and the return thereon, were then offered in evidence by the plaintiff, and were objected to; but no ground of objection is stated. The record of the suit being admissible, indeed necessary, evidence in the case, it seems to follow, as a matter of course, that the execution and return, which are matters of record, and in some sense at least a part of the record of the suit, are also admissible, if not necessary evidence in the case, to shew whether the amount of the decree was paid or not, and what was the amount, if paid. The objection in this case must be regarded as a general objection to the admissibility of an execution and return in such a case without reference to any particular ground of objection; and so regarded, it was properly overruled. If there had been any such ground of objection in this case, it behooved the exceptant to set it forth; and not having done so, it is fair to presume that none existed.

548 *The counsel for the appellant also contended that the Circuit court should have rendered judgment for the defendant, non obstante veredicto; or, at least, to have awarded a repleader; on the ground that the breaches assigned in the replication were insufficient, and the issue on which the verdict was found was immaterial. It was contended that the condition of the bond, properly construed, was referrible only to any recovery which might be had against William S. Archer as the representative of John Archer of Chesterfield. And that the recovery in this case as set out in the replication and shewn by the record therein vouched, being a recovery against him as administrator of John Archer of Amelia, though on account of assets received by the latter as executor of John Archer of Chesterfield, the condition

was not broken. I think the condition of the bond refers to such a recovery as is shewn by the replication and record; and that the bond was intended, and properly so, to indemnify the estate of John Archer of Amelia against any recovery which might be had against it in respect of the assets of his testator by him received and distributed among the legatees. The testator had been long since dead, and his estate fully administered by his executor. There was no occasion for an administrator de bonis non, for there were no remaining assets to be administered. If there were any outstanding creditors, their recourse would properly be against the estate of the executor, who as to them had committed a devastavit; and whose representative, in the event of a recovery against him by any such creditors, should have recourse over against the legatees for whose benefit the devastavit was committed. The bond was intended to provide for that recourse against the legatees. William S. Archer the representative of the executors, in effect if not in form, represented that portion of the estate of the testator for which the estate of the executor was responsible to the creditors of the testator; and the decree

549 *of Judith Archer before mentioned, was a recovery against William S. Archer as representing the estate of John Archer of Chesterfield within the meaning of the bond. I think the breaches, or at least the second and third of them, were well assigned, and that the issue was material.

I am for affirming the decree.

The other Judges concurred in the opinion of Judge Moncure.

Judgment affirmed.

Clark v. Brown.

April Term, 1852, Richmond.

(Absent CABELL, P., and BALDWIN, J.)

1. Appeals—Application—Law Governing.—Where an appeal or *supersedeas* is applied for, since the Code of 1849 went into operation, the application must be governed by the act in the Code, ch. 182, § 2, p. 683.

2. Trespass on Case—Appeal—Jurisdictional Amount.*—In an action on the case for an injury done to plaintiff's land by the mill dam of the defendant, though the freehold or franchise was drawn in question, yet if the damages found by the jury are under \$200 the Court of appeals has no jurisdiction of the case.

This was an action of trespass on the case in the Circuit court of Patrick county, brought by Adam Brown against Jacob

*Appeals—Jurisdictional Amount.—The principal case was cited in Greathouse v. Sapp, 26 W. Va. 89; Miller v. Nav. Co., 82 W. Va. 49, 9 S. E. Rep. 59. See further on this subject, foot-note to Umbarger v. Watts, 25 Gratt. 167; foot-note to Harman v. Lynchburg, 33 Gratt. 37.

Clark, for a nuisance in erecting a mill dam on his own land, whereby the water is thrown back and overflows the adjoining land of Brown. Issue was joined on the pleas of not guilty, and the statute

550 *of limitations. On the trial an exception was taken by Clark to the refusal of the Court to give an instruction to the jury asked for by him; and the jury having found for Brown, and assessed his damages to twenty dollars, Clark moved the Court to set aside the verdict and grant a new trial, on the ground that the finding of the jury was contrary to the law as applicable to the facts proved on the trial. The motion was overruled, and an exception being taken, the Court certified such of the facts proved, in relation to which the finding of the jury was supposed to be erroneous. From these two exceptions it appears that Clark, amongst other things, relied for his defence upon the fact that he and those under whom he claimed had exercised for more than twenty years before the institution of the suit, an exclusive, adversary and uncontested right of keeping up a dam at the place, and of the height of the dam in the declaration mentioned; and that such right had never been lost or abandoned. Judgment was rendered by the Court below on the 21st June 1850, and a *supersedeas* thereto was granted after the 1st July 1850.

Patton, for the appellant.

Grattan, for the appellee.

ALLEN, J., after stating the case proceeded:

The *supersedeas* being awarded after the new Code went into operation, it must, according to the case of *Yarborough v. Deshazo*, 7 Gratt. 374, be regulated by its provisions. And it is contended that by the new Code, although it may appear that a freehold or franchise was drawn in question upon the trial, yet as the damages found are under two hundred dollars, this Court has no jurisdiction. The Code, ch. 182, § 2, p. 683, provides that no petition for an appeal from, or writ of error or *supersedeas* to a judgment, decree or order of an inferior Court shall be presented when

551 the matter in controversy *is merely pecuniary and not of greater amount than two hundred dollars, exclusive of costs. Upon this provision it becomes necessary to ascertain what is meant by the phrase, the matter in controversy merely. Is it restricted to that, which in the language of Judge Roane in *Lewis v. Long*, 3 Munf. 136, 154, is of the essence and substance of the judgment, and by which the party may discharge himself? or is it to be construed as embracing any other matter which may be incidentally and collaterally drawn in question? In this case we are relieved from the necessity of going into a laborious investigation as to the meaning of the words and the intent of the legislature in making use of them. The phrase, "the matter in controversy," when used in relation to the appellate jurisdiction

of this Court, has already received a judicial exposition leading to special legislation. The legislature was familiar with this construction; and when therefore words are used which in the same connection had received a judicial construction, it must be intended that the words are used in the sense which had been given to them.

The act of 1792 concerning the Court of appeals, provided that the Court should have jurisdiction, if the matter in controversy should be equal in value, exclusive of costs, to 100 dollars, if a judgment of the District court, or be a freehold or a franchise. Under this act it was determined in the cases of *Hutchinson v. Kellam*, and *Lymbrick v. Seldon*, 3 Munf. 202, that to give the Court jurisdiction on the ground that the matter in controversy was a freehold or franchise, the right to the freehold or franchise must be directly the subject of the action; and not have been incidentally or collaterally drawn in question. In both cases the action was trespass *quare clausum fregit*, and the damages recovered less than 100 dollars: but it appeared from the records that the titles or bounds of land were drawn in question. "To give this

552 Court jurisdiction," Judge *Cabell observed, "the matter in controversy must be equal in value to 100 dollars, or must be a freehold or franchise. The action of trespass is one in which damages only are recovered, and although the title or bounds of land may be incidentally and collaterally brought in question, yet the value of the matter in controversy is from the nature of the action the value of the damages sustained by the trespass; and this as well where the title or bounds of land may be drawn in question as where they may in no manner be involved in the dispute." Roane and Fleming concurred with Cabell, and Roane adverted to the considerations which may have operated in inducing the legislature to make a distinction between this Court and the District courts in respect to the appellate jurisdiction of the latter from judgments of the County courts. The act of 1792, regulating the jurisdiction of the District court, had authorized an appeal from the County courts where the debt or damages or other thing recovered or claimed, exclusive of costs, should be of the value of 100 dollars, or where the title or bounds of land should be drawn in question. Coalter, who dissented from the other judges, had argued, that as this act was in *pari materia*, and had passed at the same session, both acts should be construed together as forming one system. Alluding to these different provisions, Roane remarked, "That the District courts being skilled in the law might in the opinion of the legislature, well be trusted with the final decision of questions of that nature, except where the sum found is over the limits of the act, or where the controversy is for the freehold or franchise itself."

The case of *Lewis v. Long*, 3 Munf. 136, was an action of debt on a single bill for more than 100 dollars; the jury found for

the plaintiff the debt in the declaration mentioned, to be discharged by less than 100 dollars; and the judgment followed 553 the verdict. Upon *appeal it was determined that the smaller sum found by the jury, and not the nominal sum for which judgment was entered, was the matter in controversy between the parties. The matter in controversy, Judge Roane observes, is that which is the essence and substance of the judgment, and by which the party may discharge himself.

A similar expression in the act of Congress establishing the Federal courts was construed in the same manner in the case of *United States v. McDowell*, 4 Cranch's R. 316. That was an action for 20,000 dollars, the penalty of an official bond of the marshal, alleging as a breach the failure to pay over to the United States 320 dollars. There was a decision against the United States, and upon error to the Supreme court it was decided that the matter in dispute being of less value than 2000 dollars, the Court had no jurisdiction. Some years after these decisions, the case of *Skipwith v. Young*, 5 Munf. 276, was brought up. It was like the present case, an action of trespass on the case for injury to the land of the plaintiff, by the erection of a mill dam. The defendant besides the plea of not guilty, filed a special plea setting out that those under whom he claimed had many years before a mill and dam at the same place, &c. The plea was withdrawn by consent, but with leave on both sides, to give in evidence the special matter in support or avoidance of the matter contained in the plea. There was a verdict for the plaintiff for one penny damages, subject to the opinion of the Court on a point reserved involving the right of the defendant to build a mill under the circumstances set forth. It thus appeared as well from the pleadings as the finding, that the questions between the parties were the right and title to the land overflowed, and the right to erect and continue the mill and dam; the same questions, which from the instruction moved for and the certifi-

554 cate of facts, would seem to have *been drawn in question in the case under consideration. But notwithstanding the imposing form in which the questions were there presented, and although it was argued and authorities adduced to prove that a verdict and judgment in an action of trespass *quare clausum fregit*, in which the pleadings put the freehold in issue, were conclusive as to the right and could be pleaded by way of estoppel, this Court determined that as the damages were less than 100 dollars the defendant could not appeal to this tribunal. In the course of his opinion in this case, Brooke, Judge, remarked, "That the matter in controversy is that for which the suit is brought, and not that which may or may not come in question. In the case relied on in 3 East, Lord Ellenborough says, the judgment is the fruit of the action and can only follow the particular right claimed, and injury complained of. The

injury in the case before the Court is emphatically the matter in controversy, though other matters may have been put in issue; the finding of which by the jury may, if pleaded, estop the party in another action."

In his opinion the Judge adverted to the consequences of so construing the statute as to extend the appellate jurisdiction to decisions of the inferior Courts, in which matters not directly in controversy, may have been indirectly drawn in question; and argued to shew that under such a construction few cases would escape the jurisdiction of the appellate Court. In consequence of these decisions, the law was amended at the revisal of 1819, and after the words "or be a freehold or franchise," there were inserted the words, "or where such freehold or franchise, or the title or bounds of land are drawn in question." Thus the law stood until the new Code superseded it. The appellate jurisdiction was limited to cases where the matter in controversy should be equal to a particular sum

555 or be a freehold or franchise; or cases in which a freehold or franchise *or the title or bounds of land, though not the matter in controversy, should be drawn in question. It was argued that the provision of the new Code was intended to re-enact the former law and carry out its principles, merely increasing the amount from 100 to 200 dollars, exclusive of costs, where the matter in controversy was merely pecuniary. The intention of the legislature must be collected from the expressions used where they are free from ambiguity. One object of the change was to impose a further limitation on the jurisdiction of this Court, and to exclude from it cases of minor importance where the matter in controversy is merely pecuniary. If the matter in controversy for which the action is brought be not merely pecuniary, but embraces something besides, which would be covered by the judgment, an appeal would lie. But we cannot suppose that the legislature, after the repeated adjudications of this Court and the legislation in consequence thereof, could have contemplated embracing by the terms used, every case where any matter not merely pecuniary was drawn in question. Such a construction instead of carrying out the manifest intent to restrict the jurisdiction would enlarge it, and leave the Court with almost unlimited appellate jurisdiction.

As the law stood before, the Court could not take jurisdiction where other matters were drawn in question collaterally, except in a few specified cases involving a freehold or franchise or the title or bounds of land. But if in consequence of the use of the word "merely" the law is to be construed as still extending to those excepted cases, what is to confine it to them? The exposition which would embrace the matters provided for by the former law, would equally embrace every other matter not merely pecuniary when drawn in question; although the direct object of the action was the recovery of damages only. And in

almost every action, matters in addition to the mere pecuniary *amount sought to be recovered may be incidentally drawn into question during the trial. To suppose that the legislature intended to enlarge the jurisdiction of this Court so as to extend to all such cases, would be imputing to them an intention to give an undefined and almost unlimited jurisdiction, whilst at the same time they were professing to restrict it within narrower limits. It may be that the effect of the present enactment upon the few excepted cases provided for by the revisal of 1819, was not adverted to, but this Court cannot look beyond the law to ascertain the intent of the legislature; and confining itself to that, it is constrained to say that in an action like this, sounding in damages merely, those damages are according to the adjudications of the Court, the only matter in controversy; and the amount recovered being less than 200 dollars the Court cannot take jurisdiction, it not being competent to take jurisdiction under the law now in force because a matter not directly in controversy may have been incidentally drawn in question.

The appeal should be dismissed as being improvidently allowed.

The other Judges concurred in Judge Allen's opinion.

Appeal dismissed.

557 *Rice's Ex'or v. Annatt's Adm'r.

April Term, 1852, Richmond.

(Absent CABELL, P., and BALDWIN, J.)

1. Debt—Plea of Payment—Evidence—Parol Admissions of Plaintiff.—In an action of debt under the plea of payment the defendant may give in evidence parol admissions of the plaintiff that but a portion of the debt claimed is really due.

2. Same—Same—When an Account Must Be Filed.*—Where the defendant relies upon a specific payment or set off by way of discount against a debt, an account stating distinctly the nature of such payment or set off, and the several items thereof, must be filed with the plea: though the defendant may rely upon the parol admissions of the plaintiff to prove such payment. But this is not necessary where no specific payment is relied on; but the defendant offers proof of the admissions of the plaintiff that but a portion of the debt is due.

This was an action of debt in the Circuit court of Halifax county, by the administrator of John Annatt against the executor of Jesse Rice. The action was founded on a bond for 109 dollars 38 cents, dated and

*Debts—Plea of Payment—When an Account Must Be Filed.—See principal case cited in *Arnold v. Cole*, 42 W. Va. 666, 26 S. E. Rep. 318; *Shanklin v. Crisamore*, 4 W. Va. 186. See also, monographic note on "Debt, The Action of" appended to *Davis v. Mead*, 18 Gratt. 118.

payable on the 13th of May 1829, executed by Jesse Rice to John Annatt; and the only defence was payment by the defendant's testator. With the plea of payment, the defendant filed an account of payment and offsets, the first item in which was, 1829, May 13, paid 109 dollars 38 cents. The other items were set offs.

On the trial of the cause there was a verdict for the plaintiff under an instruction from the Court; and the defendant then applied for a new trial on the ground of misdirection. It appeared that on the trial the defendant introduced a witness, who stated that he heard the plaintiff, sometime before the institution of this suit, tell the defendant that 25 dollars only of the bond

declared upon remained unpaid. And this being the only *direct evidence of a payment, the plaintiff's counsel moved the Court to exclude it from the jury, on the ground that no such payment as that indicated by the testimony was stated in the account of payments filed with the plea. This motion the Court overruled, but instructed the jury, that as no such payment was stated in the account filed with the plea, they could not on that testimony find a partial payment of the bond declared upon; but that they might use the testimony along with the other evidence, to fortify the presumption of payment arising from the length of time.

The Court overruled the motion for a new trial, and rendered a judgment upon the verdict for the plaintiff. Whereupon, the defendant having excepted to the opinion of the Court overruling his motion for a new trial, applied to this Court for a supersedeas, which was awarded.

Stanard & Bouldin, for the appellant.
Patton, for the appellee.

ALLEN, J., delivered the opinion of the Court.

The Court is of opinion, that as by the act of assembly, 1 Rev. Code 509, § 84, it was provided, that if before action brought the defendant hath paid the principal and interest due by the defeasance or condition, he may plead payment in bar, it would have been competent to give in evidence the parol admissions of the plaintiff that nothing was due in support of such plea of payment. And as by the act of assembly, 1 Rev. Code 487, ch. 127, it was provided, that in an action of debt due by judgment, bond, bill or otherwise, the defendant shall have liberty, upon the trial thereof, to make all the discount he can against such debt; and upon proof thereof the same shall be allowed in Court; it is competent under the plea of payment to give in evidence parol admissions of the plaintiff, that but a portion *of the debt claimed was really due. Where the defendant relies upon a specific payment or set-off by way of discount against the debt, an account stating distinctly the nature of such payment or set-off, and the several items thereof, must be filed with the plea; though the defendant may rely on parol admissions

of the plaintiff to prove such payments. But this does not apply to a case where no specific payment is relied on; as the defendant may be destitute of any evidence to prove the same and still be enabled to prove by the admissions of the plaintiff, that but a portion of the debt sued for is due. Unless such proof be admissible under the general plea of payment, the defendant would be deprived of a defence which the justice of the case required.

The Court is therefore of opinion that the Circuit court erred in instructing the jury that upon evidence of the declarations of the plaintiff in the action sometime before the institution of the suit, that 25 dollars only of the bond mentioned in the declaration remained unpaid, they could not on that testimony find a partial payment of the bond in the declaration mentioned, because no such payment was stated in the account filed with the plea, and in overruling the motion of the plaintiff in error to set aside the verdict and grant him a new trial on account of such misdirection. It is therefore considered that said judgment be reversed with costs; and the cause is remanded with instructions to set aside the verdict and award a new trial upon the usual terms.

Judgment reversed.

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*Booth v. Kinsey.

April Term, 1852, Richmond.

(Absent CABELL, P., and BALDWIN, J.)

Forthcoming Bonds*—Obligee a Surety—Validity—Case at Bar.—A debtor in execution executes a forthcoming bond to the creditor, and a third person and the obligee execute the bond with the debtor, as his sureties. The bond being forfeited, the obligee gives notice to the principal obligor and the other surety, of a motion for award of execution upon the bond, against them; but the notice does not mention the obligee as a co-obligor.

Held:

1st. Same—Same—Same—Liability of Surety.—That the bond is a valid bond to bind the other surety, but that he is only liable as a co-surety with the obligee.

2d. Same—Same—Relief of Surety.†—That if the principal creditor proves insolvent, the surety may be relieved to the extent of one moiety of the debt, either by bill in equity, or by motion under the statute for the relief of sureties.

3d. Same—Motion—Notice.‡—The notice is not defective for failing to mention the obligee as a co-obligor.

***Forthcoming Bonds.**—On matters pertaining to forthcoming bonds, see monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

†**Equity Jurisdiction.**—See principal case cited with approval in Rodes v. Rodes, 24 Gratt. 256, 259, and *foot-note*.

‡**Motion for Judgment—Notice of.**—See Board v. Parsons, 22 W. Va. 311; Shepherd v. Brown, 30 W. Va. 12, 20, 3 S. E. Rep. 190; *foot-note* to Monteith v. Com., 15 Gratt. 172; *foot-note* to Supervisors v. Dunn, 27 Gratt. 608.

The case is stated by Judge Moncure in the commencement of his opinion.

Lyons, for the appellant.
Grattan, for the appellee.

MONCURE, J. Otey Kinsey sued out a ca. sa. against Henry Shoemaker; who being arrested and committed to jail, gave a forthcoming bond with the appellant Moses G. Booth and the same Otey Kinsey, the obligee in the bond, as his sureties. A motion was made by Kinsey against Shoemaker and Booth, the other two obligors, for award of execution on the bond; and it was proved that in due time a written notice of the motion addressed to 561 Shoemaker and Booth, and full *and specific in all respects, except that the name of Kinsey was not mentioned as a co-obligor in the bond, had been served on Booth, and a verbal notice of the motion had been given to Shoemaker. And it was admitted on both sides, that the Otey Kinsey whose name was signed to the bond as an obligor, was the same person who was the obligee in the bond; and it was proved on the part of the defendants that Shoemaker had been discharged from custody under the ca. sa. by the execution of the bond aforesaid by Booth and Kinsey, without in fact having delivered up the property specified in the bond, or any other property whatever. The defendants opposed the motion on the grounds 1st, that there was a variance between the written notice and the bond; 2dly, that they had not received sufficient notice of the motion, and 3dly, because the plaintiff being a joint obligor with the defendants, could not legally recover judgment against them, and the bond was nugatory and void. But the Court being satisfied that there was no substantial variance between the written notice and the bond, and that both defendants had had legal notice of the motion; and being of opinion that the said bond was the bond of the defendants alone, and was not vitiated by the fact that the plaintiff also signed it; overruled the objections of the defendants and gave judgment against them. The defendants excepted, and obtained a supersedeas to the judgment.

In regard to the 1st and 2d objections I will only say, that I concur in the opinion of the Court below thereon, and think they were rightly overruled. In regard to the 3d, I have had much difficulty, and will have to express my opinion somewhat at length.

That a man cannot be both debtor and creditor at the same time is undoubtedly true, as applied to an individual in his own right, without any person associated with him, either on the debtor or creditor 562 side. *There is an inherent impossibility in the thing; and all instruments, whether in the form of specialties or simple contracts, made for the purpose of producing these inconsistent characters of debtor and creditor in one and the same person must of necessity be void. The

defect in such cases is substantial and radical.

But a man, either severally or jointly with others, can be creditor or debtor to himself and others. This is of every day occurrence in cases of partnership, where a member of a firm is creditor or debtor of the firm, or where the same person is a member of creditor and debtor partnerships. The same principle applies to other cases, for in every case of the kind there is a quasi partnership between the parties associated on either side, limited to the purposes of the contract; but just as effectual, quoad those purposes, as a full mercantile partnership would be.

That a man cannot be both plaintiff and defendant in the same suit at law, whether others be associated with him or not, is also true. But this is a technical, and not a substantial or radical defect. It applies to the remedy and not to the right; and may be obviated by resorting to a Court of equity, in which a man can be both plaintiff and defendant in the same suit; or by introducing a new party to the contract in whose name a suit at law may be brought without violating the technical rule; or by suing at law in such manner (if the form of the contract or the law will admit of it,) as not to exhibit the apparent inconsistency of making the same person both plaintiff and defendant.

Thus a bill of exchange or negotiable note payable by a firm to a member of it or order, becomes an available security at law in the hands of an endorsee, who may sue the drawer or maker as well as the endorser. It can hardly be necessary to cite authorities on this subject. The doctrine is stated and many of the cases cited in Smith v. Lusher, 5 Cow. R. 688.

563 *So also where a statute authorizes the assignee of a bond to sue in his own name, he may maintain a suit thereon at law, though the same person be both obligor and obligee in the bond. This was expressly and unanimously decided by the Supreme court of the United States in the case of Bradford v. Williams, 4 How. U. S. R. 576. There is a statute in Florida authorizing an assignment of bonds, and the assignee to sue at law in his own name, similar to our statute on the same subject. The Supreme court held under this statute, that where a joint and several bond was signed by three obligors and made payable to three obligees, one of whom was also one of the obligors; and the obligees assigned the bond, the fact that one of the obligors was also an obligee, was no valid defence in a suit brought by the assignee against one of the other obligors, and that the inability of one of the obligees to sue himself did not impair the vitality of the bond, but amounted only to an objection to a recovery in a Court of law; and the assignment and ability of the assignee to sue in his own name removed this difficulty. There is no doubt but that if the case of Bradford v. Williams had gone up from this state, instead of Florida, the Supreme court

would have decided the case under our statute in the same way, for our statute goes at least as far in favour of the assignee of a bond as does the statute of Florida.

So also when the bond is joint and several, and the obligee is one of the obligors; he may, I think, maintain an action at law in his own name against one of the other obligors. The principle of the decision of *Bradford v. Williams*, seems to apply to the case; for it may be here said, as was in effect said by the Court in that case, that the inability of the obligee to sue himself does not impair the vitality of the bond, but amounts only to an objection to a recovery in a Court of law; and as the

564 assignment and ability of the assignee *to sue in his own name removed the difficulty in that case, so here the ability of the obligee to sue one of the other obligors in his own name, in like manner removes the difficulty. In that case it was unnecessary to decide this particular question, because the suit was brought in the name of the assignee; and the case, in the opinion of the Court, fell within the principle of the case of a partner drawing a bill upon his own firm or making a note in the name of the firm, payable to his own order; both of which are valid in the hands of a bona fide holder. But it is manifest that if it had been necessary to decide this particular question in that case, the Court would have decided it in favour of the right of the obligee to sue. For Mr. Justice Nelson, in delivering the opinion of the Court, said: "Whether the obligees of the bonds in question could have maintained an action at law against the defendant, is a question we need not determine; though it is not easy to perceive the force of the objection urged against it, namely, that Craig one of the co-obligors is also an obligee. The bond is joint and several, and the suit against Judge, one of the obligors; and if it had been brought in the name of the obligees, Craig would not have been a party plaintiff and defendant, which creates the technical difficulty in maintaining the action at law. It would have been otherwise if the obligation had been joint and not several; for then the suit must have been brought jointly against all the obligors."

An action at common law on a joint and several bond must be against one or all of the obligors, and not an intermediate number of them. It cannot be against all of them where the obligee is also one of the obligors, for then the same person would be both plaintiff and defendant in the same suit at law. And if it were brought against the other obligors, the fact that the obligee

565 was one of the obligors might, it seems, be *plead in bar of the action; and indeed could not be plead in abatement, as in other cases of non-joinder of defendants; "because a plea in abatement ought to give a better writ, not to shew that the plaintiff can have no action at all," as he cannot in such case have against all of the obligors. *Mainwaring v. New-*

man, 2 Bos. & Pul. 120. The rule that an action cannot be maintained against an intermediate number of joint and several obligors, does not apply to a motion on a forthcoming bond; the statute authorizing execution thereon to be awarded "against the obligor, or obligors, or any of them:" And this it seems may be done even where the notice is against all of them. *Glassel v. Delima*, 2 Call 368. It seems to follow, therefore, on principles before stated, that where the obligee in a forthcoming bond is one of the obligors he may maintain a motion on the bond against the other obligors. In the case under consideration the notice, motion and judgment were all against the other obligors only.

There are several decisions of the Supreme court of North Carolina which assume the position, that whenever the same person is an obligor and an obligee in the same bond it is void, and no action can be maintained upon it against any of the obligors, whether the bond be joint, or joint and several. I have very high respect for the Court by which these decisions were made, but think the position assumed in them is not sustained by reason or authority. They were made about the same time, and rest upon each other. In only one of them, and that the fourth of the series, was it necessary to decide the question, as the decisions were sufficiently sustained by other grounds. The only English case cited in support of the position is the case of *Mainwaring v. Newman*, 2 Bos. & Pul. 120, in which the contract was joint only, and it was necessary therefore that the action should be joint. That too was the case of

566 a negotiable note executed to a firm by a member of it; *which was certainly not void, and would have been actionable at law in the name of an endorsee who was not also a defendant. I really do not see on what principle it can be said that the whole bond is void merely because one of the obligors is also the obligee. There might be some reason for saying, though I do not admit, but deny it, that the bond is void as to the obligor who is obligee, and good as to the other obligors only, on the principle that where a feme covert or other person incompetent to make a contract signs a bond as one of the obligors, it is void only as to her; or that where a partner executes a bond in the name of the firm it is good as to him and the other obligors, and void only as to the partners who do not execute the bond. But why should a person who is competent to bind himself, and does bind himself, by the execution of a bond, be allowed to avoid the bond merely because it is also executed by a person who cannot be sued at law on the bond? It is admitted by *Ruffin*, Judge, in one of the North Carolina cases, 3 Dev. R. 290, that the coverture or other personal incapacity of one of the obligors, does not affect the other obligors who are able to contract; and that the latter are bound as if they alone had executed the bond. Why are they not, a fortiori, bound

where they execute the bond with another who is capable of contracting, but cannot be sued at law on the bond because he is also an obligee in the same bond? The reason given by the Judge for their not being bound in the latter case is, that "the parties intended to have contribution" and "it never could have been intended that one of the persons who sealed the instrument should alone pay to the other the money mentioned in it. And because it cannot be enforced without that construction it must be taken to be void altogether." Now this reason applies with great force to the former, but little or none to the latter case. Where one of the obligors is a feme covert, or otherwise incompetent, it is *evident that the other obligors intended to have contribution; and yet certain they can never have it in any form of action, or in any forum. Where one of the obligors, though competent, yet happens to be an obligee, it is also evident that the other obligors "intended to have contribution," and it must be admitted on all hands they can have it by suit at law or in equity. In the former case the other obligors altogether lose the contribution intended. In the latter it could at most be only postponed; and even the evil of postponement would in many cases be avoided by allowing an assignee to bring an action at law in his own name against all the obligors. Another reason given by the learned Judge is, that "there can be no delivery to an obligee by himself; nor by one obligor to another obligor. This is a strictly technical reason, and ought to be sustained by good authority, but none is cited for the purpose. I do not see why there should be any difference between a bond and promissory note in this respect. A man is incapable of contracting with himself, whether by bond or simple contract. In this respect there is no difference between the two forms of contracting. The incapacity results from the inherent impossibility of the thing itself; not from any thing in the nature or dignity of the form of the contract. Though delivery be necessary to make a good deed, yet almost any act or word shewing an intention to deliver, is sufficient for the purpose. But suppose it were universally true that "there can be no delivery to an obligee by himself; nor by one obligor to another obligor;" would it not follow, as a necessary consequence, that a bond ineffectually executed by one party would not be void as to other parties who had effectually executed it? Suppose a bond effectually executed by one obligor is merely signed by another person; would it not be the bond of the former, though not of the latter? Suppose it is signed and sealed but not delivered by the latter, 568 would it not still *be the bond of the former? And would the fact that from the character of the parties there could not be a delivery by the latter make any difference?

But these North Carolina cases were cited and relied on in the argument of the case

of *Bradford v. Williams*, 4 How. U. S. R. 576, decided in 1846, and yet the Supreme court made the decision and expressed the opinion before mentioned. I think that decision and opinion are unopposed by authority; are reasonable; and tend to the promotion of justice. I am therefore disposed to follow them.

Pothier on Obligations has been referred to by the counsel for the appellant; but in looking to the references to that work, I see nothing which is opposed to the view I have expressed. 1st, as to the right of a surety to substitution. That right is not affected by the view I take of the case. According to that view a surety would have the same right of contribution against a co-surety who is also an obligee, as against any other co-surety. 2dly, as to the effect of a release of one of the obligors. According to Pothier there are two kinds of release, one called "a real release," the other a "personal discharge." A real release is where the creditor declares that he considers the debt as acquitted, it is equivalent to a payment, and renders the thing no longer due; "consequently it liberates all the debtors of it as there can be no debtors without something due." A personal release merely discharges the debtor from his obligation, and extinguishes the debt indirectly where the debtor to whom it is granted was the sole principal, because there can be no debt without a debtor. "But if there are two or more debtors in solido, a discharge to one of them does not extinguish the debt; it only liberates the person to whom it is given and not his co-debtor; the debt is extinguished however as to the part of the person to whom the discharge was given, and the other only remains 569 obliged for the remainder." *Pothier,

p. 111, ch. 3, art. 11, § 1 and 11. Now if the case of one of the obligors being also an obligee, is analogous to either of the releases described by Pothier, it is that called a personal discharge. 3dly, as to the effect of "confusion," which, in its application to this case, "is the concurrence of the characters of creditor and debtor of the same debt in the same person," whereby the two characters are mutually destroyed. It is answer enough to say, in the language of Pothier, that "in order to induce a confusion of the debt, the characters not only of debtor and creditor, but of sole debtor and sole creditor, must concur in the same person;" and that "if a creditor of the whole becomes heir of the debtor for part, the confusion only takes place with respect to that part." Id. p. 111, ch. 5. In most countries complete justice may be done by one and the same Court in one and the same suit; so that in a case of partial personal "release" or "confusion," the obligation of the debtors as thereby modified, can at once be enforced without difficulty. But where the difference exists, as with us, between law and equity, and common law and chancery Courts, the strict and technical rules of the common law sometimes prevent the common law Courts from doing complete

justice, or even justice at all; and a resort to a Court of chancery becomes necessary. By one of those rules we have seen that the same person cannot be both plaintiff and defendant in the same suit; so that wherever the form of the contract is such as to render it necessary in a suit thereon to make the same person both plaintiff and defendant, a Court of common law can take no cognizance of the case whatever may be the rights and obligations of the parties; and resort must be had at once to a Court of chancery. By another of those rules it would seem that a Court of common law must enforce the obligation of the debtors, if at all, in its original form, and not as modified by a partial "release" or
 570 *confusion." So that wherever in such case the form or state of the contract is such as that a suit may be brought thereon without making the same person both plaintiff and defendant, a Court of common law though it may take cognizance of the case, cannot do complete justice in it; but must render judgment for the whole amount of the obligation, leaving the debtors to resort for ultimate relief to a Court of chancery; or to a subsequent motion to the Court of law as hereinafter mentioned.

So much for the law of this case; and though there may be some doubt about the law, there can, I think, be none about the justice of the case. It is not pretended by Moses G. Booth that his signature to the bond was obtained by fraud, or that he signed it by mistake, or did not understand it. If he had had any meritorious defence he would have relied upon it, and not have relied alone on the defences of variance between the notice and bond, and insufficiency of notice, and the technical objection that the obligee in the bond was also a co-obligor. He intended when he signed the bond to incur the obligation which it plainly imports. He intended to be bound jointly with his co-obligors, and severally, for the forthcoming of the property therein mentioned on the day of sale. The bond has been forfeited. Shall he be released from his obligation, or shall he be compelled to perform it? If his obligation can be enforced according to his intention, and consistently with the rules of law, it is our duty to enforce it. It can be enforced according to his intention. He intended to be bound precisely as if some other person, instead of Otey Kinsey, had signed the bond as co-surety with him. Suppose that had been the case, a judgment could then have been recovered against him severally; or against him and the principal jointly, as has been actually done in this case: and

on payment of the debt he could have
 571 recovered one half *of the amount by motion against his co-surety. Are not his rights and obligations precisely the same in the case that has occurred, with this single exception; which makes this case more favourable to him; that his co-surety being also obligee, he would not be required to go through the form of paying

the whole debt to the obligee to recover one half of it back from him; but, if the debt cannot be made of the principal obligee, will be relieved on motion by paying one half of it into Court. Of what injustice then can he complain if his obligation be enforced precisely according to his intention? But look at the other side; and see what injustice may be done to the obligee by declaring the bond to be void. It was insisted by the defendants, the principal obligor and surety Booth, by their counsel, on the trial of the motion in the Court below, not only that the bond was void, but that the plaintiff had by his own act discharged the principal obligor from custody under the ca. sa., and thereby released him from all liability for the debt. Suppose the bond be declared void, then the debt has either been altogether released, as insisted by defendants' counsel, or the obligee will lose the benefit of the forthcoming bond, will be subjected to the expense and delay of the proceedings in the Court below and this Court; and will have to sue out a new execution on his judgment. And all this against the express obligation of the defendants incurred with their eyes open and on valuable consideration; and when the obligee has acted in good faith, and has performed his part of the contract! The obligee had the body of his debtor in custody for the debt. The appellant was willing to become the surety of the debtor if another person would become co-surety. The obligee was himself willing to become such co-surety. And accordingly, the forthcoming bond was executed and the debtor was discharged from custody. Here was a valu-

able consideration moving from the
 572 obligee, whose conduct in the *transaction, in that view of it, was not only blameless but meritorious. Indulgence to the debtor may have formed a further consideration; for the bond bears date in January 1844, whilst the notice bears date in September 1845, about eighteen months thereafter. This is the case which the record seems to present; and these are the consequences which would result from a reversal of the judgment. The law should be plainly written, which would require us to encounter consequences like these. If there be any such law it can only be the technical rule that a person cannot be obligor and obligee in the same bond, or plaintiff and defendant in the same suit. I do not think that rule requires it; and I am therefore for affirming the judgment; though I do not concur in the opinion expressed by the Court below that the bond "is the bond of the defendants alone." I think it is the bond of all the persons whose names are thereto signed as obligors; and that Kinsey is equally bound for contribution as co-surety with Booth, unless such obligation, which the bond imports, was varied by an express agreement between them; and that the obligation of Kinsey whatever it may be, may be enforced by a Court of equity, or by motion to the Court which rendered the judgment.

DANIEL, J. The third reason or cause for reversing the judgment assigned by the plaintiff in error in his petition for an appeal, viz., that the bond is void because of the fact that Kinsey who is the obligee is also one of the obligors, is, upon a first view of the case, apparently very strongly favoured by the decisions of the Supreme court of North Carolina in the cases of *Justices v. Dozier*, and *Justices v. Bonner*, 3 Dev. R. 287, 288.

In each of these cases the bond of a guardian payable to the justices of a county was declared void, on the ground that some of the obligees were also obligors 573 *in the bond; and the general principle was then asserted that, in all cases of joint bonds or of bonds joint and several, where one of the parties occupies the double relation of obligor and obligee, the instruments are at law wholly void. The soundness of this principle, however, as extended to the cases of joint and several bonds, is denied by Justice Nelson in delivering the opinion of the Supreme court of the United States in the case of *Bradford v. Williams*, 4 How. U. S. R. 476, and the counter opinion expressed, that when the bond is joint and several, the fact that one of the obligors is also an obligee, does not render the bond wholly void; or stand in the way of a recovery against any one of the obligors who is not also an obligee.

In accordance with the latter opinion is that of the Supreme court of Kentucky as announced in the case of *Daniel v. Crooks*, 3 Dana's R. 64. It appears from the statement of that case as given by Marshall, Judge, in delivering the opinion of the Court, that the appellant had entered into a bond with Magowan as security, payable to Stockton and many others, stockholders of the Mount Sterling Bank. The appellee was one of the obligees, and the appellant and his security, the obligors, were also among the obligees. The condition of the bond recited that the appellant, the principal obligor, had undertaken to settle up the business of the bank, to pay its debts to individuals, and to redeem the stock at one hundred dollars per share. To enable him to do which he was to have all the debts and property of the bank in his own right; and on performing the condition the bond was to be void. The appeal was from a decree rendered against the principal in the bond alone in a suit in chancery brought by the appellee, to compel him to redeem certain shares of the stock held by the appellee: and the case turned upon the question whether the Chancellor had properly taken jurisdiction. The Supreme court held that he had not. Judge Marshall

574 *in delivering the opinion said that the jurisdiction was asserted only on the ground that in consequence of the obligors being also obligees, the bond was either not obligatory at all, or if obligatory would not sustain an action at law in which the defendants would also be plaintiffs. The suit, he said, had been entertained and the decree founded on the idea that the

bond was not obligatory: that the Chancellor had proceeded on the ground that the security was to be considered as being entirely discharged from liability for the principal's performance of the condition; and on the further ground that the principal was to be held liable, not by force of his bond, but of the fact that he had acquired all the property of the bank and was therefore bound to pay the stockholders. For this idea he said there was no foundation; that whatever difficulties there might be in maintaining an action at law on those stipulations, in the performance of which the stockholders as a body were interested, the stipulation for the redemption of the stock was one for the breach of which in relation to himself, each obligee towards whom there could be a breach, had an easy and perfect remedy at law by a separate action of covenant: And the decree was reversed and the bill dismissed for want of jurisdiction in the Chancellor.

The reasons given by the Supreme court of North Carolina in *Justices v. Dozier* and *Justices v. Bonner*, before cited, for asserting the nullity of the bonds in those cases, are mainly of a technical character, and have, it seems to me, very little application to the case before us, when they come to be considered in connection with the peculiar nature of a delivery bond, the manner in which it is taken, the remedies upon it, and the statutory provisions for the summary relief of sureties against their principals and co-sureties.

Those reasons are briefly, first, that the bonds cannot be enforced without 575 naming some of the parties both *as plaintiffs and defendants. Secondly, that there can be no delivery to an obligee by himself, nor by one obligor to another obligor. And, thirdly, that inasmuch as the bond for these reasons must be held naught as to those who are both obligors and obligees, it ought to be declared void in toto; as otherwise the intention of the parties to the contract would be violated: For that the sureties must have intended to have contribution; that it could not have been intended that one of the persons who sealed the instrument should alone pay to the other the money mentioned in it; and because it could not be enforced without that construction it should be taken to be void altogether.

The delivery bond here taken is in pursuance of the laws authorizing a debtor under the service of a ca. sa. to tender to the sheriff property in discharge of his person, and then, if he chooses to do so, to give bond with security, payable to the creditor, for the forthcoming of the property at the day appointed by the sheriff for its sale. If the bond is forfeited by a failure of the debtor to deliver the property according to the condition, the law requires the sheriff to return the bond to the office of the clerk of the Court from whence the execution issued, to be there safely kept and to have the force of a judgment. And the Court, to whose office the bond is re-

turned, is authorized upon motion, on ten days notice, to award execution thereupon for principal, interest and costs against the obligor or obligors, or any of them, in behalf of the obligee or obligees.

It will be seen that whilst the statute requires the bond to be made payable to the creditor, a delivery to him is by no means essential to its validity. On the contrary the sheriff is required to return the bond to the clerk's office; and in the case of *Eppes' ex'ors v. Colley*, 2 Munf. 523, the objection was taken (though overruled by this Court) that the sheriff before notice of the motion

was given, had delivered the bond to the *creditor instead of returning it to the clerk's office according to the act. And in the case of *Turnbull, ex'or v. Claibornes*, 3 Leigh 392, the forthcoming bond was held to be good though taken after the death of the creditor in the execution, to whom it was made payable. No question about the delivery therefore can arise here, out of the fact that Kinsey who is the obligee is also one of the sureties.

The bond is a joint and several bond, and it will be seen also from the above recital of the provisions of the law that the obligee is authorized to proceed against "any of the obligors." If therefore some other person than Kinsey had been the third obligor to the bond, Shoemaker and Booth would have had no right to complain that the proceedings were against those two alone. It is consequently difficult to perceive how they are injuriously affected in this particular by the incapacity of the third obligor (Kinsey) to be united with them. In obtaining a judgment against Shoemaker and Booth alone, Kinsey has done no more than he would have had a perfect right under the statute to do, no matter how many other obligors there might have been in the bond; and in his proceedings no party has been placed on the record in the attitude of both plaintiff and defendant.

The technical difficulties with respect to the delivery of the bond and the form of the proceeding upon it being thus obviated, I do not see why the judgment upon it was not proper; nor why Booth might not proceed to redress himself by the surety's summary proceeding under the statute, either against the principal in the bond or against his co-surety who is Kinsey, as the circumstances of the case may require, exactly as he would or might have proceeded, had some other person than Kinsey been the other surety.

In this aspect of the case no injustice is done to any one. Booth's liabilities as a surety are in no respect *either enhanced or diminished, and Kinsey certainly cannot complain that full efficacy is given to the bond by treating him as, what he has represented himself in the bond to be, a co-surety with Booth.

The laws in regard to delivery bonds have been made in ease, and for the relief, of debtors, and this Court has been constant in refusing to permit any slight

irregularities, either in the form of the bonds or in the mode of proceeding on them, to stand in the way of a prompt recovery upon them by the creditor. And I think that we can in this case, enforce what may be fairly supposed to be the true intention of the parties without encountering any legal absurdity or doing violence to any of the forms of pleading, in proceeding to a judgment on the bond. Concurring therefore as I do with the Judge of the Circuit court that the notice was regular and that there is no variance between it and the bond, and that a judgment could be rendered upon it against Shoemaker and Booth, I am for affirming his judgment against them.

I think however that Booth may legally treat Kinsey as a co-surety, and may, by proceedings in equity or by motion in the Circuit court upon proving the insolvency of Shoemaker, be relieved by paying one half of the debt.

ALLEN, J., concurred in the opinions of Moncure and Daniel, J's.

The following was the entry:

The Court is of opinion, that there is no error in the judgment of the Circuit court; and the same is therefore affirmed with costs. The Court is however, also further of opinion, that it is competent for the plaintiff in error Booth, to treat the defendant in error Kinsey, as a co-surety in the forthcoming bond in the proceedings and judgment mentioned; and in the event of the *insolvency of the principal, to proceed, either by bill in equity, or by motion before the said Circuit court, under the provisions of the act 1 Rev. Code 460, for the relief of securities, to obtain against said Kinsey such an order for contribution as modified by the fact that the said Kinsey is also the obligee in the bond, will operate to discharge the said Booth from the judgment on the payment of one half of the debt and costs. This judgment is therefore without prejudice to the right of the said Booth to pursue any steps he may be advised to take either at law or in equity for obtaining relief to the extent above indicated.

Hunt's Adm'r v. Martin's Adm'r.*

April Term, 1852, Richmond.

(Absent CABELL, P., and BALDWIN, J.)

1. Pleading and Practice—Pleas—Partial Defence.—A plea which professes to go to the whole action, but answers only to a part of it, is defective and demurrable.
2. Detinue—Death of Defendant—Action Revived—Recovery.—Where a defendant in detinue dies, and the action is revived against his administrator

*For monographic note on Detinue and Replevin, see end of case.

†Pleading and Practice—Pleas—Partial Defence.—Every pleading should answer either the whole of what is adversely alleged, or such part as it is proposed to cover. *Richmond Ice Co. v. Crystal Ice Co.*

with the will annexed, the plaintiff is entitled to demand from the administrator, not only the property sued for, but damages for its detention, and the costs incurred in prosecuting the original action against the testator in his lifetime.

3. Same—Same—Scire Facias—Waiver of Objection to.

—The *scire facias* to revive the action of detinue against the administrator, should suggest the coming of the property into the hands of the administrator, since the death of the testator. And the *scire facias* not being in the record, nor in the clerk's office of the Court below, and no objection appearing to have been taken to it in that Court, this Court will presume that it was in all respects regular.

4. Same—Same—Action Revived against Administrator

—**Judgment.**—Where an action of detinue is revived against an administrator with the will annexed, and a judgment is recovered, the

579 judgment *for the damages for detention of the property and the costs, should not be against the administrator personally, but against him as administrator to be levied of the goods, &c. of his testator in his hands to be administered.

In June 1845 Sims as administrator of Martin, instituted an action of detinue against Eustace Hunt for the recovery of a number of slaves. The process does not seem to have been served upon Hunt, and an attachment to enforce an appearance was issued and levied on slaves. A judgment was confirmed against Hunt in the office; and at the October term of the Court his death was suggested. At the May term 1846 the suit was revived against Coleman as administrator with the will annexed of Eustace Hunt, upon a *scire facias* said to be issued on the 11th of March, but it is not in the record, and the clerk of the Circuit court certified that it was not among the papers in the cause in his office. At the May term of the Court, Coleman appeared and pleaded the general issue, and offered three special pleas, which were objected to by the plaintiff, and rejected by the Court. To the rejection of which the defendant excepted. The third plea avers that after the suit was brought, and between the death of Hunt and the issue of process to revive the suit against the defendant, he had delivered all the slaves but one to the plaintiff, and that the plaintiff had accepted them. The first and second pleas as to the slaves claimed in the declaration, aver that after the suit was brought and between the death of Hunt and the issue of the process to revive the suit against the defendant, he had delivered all the slaves but one to the plaintiff who had accepted them; and as to that one the defendant did not detain him.

At the May term of the Court the cause was tried, when the jury found a verdict for the plaintiff for all except one slave, and his damages were assessed at 2000 dollars. Whereupon the defendant moved the Court

99 Va. 241, 37 S. E. Rep. 851, citing 4 Min. Inst. (3d Ed.) pt. 1, 784; *Hunt v. Martin*, 8 Gratt. 578.

Same—Scire Facias—Waiver of Objection.—See the principal case cited in *Payne v. Bowlin*, 6 W. Va. 374.

580 for a new trial, but the plaintiff releasing 500 dollars *of the damages, the Court overruled the motion, and gave a personal judgment against the defendant for the slaves and 1500 dollars damages. But the plaintiff afterwards released on the record the slaves and their alternative values.

The defendant applied to this Court for a supersedeas, which was awarded.

Grattan, for the appellant.

Griswold, for the appellee.

DANIEL, J., delivered the opinion of the Court.

The third special plea tendered by the plaintiff in error, whilst it professes in its commencement to be a plea to the whole action, answers only as to the slaves in the declaration mentioned, and is wholly silent as to the damages for detention, and as to the costs of the action against Hunt. On the death of Hunt the defendant in error had a right to demand of his administrator not only the slaves but also the damages for their detention and the costs incurred in prosecuting the original action against Hunt in his lifetime. A plea therefore averring the delivery of the slaves to the defendant in error, and the acceptance of them by him, was no answer to so much of the *scire facias* as claimed the damages and costs aforesaid. The Court is of opinion that the said plea was therefore defective, and that the Circuit court did not err in refusing to receive it.

The first and second special pleas do not profess in terms to answer the whole action, and might perhaps have been properly received by the Court as pleas to so much of the *scire facias* as demanded the slaves therein mentioned. The error (if any) however in refusing to receive said pleas was cured by the release of his recovery as to the slaves and their values, subsequently made by the defendant in error; and there is now no injury arising from the refusal of the Court to receive said pleas, of which the plaintiff in error can complain.

581 *The objection taken here in argument for the first time by the counsel of the plaintiff in error, that there is no *scire facias* nor declaration alleging that the slaves in controversy have since the death of Hunt, come into the possession of his administrator cannot avail him. From an inspection of the certificate of the clerk of the Circuit court which has been read by the agreement and consent of the counsel, it appears that the *scire facias* which issued on the 11th March 1846, is no longer on file in his office. In the absence of the said *scire facias*, the record being silent as to any objection having been taken to it in the Circuit court, it must be presumed by this Court that the said *scire facias* was in all respects regular, and that it suggested, as it ought to have done, the coming of the slaves into the possession of the administrator since the death of the testator, in which case there was no need of any such allegation by a formal declaration.

The Court is however of opinion that the Circuit court erred in rendering a personal judgment against the plaintiff in error for the damages for the detention of the slaves and the costs, instead of rendering a judgment for said damages and costs against the plaintiff in error as administrator, to be levied of the goods &c. of the testator in his hands to be administered. The said judgment is therefore reversed with costs &c., and this Court proceeding to render such judgment as ought to have been rendered; and it appearing that the defendant in error has released to the plaintiff in error the slaves together with their respective values, it is adjudged &c. that the said defendant in error recover against the said plaintiff in error 1500 dollars, the damages aforesaid, and the costs in the Court below, to be levied of the goods &c. of the testator in his hands to be administered.

DETINUE AND REPLEVIN.

- I. When Detinue Lies.
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Cross Reference to Monographic Note.

Trover and Conversion, appended to Eastern Lunatic Asylum v. Garrett, 27 Gratt. 163.

I. WHEN DETINUE LIES.

The action of detinue lies where a party claims the specific recovery of goods and chattels or deeds and writings detained from him. Steph. Pl. p. 15. approved in *McFadden v. Crawford*, 36 W. Va. 671. 15 S. E. Rep. 408. See also, *Arthur v. Ingels*, 34 W. Va. 639. 12 S. E. Rep. 872. "The design of the action of detinue is to recover the specific chattel illegally taken (and of course, therefore, illegally detained), together with damages for the detention. And in case the specific chattel is not to be had, the value thereof is to be recovered, together with damages for detention. The action itself contemplates that it may be needful to resort to the alternative of recovering the value, and, therefore, as well in the writ of summons as in the declaration, the value of the chattel is stated." 4 Min. Inst. (2d Ed.) 483, 490; 4 Min. Inst. (3d Ed.) 429.

Fixtures Attached to Freehold.—Detinue does not lie for the recovery of fixtures which are attached to and a part of the realty. *McFadden v. Crawford*, 36 W. Va. 671. 15 S. E. Rep. 408.

Slaves Conveyed in Trust.—But detinue will sometimes lie for slaves conveyed in trust, the trustee being dead. *Robinson v. Brock*, 1 Hen. & M. 214.

Proceedings under Execution Void.—If the proceedings under an execution are wholly void, no title passes by the sale to the purchaser, and the defendant may have redress in an action of detinue. *Hamilton v. Shrewsbury*, 4 Rand. 427.

Conditional Transfer.—Where the vendor of a slave gave a bond to the buyer, with a condition, reciting that, whereas he had sold him a slave for a certain sum of money, if, therefore, the buyer should pay him the said sum, and another sum annually for hire of the said slave until he should pay the said purchase money, which he might do at any time (when the said hire should cease), then the vendor should convey to him a lawful right and title to the said slave; which title in the meantime should remain in the vendor, the buyer was held not entitled under this bond, to the possession and property of the slave; but the vendor could recover in detinue. *Ervine v. Dotton*, 6 Munf. 231. Until the revival of 1819, no action could be maintained in detinue, nor any action except for debts, by the committee of a lunatic, and these last only by the committee of a lunatic "sent to the hospital." *Ashby v. Harrison*, 1 P. & H. 1.

Anomaly of Action of Detinue.—Detinue is, in one particular, an anomalous action; it is difficult to decide whether it ought to be classed amongst actions *ex contractu* or *ex delicto*. The right to join detinue with debt, and the ability to use detinue to recover goods in pursuance of the terms of a bailment to the defendant, seem to afford grounds for reckoning it an action *ex contractu*; whilst the fact that it lies wherever the chattel in question is illegally withheld, notwithstanding there be no contract, but the possession of the defendant was acquired exclusively by tort, marks it as an action *ex delicto*. 4 Min. Inst. (2d Ed.) 484; *Catlett v. Russell*, 6 Leigh 363.

II. PROOF AS TO PROPERTY AND POSSESSION OF PARTIES.

In detinue, the plaintiff must prove property in himself, and possession in the defendant; but

proof of possession anterior to the bringing of the suit is sufficient, unless the defendant can show that he was legally dispossessed. *Burnley v. Lambert*, 1 Wash. 308; *Lynch v. Thomas*, 3 Leigh 682.

1. **SPECIAL PROPERTY.**—The plaintiff in detinue, must have, at the time of bringing the action, a general or special property in what he seeks to recover, or some right of possession thereto. *Robinson v. Woodford*, 37 W. Va. 377, 16 S. E. Rep. 602.

Thus, a person who has only a special property as a bailee, etc., may also support the action when he delivered the goods to the defendant, or they were taken out of such a bailee's possession. *Boyle v. Townes*, 9 Leigh 158.

2. **POSSESSION OF PARENT INURES TO INFANT.**—Where, in an action of detinue, it appears that a slave was given to an infant, and left by the donor with the mother of such infant, for its benefit (the father being dead), the possession by the mother is to be considered possession by the infant. *Mortimer v. Brumfield*, 8 Munf. 122.

3. **FIVE YEARS' ADVERSE POSSESSION.**—Five years' peaceable possession of a slave, will entitle a plaintiff in detinue, who has lost the possession, to recover on the mere ground of his previous possession; but without prejudice to the titles of those who were not parties to the suit. *Newby v. Blakey*, 3 H. & M. 57.

The court, in *Morris v. Lyon*, 84 Va. 331, 4 S. E. Rep. 734, said: "In *Newby v. Blakey*, 3 H. & M. 57, it was held that five years' adverse possession of certain slaves, acquired without force of fraud, gave to the party holding such possession a legal right which entitled him to recover the slaves in an action of detinue. And in *Elam v. Bass*, 4 Munf. 301, it was decided that such possession constituted a complete defence under the plea of *non detinet*. And to the same effect are the cases of *Spotswood v. Dandridge*, 4 H. & M. 139, and *Garland v. Enos*, 4 Munf. 504."

"In the cases of *Newby v. Blakey*, 3 H. & M. 57, and *Elam v. Bass*, 4 Munf. 301, it was held that a defendant may protect himself on the plea of *non detinet* by proof of five years' possession of the negroes, before the emanation of the writ." *Austin v. Jones*, Gilm. 355.

Disclaimer of Title by Defendant.—But the plaintiff in detinue may adduce evidence of parol acknowledgments, by the defendant, or by the person under whom the defendant claims, that the property belonged to the plaintiff; for the purpose of rebutting an alleged adverse possession. *Smith v. Townes*, 4 Munf. 191.

Where the defendant, in an action of detinue, pleads the statute of limitations, and the defendant replies that within five years, etc., the defendant acknowledged the article detained to be the plaintiff's property, such replication is insufficient for not averring also a promise in writing to deliver the possession, because the gist of the action is an unjust detention by the defendant of the plaintiff's property. *Morris v. Lyon*, 1 Va. Dec. 615, 2 S. E. Rep. 515.

4. **POSSESSION OF DEFENDANT UNDER BILL OF SALE.**—Where, in detinue, a demurrer to evidence states that the defendant in support of his right offered a bill of sale, and no other evidence of the defendant's possession is mentioned, that is sufficient to prove the possession. The plaintiff, however, may prove parole declarations of the defendant disclaiming title to the property, under the bill after he had notice of the plaintiff's pur-

chase, and before he had perfected his own title by obtaining possession. *Biggers v. Alderson*, 1 H. & M. 54; *Fowler v. Lee*, 4 Munf. 375.

5. SUFFICIENCY OF COUNTS.

Counts.—In an action of detinue there are two counts in the declaration. The first does not allege property in the plaintiff. The second does allege it. The court refuses to allow the defendant to demur to the several counts. The jury find expressly that the property is the property of the plaintiff. *Held*, if the first count is defective, yet the second being good, and the jury finding that the property was the property of the plaintiff, the defendant is not injured by the refusal of the court to allow the demurrer to be filed, and it is no cause for reversing the judgment. *Binns v. Waddill*, 33 Gratt. 588.

Misjoinder of Counts.—Where one of the two counts in a declaration in detinue counts on a right of property in the plaintiff and the other on a right of possession in him as bailee, there is no misjoinder of actions. *Boyle v. Townes*, 9 Leigh 158.

III. WHO MAY MAINTAIN THE ACTION.

Administrator.—If an administrator brings detinue, he is not bound at the trial to produce the certificate for his obtaining letters of administration, unless he receives notice that it will be required. *Hughes v. Clayton*, 3 Call 554.

Curator and Receiver.—A person appointed curator and receiver of chattels by a court of chancery, does not, by virtue of that appointment, acquire a right of property, but if he brings detinue for the chattels, describing himself as curator and receiver, and counting as upon his own property, and on a bailment thereof to the defendant, the count is good, the description of curator and receiver being surplusage. *Boyle v. Townes*, 9 Leigh 158.

Joint Trustees—Death—Survival.—Where two trustees bring an action of detinue to recover the trust property, and one of them dies, the right of action survives to the other, and he may carry on the suit. *Nichols v. Campbell*, 10 Gratt. 500.

Bailees.—So also, a bailee of chattels may maintain detinue for them upon his right of possession as bailee. *Boyle v. Townes*, 9 Leigh 158.

Mortgages.—An action of detinue may be maintained by mortgagees against the purchaser of the property which has been taken under execution by a creditor of the mortgagor, although the property remained in the possession of the mortgagor for five years or more, and the deed contained no clause giving him such authority. *Rose v. Burgess*, 10 Leigh 186.

Married Woman.—And a married woman, too may bring an action of detinue to recover her separate personal property, and join her husband as coplaintiff. *Robinson v. Woodford*, 37 W. Va. 377, 16 S. E. Rep. 602.

IV. AGAINST WHOM ACTION LIES.

1. **IN GENERAL.**—Detinue can never lie against one who was never in possession of the property sued for. *Allen v. Harlan*, 6 Leigh 42, 29 Am. Dec. 205.

2. **EXECUTORS.**—Detinue against an executor for property destroyed or converted by his testator, or in the possession of a co-executor, cannot be sustained. *Allen v. Harlan*, 6 Leigh 42, 29 Am. Dec. 205.

Possession by Executor.—But detinue for a chattel lies against an executor as such, provided the chattel actually came to the executor's possession.

Catlett v. Russell, 6 Leigh 344; Allen v. Harlan, 6 Leigh 42; Greenlee v. Bailey, 9 Leigh 526.

And detinue for property in the possession of an executor, although it was first taken and detained by the testator, is maintainable, and the judgment and process should be against the executor, and not against the estate. Allen v. Harlan, 6 Leigh 42, 29 Am. Dec. 205.

It was said by CABELL, J., in Catlett v. Russell, 6 Leigh 360, in speaking of the defences that an executor might make in action of detinue brought against him for a chattel detained by the testator in his lifetime, "He might have pleaded that he did not detain the property sued for, and this would have thrown upon the plaintiff the burthen of proving, not only his own title, but possession in the defendant. He chose, however, to rely on the plea that the testator did not detain. I see no objection to the form of this plea, nor to its matter, as constituting an effectual defence."

a. Revival of Action.—Detinue brought against a testator and pending at his death, may be revived by *scire facias*, against the executor, under statute, 1 Rev. Code, ch. 128, § 88, if the chattel demanded actually came to the executor's possession. Catlett v. Russell, 6 Leigh 344; Allen v. Harlan, 6 Leigh 42; Greenlee v. Bailey, 9 Leigh 526. See Rose v. Burgess, 10 Leigh 186.

Suggestion in Declaration.—Therefore, it must be suggested in the *scire facias* or alleged in the declaration thereupon, that the goods came to the executor's or administrator's possession, for if the executor's possession be nowise alleged, there can be no recovery against him. Allen v. Harlan, 6 Leigh 42, 29 Am. Dec. 205; Catlett v. Russell, 6 Leigh 344; Hunt v. Martin, 8 Gratt. 578.

Effect of Revival.—Where a defendant in detinue dies, and the action is revived against his administrator with the will annexed, the plaintiff is entitled to demand from the administrator, not only the property sued for, but damages for its detention, and the cost incurred in prosecuting the original action against the testator in his lifetime. Hunt v. Martin, 8 Gratt. 578.

"I have never had a doubt, that an executor cannot be charged in detinue, merely on the possession of, and detention by, the testator. The thing sued for, which is demanded in specie, must have come to the hands of the executor himself, and be detained by him, to justify an action of detinue against him." Per BROCKENBROUGH, J. Catlett v. Russell, 6 Leigh 348.

Revival by Consent.—Upon the death of a defendant in detinue, if his administrator consents that the cause shall stand revived against him, such consent places the cause in the same situation that it would be in after the service of a *scire facias* against the administrator, alleging that the property had come to his possession and was detained by him. Greenlee v. Bailey, 9 Leigh 526.

In such a case, if the administrator, instead of pleading *de novo*, goes to trial upon the plea put in by his intestate, he cannot, after verdict against him, arrest the judgment because of his own failure to plead anew. Greenlee v. Bailey, 9 Leigh 526.

V. ELECTION OF ACTIONS.

"If the chattel withheld is of exceptional specific value, as by having attached to it a *pretium affectionis*, so that the claimant is specially desirous to recover it in kind, or if it is of a character likely to appreciate in value, these are considerations which point

to the use of the action of detinue, rather than of *trover* and *conversion*; whilst if the chattel has no specific and peculiar value, nor is likely to appreciate in value, and especially if it is likely to depreciate, and most especially if it is perishable, these considerations decidedly recommend *trover* and *conversion*, rather than detinue. In detinue the plaintiff recovers the specific chattel, if to be had, or if not, its alternative value at the time of the verdict; whilst in *trover* and *conversion* the value at the time of the conversion, which is before suit brought, is recovered. Hence, the expediency of one or the other action, according as the property is appreciating or depreciating in value." 4 Min. Inst. (3d Ed.) 450.

VI. DECLARATION.

1. NECESSARY ALLEGATIONS, IN GENERAL.—In detinue the plaintiff must aver and prove the kind, quality or number and value of the property claimed by him, and that he is entitled to recover the same, and that the defendant wrongfully detains it. Robinson v. Woodford, 37 W. Va. 377, 16 S. E. Rep. 603, citing Burns v. Morrison, 36 W. Va. 423, 15 S. E. Rep. 62.

2. SHOWING PLAINTIFF'S PROPERTY.—A declaration in detinue, for a slave, is insufficient to support the action, if it omits to state that the slave in question belonged to, or was the property of, the plaintiff; and such defect is not cured by the verdict. Kent v. Armistead, 4 Munf. 72.

Thus, in an action of detinue, it is necessary for the plaintiff to aver and prove that he has title to the property, with present right of possession in himself; and, *secondly*, actual possession thereof by the defendant anterior to the bringing of the suit. Burns v. Morrison, 36 W. Va. 423, 15 S. E. Rep. 62, citing Burnley v. Lambert, 1 Wash. 308.

3. DESCRIPTION OF PROPERTY.

a. Certainty.—An action of detinue may be maintained for an infant negro child of such a mother, without any other description. Bass v. Bass, 4 H. & M. 478.

In detinue, if a negro woman, by name, and her issue be demanded in the declaration, without naming them, and the jury find the names of the issue, the defect, if any, is cured, and judgment should be entered according to the verdict. Holladay v. Littlepage, 3 Munf. 539.

It seems, that if a declaration in detinue demand a negro woman, by name, and three children, without mentioning their names, and a case be agreed, submitting that if the law be for the plaintiff upon certain other points, judgment may be entered, in his favor, "for the slaves in the declaration mentioned," the court may insert the names of the negro children in the judgment. Royall v. Eppes, 2 Munf. 479.

b. Value.

Severing Values.—In an action of detinue, the declaration must state the price or value of the thing converted. Moreover, the failing to lay a separate value, as to each slave demanded, is an error which would be fatal on demurrer, but is cured by a verdict severing the values. Pearpoint v. Henry, 2 Wash. 192; Holladay v. Littlepage, 3 Munf. 539. See *post*, this note, title "Verdict."

It is not error that the jury find general damages for detaining several slaves, but the alternative value of each slave ought to be separately found. Holladay v. Littlepage, 3 Munf. 539.

A verdict in an action for the recovery of personal property before a justice or on its appeal must find

the value of the property, and of each article sued for, as in the action of detinue, and the judgment must do so. *White v. Emblem*, 48 W. Va. 819, 28 S. E. Rep. 761.

c. Demand.—It is not necessary, in the declaration in detinue, to state a special demand and refusal; but the general charge, that the defendant, "although often requested," etc., is sufficient. *Mortimer v. Brumfield*, 8 Munf. 122.

But, if the declaration in detinue does not contain a demand "that the defendant render to the plaintiff," the property sued for; yet, after verdict on the plea of *non detinet* judgment ought not to be arrested. *Bogges v. Bogges*, 6 Munf. 486.

VII. PLEAS.

1. NON DETINET.—"A formal action of detinue asserts that the defendant unlawfully detains the property, and the general issue is *non detinet*, denying the unlawful detention." *White v. Emblem*, 48 W. Va. 819, 28 S. E. Rep. 761. See also, *Bogges v. Bogges*, 6 Munf. 486; *Garland v. Bugg*, 1 H. & M. 374.

a. Defences Admissible Thereunder.

(1) *In General.*—The plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under that plea. 2 Chit. Pl. (16th Ed.) 727; *Arthur v. Ingels*, 34 W. Va. 639, 12 S. E. Rep. 872.

"The pleadings, generally, are the best tests of the law. The plea of *non detinet* traverses the allegation in the declaration, and puts it upon the plaintiff to prove them. As to the possession of the defendant, that need only be proved either at the suing out of the writ, or at some time before." *Austin v. Jones*, Gilm. 351; *Arthur v. Ingels*, 34 W. Va. 639, 12 S. E. Rep. 872.

Deed Void.—In detinue for slaves, parol evidence to prove that a deed was executed for the purpose of defrauding creditors, and therefore void, is admissible upon the plea of *non detinet*. *Stratton v. Minnis*, 2 Munf. 329.

Adverse Possession.—The defendant in detinue may protect himself, on the plea of *non detinet* (without pleading the act of limitations) by proving that he, and those under whom he claims, had possession of the property in controversy, more than five years before the emanation of the writ. And such evidence cannot be rebutted by the plaintiffs proving that, before the five years had elapsed, he brought a suit in chancery to recover the same property (which suit was dismissed on the ground that his claim was exclusively cognizable at law), and that, within one year after such dismissal, he took out the writ in detinue. *Elam v. Bass*, 4 Munf. 301.

Burden of Proof Shifting.—In his defence the defendant may prove a want of sufficient title to the property in the plaintiff, or he may prove a want of possession in himself. If the plaintiff shall have proved an anterior possession in the defendant, the burden is shifted, and it devolves upon the latter to prove that he has been legally dispossessed. *Burns v. Morrison*, 36 W. Va. 423, 15 S. E. Rep. 62.

2. PUIS DARREIN CONTINUANCE.

Death of Property after Suit Brought.—Where, in an action of detinue, the sole plea interposed is *non detinet*, and the property sued for dies during the pendency of the suit without fault of the defendant, the plaintiff may recover the alternate value of the property, unless the matter is brought to the atten-

tion of the court by plea *puis darrein continuance*. *Arthur v. Ingels*, 34 W. Va. 639, 12 S. E. Rep. 872; *Austin v. Jones*, Gilm. 341.

JUDGE TUCKER, in the second volume of his commentaries (p. 83) in discussing the case of *Austin v. Jones*, Gilm. 341, says: "From the consideration urged by JUDGE COALTER, it seems to me that the proper course in such case is to plead the death of the slave since the last continuance in bar of the recovery of the slave or her value."

VIII. VERDICT.

Responsiveness to Issues.—Issues being joined on the pleas of *non detinet*, and the act of limitations, a verdict that the defendant doth detain the slaves, in manner and form, etc., is sufficiently responsive to both issues. *Boatright v. Meggs*, 4 Munf. 145.

Where the defendant in detinue pleads *non detinet*, and a special plea in bar, to which pleas there is a general replication, denying the truth of both, and issues are joined, a general verdict for the plaintiff is sufficiently responsive to both issues. *Garland v. Bugg*, 1 H. & M. 375.

But in detinue the jury may exceed the prices of the slaves laid in the declaration. *Biggers v. Alderson*, 1 H. & M. 54.

Erroneous Recitals.—If the jury find for the plaintiff the slaves in the declaration mentioned, and proceeding to state their names, and several values, recites the name of one of them erroneously, such error should be corrected by reference to the declaration. *Boatright v. Meggs*, 4 Munf. 145, citing *Royall v. Eppes*, 2 Munf. 479; *Holladay v. Littlepage*, 2 Munf. 539.

1. ASSESSING VALUE.

Verdict Finding Joint Values.—If in a declaration for several slaves laying separate values, the jury find a joint value, it is error, and as to that, a *venire facias de novo*, will be awarded, in order to ascertain the separate values. *Higginbotham v. Rucker*, 2 Call 313.

Determination of All Issues.—So also, in detinue for five slaves, if the jury find for the plaintiff as to four of them without also finding for the plaintiff or defendant, as to the fifth, the verdict will be set aside, and a *venire facias de novo* awarded. *Butler v. Parks*, 1 Wash. 76.

Writ of Inquiry.—But, in detinue for several slaves, if their value be jointly assessed in the verdict, judgment ought not to be entered, but a writ of inquiry to ascertain their respective values should be awarded. *Cornwell v. Truss*, 2 Munf. 195.

Omission of Material Finding.—If the jury, in an action of detinue for slaves, finds a special verdict, and, as to some of the slaves, omits to state a circumstance which is necessary to ascertain whether the plaintiff is entitled to them or not, the verdict is insufficient, and a *venire de novo* ought to be awarded. *Robinson v. Brock*, 1 H. & M. 313.

a. Distringas Superseded.—After a *distringas* upon a judgment in detinue has been returned executed, but without satisfaction, if the court on the plaintiff's motion, directs the *distringas* to be superseded, so far as it relates to the specific property, and to be executed as to the alternative value, such order is not erroneous; but it seems the plaintiff may have a new *distringas* to be executed as to such value. *Garland v. Bugg*, 5 Munf. 166. See *Cloud v. Catlett*, 4 Leigh 462.

Notice of Motion to Supersede Distringas.—Notice of a motion to supersede a *distringas* or for a *ca. sa.* or *A. fa.* in lieu thereof, need not be given by the plain-

tiff to the defendant. *Garland v. Bugg*, 5 Munf. 166.

It seems that, according to the common law, still in force in Virginia, the plaintiff in detinue is not entitled to the issue of the defendant's lands or other property, received by the sheriff upon the *distringas*. *Garland v. Bugg*, 5 Munf. 166.

2. MEASURE OF DAMAGES AND EXTENT OF RECOVERY.

Conditional Transfer of Property.—In an action of detinue to recover personal property transferred conditionally to a vendee, which condition is broken, whereupon the vendor demands possession of the property, which the vendee refuses to surrender, the measure of damages for the unlawful detention of such property would be ordinarily the value of the use of the property from the time it was illegally refused to be surrendered to the vendor till the rendition of the verdict of the jury, excluding any compensation for the use of the property while the vendee held it legally, and abating nothing from the damages because of payments, in works or otherwise, made by the vendee to the vendor for the property under the contract. *McGinnis v. Savage*, 29 W. Va. 362, 1 S. E. Rep. 746.

Mortgagee of Property Conveyed under Chattel Mortgage.—If in detinue by a mortgagee for property conveyed to him by a chattel mortgage he establishes his right to recover, the measure of his damages is the amount proved to be due and unpaid on his trust lien, for which he should have alternate judgment against the purchaser. *Hundley v. Calloway*, 45 W. Va. 516, 31 S. E. Rep. 937.

a. Recovery of Increase of Slaves.—In an action of detinue for a female slave, the recovery may be, not only for the slave named in the writ, but for her children born since the commencement of the action. *Morris v. Peregoy*, 7 Gratt. 373; *Martin v. Martin*, 12 Leigh 495. In this latter case it was left undecided whether in detinue for a female slave, her increase born pending the action can be recovered, but the dictum of the judge showed that, if the question had been before him for decision, he would have decided that the increase could be recovered.

b. Of Hires and Profits.—Where a plaintiff, claiming as trustee in a deed of trust to secure a debt, brings an action of detinue to recover slaves, he is entitled to recover the hires or profits from the time they were held adversely. *Nichols v. Campbell*, 10 Gratt. 560.

Appellate Practice.—But if, in detinue for slaves, the judgment of the superior court, reversing that of the county court (which was in the plaintiff's favor), be reversed by the court of appeals, and that of the county court affirmed, no action lies to recover the profits of the slaves, accruing between the date of the judgment of the county court, and that of its final affirmance by the court of appeals. *Alderson v. Bigger*, 4 Munf. 528.

IX. JUDGMENT.

1. FORM.—In detinue, the plaintiff claims the goods in specie. The judgment is, in effect, that he recover the goods if they can be obtained from the defendant by the sheriff, and a certain sum assessed by the jury for damages for the detention, and, if the goods cannot be had, then a certain sum assessed by the jury as their value, besides the damages for detention, with costs. 3 Chit. Pl. (16th Ed.) 622; *Arthur v. Ingels*, 34 W. Va. 639, 12 S. E. Rep. 872; *White v. Emblem*, 43 W. Va. 819, 28 S. E. Rep. 761.

For example, if in detinue, the jury find for the plaintiff the slaves, if to be had, or \$250 for each slave, and damages 1 d.; the court may render judgment for the slaves, if to be had, and if not, the price found by the jury, with the damages and costs, though no price or value be laid in the declaration. *Bates v. Gordon*, 3 Call 556.

a. Personal Judgment against Executor and Administrator.—Judgment in detinue against an executor as such, should be given against him personally, for the goods by him detained, or the alternative value; but for all damages for detention, both in the testator's time and in his own, it should be against him *de bonis testatoris*. *Allen v. Harlan*, 6 Leigh 42, 29 Am. Dec. 205; *Greenlee v. Bailey*, 9 Leigh 526.

But in *Catlett v. Russell*, 6 Leigh 244, it was held that the judgment in detinue against an executor as such, should be for the goods or the alternative value against the executor *de bonis propriis*, and for the damages for detention, both in the testator's and executor's own time, *de bonis testatoris*. *CABELL, J.*, and *BROCKENBROUGH, J.*, dissented, however, holding, in accordance with the decision in *Allen v. Harlan*, 6 Leigh 42, that the judgment should be against the executor for the goods, if to be had, if not, for the alternative value, the damages for detention, and the costs, all to be levied *de bonis testatoris*.

Where an action of detinue is revived against an administrator with the will annexed, and a judgment is recovered, the judgment for the damages for detention of the property and the costs, should not be against the administrator, personally but against him as administrator, to be levied of the goods, etc., of his testator, in his hands to be administered. *Hunt v. Martin*, 8 Gratt. 578.

Termination of Life Estate.—An executor, or administrator, holding slaves in which his testator, or intestate, had only an estate for life, terminable upon his dying without issue living at the time of his death, may be charged in detinue, personally, and not as executor or administrator. *Royall v. Eppes*, 2 Munf. 479.

2. EFFECT OF JUDGMENT.—If the plaintiff obtains a judgment in detinue for slaves and their profits to the rendition of the judgment, he cannot come into equity for the profits which afterwards accrued pending an appeal, nor to recover their increase not included in such judgment, nor to compel the delivery of them by purchasers from the defendant. *Alderson v. Biggars*, 4 H. & M. 470.

X. ACTION ON DETINUE BOND.

In an action on a bond given by a plaintiff in detinue to obtain immediate possession of the property, it is unnecessary to allege or prove that there was a judgment in favor of the defendant in the action settling his right to the property, and fixing its value, where the action has been dismissed or nonsuit suffered by the plaintiff. But it is indispensable to allege and prove that the property was seized from the plaintiff under process in the case, and delivered to the plaintiff in detinue. *Altizer v. Buskirk*, 44 W. Va. 256, 28 S. E. Rep. 789.

Possession after Execution of the Bond.—And a declaration upon a detinue bond executed under sec. 1, ch. 102 of the W. Va. Code, which does not allege that the plaintiff in the action of detinue, had possession of the property after the bond was executed, is fatally defective. *Bratt v. Marum*, 24 W. Va. 662.

Bond Conditional—Parties to Bond.—But where a

bond given by the plaintiff in detinue is merely conditional that he will pay all costs and damages which might be awarded against him, or sustained by any person by reason of his suing out the action of detinue, instead of all costs awarded against him, and all damages which may accrue to the defendant or any other person, by reason of the seizure of the property, under Va. Code, § 2907, as required by that section, a recovery cannot be had thereon, by a person not a party to that action, for damages sustained by reason of the seizure of his property in such proceedings. *Jackson v. Hopkins*, 92 Va. 601, 24 S. E. Rep. 224.

XI. JURISDICTION OF EQUITY COURTS.

The jurisdiction of a court of equity to decree the specific delivery of title papers to heirs at law, devisees and other persons properly entitled to the custody and possession of the same, when they are wrongfully detained, or withheld from them, is not affected by the fact that a statute (Va. Code, ch. 188), gives the complainants a complete and adequate remedy by an action of detinue. In the absence of prohibitory or restrictive words in the statute, courts of equity still retain their jurisdiction in such cases. *Kelly v. Lehigh, etc., Co.*, 98 Va. 405, 36 S. E. Rep. 511.

Insolvency of Defendant—Injunction.—The insolvency of a defendant in detinue is no ground for an injunction to prevent the removal or disposition of the subject of litigation. An ample remedy is afforded the plaintiff by Va. Code, 1887, sec. 2907. *Langford v. Taylor*, 99 Va. 577, 39 S. E. Rep. 223.

XII. EVIDENCE.

Evidence insufficient.—Although the plaintiff in detinue for a slave, proves that the defendant (whose wife was entitled to the slave in question, as part of her dower of the estate of a former husband) gave the slave to the plaintiff's wife, when a *feme sole*, upon condition that her brothers, who held the reversionary interest, would join in a deed conveying to her the absolute title, and that they promised and agreed to execute such deed, but never did, and one of them afterwards refused to do so, still this evidence is insufficient to entitle the plaintiff to recover. *Fitzhugh v. Beale*, 4 Munf. 186.

Proof of Gift by Defendant.—In detinue for slaves, proof on the part of the defendant that the plaintiff brought to his house one of the slaves who had run away, and then said he had given them to the defendant's wife, is not conclusive in his favor; but the court may instruct the jury, that, if, from the evidence, they believe the plaintiff had given the slaves to the defendant, they should find for him. *Boatright v. Meggs*, 4 Munf. 145.

Evidence as to Possession.—The plaintiff who had negotiations with the defendant for the purchase of land, payment to be made with notes of a third person, called at the defendant's office in regard to the transaction, and the defendant asked her to let him see the notes. He took them and started to leave the office, when she demanded them, but the defendant retained them, and took them to the maker to inquire about their verity. And the plaintiff again asked for the notes, but the defendant would not give them up, so subsequently the plaintiff left the office without any arrangements in regard to the sale having been made, and it was held that there was no evidence that the notes were given in pursuance of an agreement to purchase the land. *Brown v. Pollard*, 89 Va. 696, 17 S. E. Rep. 6.

XIII. REPLEVIN.

1. WHEN MAINTAINABLE.—By the old common law, the writ of replevin was resorted to, for the redelivery and recovery of the specific chattel, a remedy, in some respects, more effectual than the action of detinue. The gist of the action was the tortious taking. *Martin v. Martin*, 13 Leigh 495; *Vaiden v. Bell*, 3 Rand. 448.

A writ of replevin lay at common law, for all goods unlawfully taken; and this was the law of Virginia, until the act of 1823, which abolished that writ in all cases, except those of distresses for rent. *Vaiden v. Bell*, 3 Rand. 448.

"The action of replevin, it will be remembered, was not even at common law, available for unlawful detainer, but only where the taking is unlawful." 4 Min. Inst. (2d Ed.) 491.

2. EXCESSIVE DISTRESS FOR RENT.—A tenant complaining of a distress for rent, made for more rent than was in arrears and due, not having resorted to an action of replevin for redress, nor showing any reason for failing to resort to his remedy at law, is not entitled to relief in equity. *Mayo v. Winfree*, 2 Leigh 370.

But the court may hear evidence after verdict, in case of a replevin, in order to show that the landlord distrained for more rent than was due; on showing which, the judgment will be for the rent merely, and not the double value. *Maxwell v. Light*, 1 Call 117.

Retorno Habendo.—*Quære*: If the defendant prays a *retorno habendo* in replevin, he can claim judgment for double rent? *Blincoe v. Berkeley*, 1 Call 405.

3. AVOWRY.—The common-law rules respecting the pleadings in replevin, and particularly in regard to the nicety and precision required in the avowry, are in force in Virginia, unaffected by any statutory provision; therefore an avowry, faulty according to the common-law rules applicable to that pleading, is bad on general demurrer. *Southall v. Garner*, 3 Leigh 372.

Nonappearance of Plaintiff.—Where the defendant in replevin makes an avowry for rent due him from the plaintiff, and then the plaintiff, failing to appear and plead, is nonsuited, it is proper to award a writ of inquiry to ascertain the avowant's damages, under the twenty-third section of the general statute of rent, 1 Rev. Code, ch. 113. The avowry is to be considered as only a suggestion, and though it be faulty as an avowry, in not showing the landlord's title, yet as a suggestion it is good and sufficient. Moreover the statute of jeofails would be applicable, in such a case, to cure all defects in the avowry. *Bargamin v. Poitiaux*, 4 Leigh 412.

Sufficiency of Issue.—If, in replevin, the avowry alleges that a sum of money was arrear for rent, and the plaintiff replies that he did not owe it at the time of the distress, it is a sufficient issue. *Turberville v. Self*, 4 Call 580.

4. PLEAS.—Under the act of 1792 (Rev. Code, vol. 1, ch. 66, sec. 40), the plaintiff in replevin may plead as many several matters whether of law or fact, as he shall think necessary for his defence; notwithstanding such several matters be inconsistent with each other. *Waller v. Ellis*, 2 Munf. 88.

Errors Cured by Verdict.—The defendant cannot plead several pleas in replevin by our statute; but the error will be cured by the verdict. *Vaiden v. Bell*, 3 Rand. 448.

5. SET-OFF.—Where a lessor covenants to put certain repairs upon the demised premises, which

he fails to do, in an action of replevin upon a distress for rent, the tenant may set off the damages accrued by the failure of the lessor to make the repairs. *Murray Caldwell & Co. v. Pennington*, 8 Gratt. 91.

6. PRESENT STATUS OF REPLEVIN.

Abolished in Virginia.—The action of replevin has not existed in Virginia since 1850. The statutory substitutes for it are, in favor of the tenant, in the case of a distress for rent, delivery or forthcoming bond; in all other cases, the process of interpleader. 4 Min. Inst. (2d Ed.) 483-86-87; 3 Rob. Pr. (2d Ed.) 482-3; Virginia Code 1887, § 2899.

Abolished in West Virginia.—No action for replevin

exists in West Virginia. The person injured has his remedy by action: presumably by action for damages. Code of West Virginia, 1891, p. 725; Code of West Virginia, 1899, ch. 103, sec. 4.

Remedies Substituted Therefor.—In West Virginia, the action of replevin having been abolished, a replevy bond and counter forthcoming bond have been made a part of the proceedings in the action of detinue, and the scope of this action as a remedy has been enlarged and advanced by ch. 103 of the Code. *Robinson v. Woodford*, 37 W. Va. 377, 16 S. E. Rep. 603. See also, West Virginia Code 1899, ch. 103, pp. 794, 795.

REPORTS OF CASES

DECIDED BY

THE GENERAL COURT

OF

VIRGINIA,

AT

DECEMBER TERM 1851,

AND

JUNE TERM 1852.

DECEMBER TERM 1851.

JUDGES PRESENT.

Field,

Lomax,

Leigh,

Thompson,

Estill.

Commonwealth v. Feazle.

December Term, 1851.

Gaming—Public Places—Storehouse*—Case at Bar.—A storehouse in a village, late at night, after persons cease to come to the store to purchase goods, and the door is locked, is not a public place, within the meaning of the statute against gaming.

This was a presentment in the Circuit court of Cabell county at the September term 1848, against Everett *Feazle, for unlawful gaming by playing at a game of cards in the storehouse of Irvin Lusher, a public place in the county of Cabell. The defendant pleaded "not guilty;" and on the trial the jury found a special verdict as follows:

That the defendant sometime in the month of March 1848, did play at a game of cards in company with others in the town of Barboursville, in the county of Cabell, at the storehouse of Irvin Lusher, mentioned in the presentment; that the persons engaged in playing at the time, had gathered together late in the evening at the said storehouse, and sat about the fire until the customers had retired, and until it was believed that no person would come that night for the purpose of trading; and until the tavern across the street had been closed, and the people in town had gone to bed. The door and windows being closed, some person having proposed a game, the door of the storehouse was locked, the key hole stopped, and every place through which it was supposed light might escape or be seen outside of the house, was closed, and a blanket or other cloth was thrown over the box upon which they played so as to prevent noise.

At the time of the playing said Irvin Lusher had in his storehouse spirituous liquors, crackers, cheese, raisins &c., and the persons playing would draw liquor and drink it, and take crackers &c. and eat them, without asking for them; he being present and not objecting. And the said

***Gaming—Public Places.**—On this subject, see the principal case cited in *foot-note* to Bishop v. Com., 13 Gratt. 786; State v. Brast, 31 W. Va. 383, 7 S. E. Rep. 12. See also, Purcell v. Com., 14 Gratt. 679, and *foot-note*.

Irvin Lusher refusing to take any pay for the things thus taken, and also furnishing candles and fuel, the persons engaged in playing withdrew money from the common stock, and gave it to him for the light and fuel.

Through the spring and winter of 1848, before the playing mentioned in the presentment, sundry persons had gone to said storehouse, and there played at cards three or four times: And at these times the doors, windows *&c. were closed in the same manner as before mentioned.

On the night when the defendant played as above stated, when the proposal to play was first made Lusher objected on the ground that it was too early in the night, that persons might be up who might desire to come into the house.

Upon this special verdict the Court with the consent of the defendant, adjourned to this Court the following questions:

First. From the foregoing facts, is the place at which the playing took place, a public place, within the meaning of the law to suppress gaming?

Second. What judgment ought the Court to give on the special verdict?

LOMAX, J., delivered the opinion of the Court.

The Court is of opinion that the place in the proceedings mentioned, is not a public place within the meaning of the law to suppress gaming.

2d. That judgment should be rendered on the special verdict in favour of the defendant.

FIELD and ESTILL, J's, dissented.

588 *Commonwealth v. Hall.

December Term, 1851.

Intoxicating Liquors—License to Sell—Right of Partners*—Case at Bar.—A license to one man to keep a tavern at his house in a village, will not authorize another who formed a partnership with the first in the sale of the spirituous liquors which the first was authorized to sell under his license, to sell

*See monographic *note* on "Intoxicating Liquors" appended to Thon v. Com., 31 Gratt. 897.

liquors at a house on the same lot and within the same enclosure with the tavern.

This was an indictment in the Circuit court of Gilmer county at its September term for 1850, against Hannibal Hall, for selling by retail ardent spirits without a license. The first count in the indictment charged the selling to be drank at the place where sold; the second charged it not to be drank where sold.

The parties agreed the facts, and submitted the question of law arising thereon to the Court. The facts were, that on the 29th of May 1849, the County court of Gilmer granted a license to Thomas Marshall to keep an ordinary at the house where he was then living in the town of Glenville, until the May term of the County court 1850. Under this license Marshall commenced and kept an ordinary: the liquors were kept, sold and drank in a small building on the same lot, and in the same enclosure in which the main building was situated, and about ten feet from it. On the 8th of December 1849, Marshall and the defendant, by an agreement under seal, formed what is termed in the agreement a partnership in the bar attached to the ordinary, by which, in consideration of the amount that Marshall had paid for the license to keep an ordinary and for the rent of the small building, the defendant bound himself to furnish and keep constantly on hand a supply of liquors suitable for the customers of said ordinary: And the profits were to be divided in proportion to the sums advanced by each party.

589 *On the 1st of March 1850, the County court, with the consent of Marshall, transferred his license to Stephen W. Ratcliff, who had rented and removed to the property occupied by Marshall as an ordinary. On the 11th of April Ratcliff and the defendant entered into an agreement in all respects like that between Marshall and the defendant; and on the 12th day of April the defendant sold liquors by retail, at the small building above described as being the place where Marshall had kept and sold liquors.

With the consent of the defendant the Circuit court adjourned to this Court the following question:

What judgment ought this Court to give on the facts agreed?

By the Court. Judgment ought to be given against the defendant for 30 dollars and the costs.

Commonwealth v. McKinney.

December Term, 1851.

Indictments—Record Not Showing That Defendant Was Indicted—Effect.*—An indictment for a wilful trespass was against Joseph McKinney. It was endorsed by the grand jury, an indictment against Thomas McKinney, "a true bill," and so it was noted upon the record. A writ was issued and

***Indictments—Failure of Record to Show Defendant Was Indicted—Effect.**—For the proposition that if the record fails to show that the defendant was indicted,

served on Joseph, who appeared and moved to quash it. **HELD:**

1st. Same—Same—Same.—The writ should be quashed.

2d. Same—Record—Power of Court to Alter.†—The Court cannot alter the record so as to make it conform to the indictment.

This was an indictment for a wilful trespass to personal property in the Circuit court of Preston county: and the facts were agreed as follows. At the September term of the Court for 1850 an indictment 590 for a *wilful trespass to personal property against Luke McKinney, John McKinney and Joseph McKinney, was sent to the grand jury, which indictment they returned to the Court with the following endorsement:

"Commonwealth v. Luke McKinney, Thomas McKinney and John McKinney."

"Indictment for wilful trespass to personal property. A true bill.

"William Royse, Foreman."

The record of the Court set out that, The grand jury adjourned on yesterday, appeared pursuant to the order of adjournment, and retired to their room; and after some time returned into Court, and presented an indictment against Thomas McKinney, Luke McKinney, and John McKinney, for wilful trespass to personal property, a true bill.

A writ of venire facias was issued against the parties, which was served on Luke, John and Joseph McKinney; and thereupon Joseph McKinney appeared and moved the Court to quash the said indictment as to him, or to set aside the service of the venire facias upon him, and discharge him from further prosecution in this cause, for want of any sufficient record of the finding of a bill of indictment against him. Whereupon the Court, with the consent of the said Joseph McKinney, adjourned to this Court the following questions:

1st. Whether the said record of the finding of an indictment against Luke McKinney, Thomas McKinney and John McKinney, is a sufficient record of the finding of a bill against the said Joseph McKinney to put him to answer the same?

2d. What is the legal effect of the variance between the record of the finding of said indictment and the indictment itself?

591 *3d. Is it competent for the Court by an order now to be made, to correct the error in the record of the finding of the said bill, so as to make the same conform thereto, and to cause the said prosecution to proceed against the said Joseph McKin-

a motion to quash will be sustained, the principal case is cited and approved in *Simmons v. Com.*, 89 Va. 158, 15 S. E. Rep. 386, dissenting opinion of PHILGAB, J., in *Gilligan v. Com.*, 99 Va. 829, 37 S. E. Rep. 902. See also, generally, monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

†Record—Amendment.—See foot-note to *Price v. Com.*, 83 Gratt. 820, where the principal case is cited.

ney with or without further process against him?

4th. Ought the Court to quash the said indictment as to the said Joseph McKinney, or to set aside the service of said venire facias upon him, and discharge him from further prosecution in this case?

5th. What judgment ought the Court to render in the premises?

FIELD, J., delivered the opinion of the Court.

The Court is of opinion and decides, that the sheriff's return of the venire facias as to Joseph McKinney should be quashed, and the said Joseph discharged from further prosecution upon the indictment, because it does not appear from the record that the said Joseph has been indicted; and it is not competent for the Court to alter or amend the record in that respect. *Cawood's Case*, 2 Va. Cas. 527, and others referred to in 3 Rob. Pr. 98.

We deem it unnecessary to decide any other question.

592 *Commonwealth v. Shelton & Others.

December Term, 1851.

Gaming—Betting on Horse Race—Construction of Statute.*—Betting on a horse race is not within the meaning of the 5th section of the 10th chapter of the act of the 14th March 1848, concerning crimes and punishments, and proceedings in criminal cases.†

At the October term for 1849 the grand jury for the county of Cabell presented Jerome Shelton, Ballard McComas, David Shelton, Rowland Bias, Johnson Lusher and Thomas A. Childers for unlawful gaming by betting on a horse race, at a race field on the lands of Thomas McComas in the county of Cabell.

The prosecution against Bias was dismissed; and when the trial of the other defendants came on the jury found a special verdict as follows:

That some time within twelve months before the finding the presentment in this cause, a horse race was run in a field belonging to Thomas McComas, in the county of Cabell, for twenty or twenty-two dollars; that one of the horses belonged to one Ray and the other to a man named Hodge: That the agreement to run the race and the amount for which it was to be run, was agreed upon at the house of Andrew McComas, about

*See monographic note on "Gaming" appended to *Neal v. Com.*, 22 Gratt. 917.

†That section is as follows: "Any free person who at any ordinary, race field, or public place, shall play at any game whatever except bowls, chess, backgammon, draughts, or any licensed game, or bet on the hands or sides of others who do play, shall be punished by fine of thirty dollars, and give security in such sum as the Court may require, to be of good behavior for twelve months; but no person shall be imprisoned in default of such security more than three months."

a mile distant from the place where the race was run, and on the opposite side of the river. That David Shelton made the agreement for the bet, and
593 *was interested in the race one fifth of the amount of the bet for which it was run.

That about a month previous to the time of running the race above referred to, a like race was run at the same place, for the sum of 50 dollars, in which the defendant Ballard McComas agreed to become interested to the extent of one third of the bet: This bet was also made at the house of Andrew McComas.

That at another time a third horse race was run at the same place, by the defendants Thomas Childers and Johnson Lusher, for the sum of one dollar, which bet was also made at the house of Andrew McComas. That these bets were all made and the races run within a year before the finding of the presentment in this case. That all the defendants were on the ground at the time when the several races were run. There was a verdict in favour of Jerome Shelton; and as to the other defendants the question was submitted to the Court upon the special verdict.

With the consent of the defendants the Circuit court adjourned to this Court the following questions:

1st. Is betting on a horse race gaming within the meaning of the 5th section of the 10th chapter of the act of 1848, passed March 14th, 1848, entitled an act to reduce into one the several acts concerning crimes and punishments and proceedings in criminal cases?

2d. If not included in the 5th section, is betting upon a horse race included within the meaning of the 6th section of the 10th chapter of said act?

3d. If betting upon a horse race be indictable upon either of said sections, is a person interested in said race to a less amount than 20 dollars, where such bet exceeds that sum, guilty of unlawful gaming or wagering.

4th. Where the presentment charges, as in this case, that the betting took place at the race field, is the presentment sustained by proof of a betting at another and different place?

594 *5th. If the case set out in the presentment be unlawful gaming as aforesaid, is proof that one of the defendants agreed to become interested, without proof that he staked any money, sufficient to sustain the presentment on that point?

6th. What judgment ought the Court to render in the premises?

LOMAX, J., delivered the opinion of the Court.

The presentment charges that the defendants "on the 1st of August 1849, at a race field on the lands of Thomas McComas in the said county of Cabell, unlawfully did game by betting on a horse race then and there run over the paths in said race field, contrary to the form of the statute" &c.

The 5th section of the 10th chapter of the act passed 14th March 1848, entitled an act to reduce into one the several acts concerning crimes &c. enacts as follows: "Any free person who at any ordinary, race field or public place, shall play at any game whatever, except bowls &c., or bet on the hands or sides of others who do play, shall be punished by fine of 30 dollars, and give security" &c.

The first question in the case adjourned submits to this Court the consideration whether "is betting on a horse race gaming within the meaning of the section which has just been quoted." And the answer to it must depend on this, whether a horse race is a playing at a game, so that betting upon the race is a betting on the hands or side of others who do play.

In the construction of the English statute 9 Ann, ch. 14, for preventing of excessive and deceitful gaming, it was held by the Courts in England, that the word games used in that act comprehended horse races. That statute was understood, as it would seem, to comprehend the games embraced by the preceding statute of 16 Car. 2, ch.

7, which was entitled an act against 595 deceitful, *disorderly and excessive gaming. And in this statute horse races are expressly mentioned; and persons winning by fraud, or cheating at "cards, dice, tables, tennis, bowls, kittles, shovel board, cock fightings, horse races, dog matches, foot races, and all other games and pastimes," were to forfeit treble the sum or value of money so won. When therefore the statute of Ann spoke of playing or betting, it was considered that it had relation to games or plays in former statutes against gaming; that foot races and horse races and the like, had been expressly mentioned as games in the statute of Charles, and that the two statutes were to be taken together. *Lynall v. Longbotham*, 2 Wils. R. 36; *Bloxton v. Pye*, 2 Wils. R. 309. The first statute in Virginia relating to gaming was passed in February 1727. 4 Hen. Stat. 214. This statute was mainly a transcript of 9 Ann, ch. 14, above referred to. There was, however, for the construction of the word games, or playing or betting at games, no prior statute in Virginia, as there was in England, that could be referred to to illustrate the meaning of this language. Hence the assembly found it necessary to pass the second statute in Virginia, in 1740. 5 Hen. Stat. 102. It recites that the former act of 1727 had been construed not to extend to horse racing and cock fighting, which had been found to produce as great mischiefs as any of the games in said act mentioned, and therefore it enacted, as in the former act, that all promises, agreements, mortgages, securities &c., where the consideration was money won, laid or betted at horse races, cock fights or any other sports or pastimes, or any wager whatsoever, should be void" &c. &c.; adopted pretty much the very same provisions in regard to these sports and pastimes as in regard to gaming in the

former statute. These provisions in both statutes related only to civil rights and civil remedies, without at all affecting gaming as a criminal offence. For

596 the first time, gaming *was made an offence in Virginia by the 4th section of this act of 1740, which prohibited gaming at ordinaries; and inflicted a penalty on ordinary keepers for permitting gaming at their ordinaries. In the revision of the laws in 1748, both of the preceding acts of 1727 and 1740 were embodied in one act; and that act vacates promises, agreements, mortgages &c., where the consideration was "money or other valuable thing laid or betted at cards, dice, tables, tennis, bowls, or any other game or games whatsoever, or at any horse race, cock fighting or any other sport or pastime, or on any wager whatsoever." It will be observed that as well in this statute as in that of 1740, horse racing was not included in the list enumerated as gaming; but is added in a list seemingly distinct from the former list, and denominated sports or pastimes. A provision was made in the 5th section of this act of 1748, against the offence of gaming at ordinaries or other public places; and it enacted that "any person playing in an ordinary, race field or other public place, at any game or games whatsoever, except billiards, bowls, backgammon, chess, or drafts; or who shall bet on the side or hands of such as do game, every person on conviction thereof," in the mode prescribed, should be liable to certain penalties. The offence of ordinary keepers permitting gaming, was also re-enacted; and justices were subjected to penalties for neglecting to put the act in force; and punishments inflicted upon cheats &c. In 1792, (1 St. at large N. S. 106,) there was a re-enactment of the provisions in the same language as to the enumerated list of acts designated as gaming, and as to horse races and other sports or pastimes; and so again in the revision of 1819, 1 Rev. Code, ch. 147, vacating all contracts &c. made upon consideration of games, and sports or pastimes, and any wager whatsoever, as in the former laws: And in regard to the criminal offence of gaming at ordinaries and other public 597 places, retaining the very *same language, (so far as is pertinent to the offence,) as that which was used in regard to the same offence in the statute of 1748; and which was used in the former revisions.

Now it is remarkable in the same laws relating both to civil consequences of gaming, or contracts founded on gaming considerations, the laws take the amplest scope of expression embracing what is denominated games or gaming, sports or pastimes, and all wagers whatsoever, vacating all contracts upon considerations arising out of such acts: Nevertheless the phraseology of those clauses which treat of gaming criminaliter, as offences, the language is much more circumscribed. The clause respecting gaming at ordinaries and other public places, dropped horse racing, cock

fighting or other sport or pastime, "or any wager whatsoever," which had been included in the civil provisions enacted in the same law; and enacted that if any person shall at any time play in an ordinary, race field, or any public place, at any game or games whatsoever, except bowls, backgammon, &c., or shall bet on the sides or hands of such as do game, every person upon conviction thereof, &c., shall be subjected to a penalty denounced. This omission of what the statute had in preceding clauses under the denomination of sports and pastimes, and seemingly distinguished by the legislature from what was denominated gaming, and the omission of the comprehensive word "wagers" generally, does seem to be very significant of an intention not to include the two latter classes of cases within the games or gaming to be treated criminaliter. In the following section (the 6th section) 147, revisal of 1819, which inflicts a penalty for winning or losing more than 20 dollars at any time within twenty-four hours, the language is "playing or betting at any game," (not at any sport or pastime,) with an enlargement by the words, "or wager whatsoever," which last

598 words were *omitted in the preceding section as has just been noticed. What may be the effect, within the 6th section, of a wager upon a horse race, is not within the scope of an enquiry confined to the 5th section of chap. 10, in the act of 1847-8, by the question which is adjourned to this Court by the Judge below. It seems also not to be without much significance, that the legislature in the very clause now under consideration, in describing public places where the gaming was made offensive, should mention a race field as one of them. For if horse racing was one of the species of the games which were made criminally offensive, no public race field could legally be contemplated as having existence. It would have been as inappropriate as to have spoken in a law as to gaming or other offence in a billiard room during that period when the law had entirely forbidden billiard tables to be kept or billiards to be played. The whole history of our legislation in regard to the subject of gaming, and the uniform peculiarity of the language in which that legislation has been expressed, seem most strongly to discriminate horse racing or other sport or pastime from the gaming which was made criminal; and to exclude it from the operation of this section of the law. In confirmation of this construction of the law, comes the history of this Commonwealth for more than a century since the law was passed making it penal to play at any game in an ordinary, race field or any other public place. No sport or pastime has, during all that time, been more favourably and more extensively indulged by all ranks and professions of society in Virginia than horse racing. It seems to have been universally regarded as a licensed amusement to all classes; which none in former times more encouraged than those holding official stations, the obliga-

tions of which would have constrained them to have enforced the denunciations of the law against the amusements which they were patronizing and enjoying, if the same had been illegal. *It would seem most wonderful if the terrors of this law had remained latent so long, ever, since 1740, under the construction of it supposed or doubted upon this record, and now to be roused into activity in the year 1850.

This Court responds to the first question adjourned, that betting on a horse race is not within the meaning of the 5th section of the 10th chapter of the act passed March 14th, 1848, entitled an act to reduce into one the several acts concerning crimes and punishments and proceedings in criminal cases. The decision upon this point in the case renders it unnecessary, upon this record, with the special verdict found therein, to answer the second question which has been adjourned: because it appears that the losing or winning in the present case in any of the bets charged in the presentment, was not of a sum, or anything of greater value than 20 dollars. And moreover, that any answer to the third, fourth and fifth questions is rendered unnecessary in this case, after the decision of this Court hereinbefore given upon the first question. And in regard to the last question adjourned, it is considered by this Court that judgment should be entered for the defendants: Which is ordered to be certified.

600

*Bell v. The Commonwealth.

December Term, 1851.

1. **Indictments*—For What Defects Court Will Quash.**† —In prosecution for felonies and other serious offences, the Court will not on the motion of the prisoner quash the indictment, unless where the Court has no jurisdiction; where no indictable offence is charged; or where there is some other substantial and material defect. In other cases he will be left to his demurrer, motion in arrest of judgment, or writ of error.
2. **Same*—Surplusage.—QUERRE.** If the statement in the commencement of the indictment, of the name of the Court and the term at which the indictment was found, is not surplusage. If not surplusage it is useless.
3. **Same*—Laying Venue—Case at Bar.**—Where the indictment in the caption names one county and in the body of it speaks of the defendant as of another county, the charging the offence to have been committed in the county aforesaid, is error, it not being alleged with sufficient certainty that

***Indictments.**—On all matters pertaining to indictments, see monographic *notes* on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

†**Same—For What Defects the Court Will Quash.**—In Huff v. Com., 14 Gratt. 648, it was held that, because the presentment in that case did not charge any offence, the lower court erred in overruling the motion to quash it; and, for that error, the judgment was reversed and the presentment quashed, the count citing the principal case as authority for its holding.

the offence was committed in the county in which the indictment was found.

4. **Statute—Discharge of Prisoner—"Two Terms"—Interpretation.**—A prisoner being sent on for further trial by an examining Court, which sat during the session of the Circuit court to which he is sent for further trial, that term of the Circuit court is not one of the two at which the statute directs that he shall be indicted, or that he shall be discharged from imprisonment.

Alonzo G. Bell was indicted in the Circuit court of Campbell county, for stealing a horse. When brought to the bar, before pleading he moved the Court to quash the indictment, on two grounds. 1st. Because the caption of the indictment recites the Court as "the Circuit Superior court of law and chancery for Campbell county," when in fact there is no Court in the Commonwealth bearing that title; the true name of the Court being, "the Circuit court of Campbell county." 2d. Because the indictment on its face declares that it was found by the grand jury at the October term of the Circuit Superior court of law and chancery holden in and for the county of Campbell aforesaid, in the year of our Lord one thousand eight hundred
601 *and fifty; when in fact no such Court was then held, and no such indictment was found at the October term 1850, of the Circuit court of Campbell county.

The record states in its commencement, the name of the Court, and the term, correctly; and these are also stated correctly when recording the fact that the indictment was found against the prisoner. But in the indictment itself the errors relied on as the ground of the motion are found; and an inspection of the record of the Court for the October term 1850, shewed that no indictment was found at that term against Bell. But the Court overruled the motion and the prisoner excepted.

The prisoner then offered a special plea which was in substance, that on the 13th of May he was examined before the County court of Campbell for the supposed felony in the indictment mentioned, and was remanded for trial in the Circuit Superior court of law and chancery for the county of Campbell. That said Circuit Superior court was in session on the said 13th of May 1850, when the prisoner was so remanded, and had been in session from the 8th day of May, and continued its session until the 18th day of May, 1850. That the next term of said Court, (its name having been changed in the meantime to "The Circuit court of the county of Campbell,") was commenced on the 8th day of October 1850, and continued its session until the 19th of October, when it again adjourned until its next regular term in May 1851. And that the prisoner was not indicted at either of the said terms of May or October 1850; nor did the failure to indict him arise from any of

the causes stated in the statute; and so the prisoner was not lawfully indicted for said supposed offence set out in the indictment. This plea the Court rejected; and the prisoner again excepted.

The prisoner then pleaded "not
602 guilty" and upon *his trial was convicted and sentenced to two years and six months imprisonment in the penitentiary.

In the caption of the indictment the Court is stated as of the county of Campbell. It then proceeds to state that the grand jury for the county aforesaid present Alonzo G. Bell late of the county of Roanoke, in the State of Virginia, and at the parish of Russell and in the county aforesaid; one bay mare of the value &c.

The prisoner applied to this Court at its June term 1851 for a writ of error to the judgment, which was awarded.

Irving, for the prisoner.

The Attorney General for the Commonwealth.

LEIGH, J., delivered the opinion of the Court.

Alonzo G. Bell was indicted at the May term 1851 of the Circuit court of Campbell, and at the same term he was tried and convicted. Before a jury was empaneled for his trial, he moved to quash the indictment. This motion was overruled, and he excepted to the opinion of the Court. He also offered a plea, which was rejected, and he again excepted to the opinion of the Court.

At the last term of this Court, he applied for a writ of error. The record then before the Court did not shew that the indictment had been found by the grand jury, and a writ of error was awarded. A full record has been certified to this Court, from which it appears that the indictment was found by a grand jury regularly empaneled. And we are now to enquire whether there is any error in the proceedings and judgment in the Circuit court.

In the indictment the Court is styled "The Circuit Superior court of law and chancery," and it is stated that the grand jury was empaneled at the October
603 *term 1850 of the Court; whereas the true style of the Court is, the Circuit court, and in point of fact the grand jury which found the indictment was empaneled at the May term 1851 of the said Court. And it is insisted by the prisoner's counsel that for the misdescription of the Court, and the misstatement as to the term at which the indictment was found, in the indictment, the Court ought to have quashed the indictment. And to sustain this position, the Court was referred to passages in Stark. on Cri. Plead. 258, and Archb. Plead. and Ev. in criminal cases 33. The passages cited from these authors apply to captions of record certified to the Court of King's Bench from inferior Courts, and point out what the captions of such certified records ought to contain. But the caption in the present case is in proper form, and therefore these authorities do not apply to the ques-

†Statute—Discharge of Prisoner after Two Terms of Court—What Term Not Counted.—See foot-note to Bell's Case. 7 Gratt. 646, where the cases citing the principal case on this point are collected.

tion under consideration. There is in this case nothing wrong in the caption, and the defects, if defects there be, are in the indictment alone. Still the question remains whether the court ought to have quashed the indictment for the misnomer of the court and for the misstatement of the term at which the indictment was found.

A motion to quash an indictment is addressed to the discretion of the court, and in cases of felony and other serious offences, courts when the motion is made by the defendant, usually refuse to quash, unless upon the plainest and clearest grounds, but leave the party to a demurrer, or motion in arrest of judgment, or writ of error. 1 Chit. Cr. Law 246, top paging, Phila. Edi. 1819. And the cases in which the Court, on the motion of the party accused, ought to quash are, where the Court has no jurisdiction; where no indictable offence is charged; or where there is some other substantial and material defect. 1 Chit. Cr. Law 248.

Upon this authority, we are of opinion that the Circuit court rightly refused to quash the indictment for the defects
604 *above mentioned. For these defects

shew no want of jurisdiction, and an indictable offence is plainly set forth, and the defects complained of are merely formal, not affecting in the least the guilt or innocence of the accused, and not calculated to embarrass him. Indeed they are so wholly unconnected with the charge, that they ought perhaps to be regarded as surplusage. We have looked to the forms of indictments given in Starkie on Criminal Pleading; and in none of them is the style of the Court, or the term of the Court at which the indictment was found, set forth.

And the setting them forth in this indictment, if it be not surplusage was certainly useless, and for the insertion of useless matter an indictment ought not to be quashed.

The facts set forth in the rejected plea, were before this Court at the last December term, on the application of the prisoner for the writ of habeas corpus, in order that he might be discharged by reason that he had not been indicted within two terms after he had been remanded to the Circuit court to be tried. On that occasion after great consideration this Court was of opinion that two terms, such as the law contemplates, had not elapsed; and that the prisoner had no right to claim his discharge on this ground. We have at this term reconsidered the question, and we have come to the same conclusion. We are therefore of opinion that the matter set forth in the plea was no ground of defence, and that the Circuit court rightly rejected the plea.

But there is a defect in the indictment, in not setting forth with sufficient certainty the county in which the larceny was committed, for which the judgment must be reversed. Campbell county is mentioned in the caption, and in the body of the indictment the county in which the larceny was committed is set forth in the following words, "that Alonzo G. Bell late of the

county of Roanoke in the State of Virginia, labourer, on the 10th day of March, 605 in the year of our Lord one *thousand eight hundred and fifty, with force and arms at the parish of Russell and in the county aforesaid." So that two counties had been previously mentioned before the county in which the larceny was committed is stated, and then the county where the larceny was committed is stated by the words "in the county aforesaid," without stating to which of the previously named counties the word "aforesaid" had reference. This manner of stating the county where the theft was committed, is insufficient. 1 Chit. Cr. Law 160; Archbold's Pleadings and Evidence in criminal cases 49; 2 Gabbett's Cr. Law 205; 1 Wms. Saund. 308, n. 1. According to some of these authorities, the word "aforesaid" refers to the county last before named. If this be the correct construction, the word "aforesaid" referred to the county of Roanoke, and then the Circuit court of Campbell had no jurisdiction; and according to a part of these authorities, it is uncertain to which of the counties before named the word referred; and the Court cannot say in which county the offence was committed. But which ever of these may be the true construction, all the authorities agree that the indictment is bad. And for this error the judgment must be reversed.

The judgment was as follows:

It seems to the Court here, that there is error in the said judgment in this, that it is not sufficiently alleged in the indictment that the stealing of the mare was committed in the county of Campbell: Wherefore it is considered that the said judgment be reversed and annulled. And this Court proceeding to give such judgment as the Circuit court ought to have rendered, it is further considered that the said Alonzo G. Bell go quit of the said indictment. And on the prayer of the attorney general that the said Alonzo G. Bell may be held in
606 custody to answer a good and sufficient indictment *to be exhibited against him in the Circuit court of Campbell, for the felonious stealing, taking and carrying away the mare in the aforesaid first indictment mentioned, it is ordered accordingly, unless the said Alonzo G. Bell shall be discharged by the said Circuit court, or otherwise, by reason that there have been three regular terms of the said Court since his examination without his being tried, or unless he shall be otherwise legally entitled to be discharged.

Clore's Case.

December Term, 1851.

(Absent FIELD, J.)*

1. Examining Court—Irregularities—Indictment—Effect.†—After a prisoner has been tried by an ex-

*He had tried the cause in the Circuit court.

†Examining Court—Irregularities—Indictments—Effect.—"It is well settled by decisions of the general

amining Court and remanded for further trial before the Circuit court, and an indictment has been found against him, it is too late to plead in abatement that, or move to quash the indictment because, there were irregularities in his examination before the committing magistrate.

2. **Same—Record—Sufficiency.**—If it may be fairly understood from the record of the examining Court that the crime for which the prisoner is indicted is the offence for which he was examined that is sufficient.

3. **Jurors—Exclusion—Right of Prisoner to Except.**—**QUARE.** If the setting aside a person called upon the *venire*, on the motion of the attorney for the Commonwealth, is a ground of exception by the prisoner.

4. **Same—Challenge—Scruples as to Capital Punishment.**—Upon a trial for murder a venireman when called, states that he has conscientious scruples about the propriety of capital punishment, and is opposed to it; and being asked by the Commonwealth's attorney, whether if the testimony in the cause proved the prisoner to be guilty of murder in the first degree, he would convict him of it, replies, I do not know. He is properly challenged for cause by the attorney, and set aside by the Court.

5. **Same—Same—Opinion Formed—Competency**—**Case at Bar.**—A venireman when called stated,

607 "That he had not heard any *of the evidence nor had he heard any report of it from those who had heard it; but from the rumour of the neighborhood he had formed an opinion which was at the time he spoke existing on his mind, and which he should stick to, unless the

court, made under the former laws, that the warrant of commitment formed no part of the record; and that when it appeared that the prisoner had been regularly examined for the same offence with which he was indicted, the court could not be called upon to investigate the legality of the commitment. *McCaul's Case*, 1 Va. Cas. 271; *Murray's Case*, 2 Va. Cas. 504. And in *Clore's Case*, 6 Gratt. 606, it was decided by the same court, that the principle of the decisions just above mentioned is not at all varied because of the subsequent amendments of the law in the Code, relating to arrest and commitment; that after the finding of the grand jury upon the examinations and proofs before them, charging the accused with the murder, it was no defence in reason or in law to the prisoner, that there had been irregularities in his commitment." *Wormeley v. Com.*, 10 Gratt. 670. To the same effect, the principal case was cited in *Kemp v. Com.*, 18 Gratt. 975; *Chahoon v. Com.*, 20 Gratt. 761, 766, 784; *foot-note* to *Wormeley v. Com.*, 10 Gratt. 658. See also, monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

‡**Jurors—Exclusion—Right of Prisoner to Except.**—See what is said in *foot-note* to *Montague v. Com.*, 10 Gratt. 707, on this point.

§**Jurors—Opinion Formed—Competency.**—On this subject the principal case was cited in *Wormeley v. Com.*, 10 Gratt. 687 (see also, *foot-note* to this case); *Jackson v. Com.*, 23 Gratt. 919, 929, 983, and *foot-note*; *foot-note* to *Shinn v. Com.*, 33 Gratt. 901; *Lyles v. Com.*, 88 Va. 207, 13 S. E. Rep. 802; *Hall v. Com.*, 80 Va. 175, 15 S. E. Rep. 517; *State v. Baker*, 83 W. Va. 324, 327, 10 S. E. Rep. 641, 642; monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 738.

evidence should turn out to be different from what rumour had reported it to be. That he had no prejudice nor partiality for or against the prisoner, and believed he could give him a fair and impartial trial according to the evidence that should be given in." He is a competent juror, and challenge of him for cause by the prisoner, was properly overruled.

In the Circuit court of Madison county at its May term 1851, Edmund Clore was indicted for the murder of Thomas Carpenter. At the same term of the Court he offered two pleas in abatement. In the first he alleged that he was committed to prison by Thomas A. Gordon Esq. a justice of the peace for the county of Madison, without any enquiry or examination into the truth of the offence wherewith he was charged or for which he was committed. In the second, he alleged that the offence wherewith he stood charged was never examined into by a justice of the peace in his presence. The Court rejected his pleas.

The prisoner then moved the Court to quash the indictment in consequence of the same irregularity of proceeding before the committing magistrate as set forth in the pleas in abatement, and because the prisoner had not been duly examined before a Court of examination upon the charge of murder set forth in the indictment. And he furthermore moved the Court, in the event of refusing to quash the indictment, to defer all further proceedings therein until the prisoner should be regularly committed for examination by a justice of the peace of Madison county, upon the charge of murder set forth in the indictment, and should be duly examined therefor by the proper Court of examination and remanded to this Court for trial. Upon this motion the record of the examining Court was inspected by the Court. This record contains

608 the warrant of the justice to arrest the *prisoner for the murder of Thomas Carpenter; and the mittimus of the same justice committing the prisoner to the jail of the county to be examined for the same murder. The record further states, that Edmund Clore who stands charged with the murder of Thomas Carpenter, was brought to the bar of the Court in custody &c., that witnesses were sworn and examined on the part of the Commonwealth, that the arguments of counsel were heard. And then proceeds, "On consideration whereof it appears to the Court that a felony has been committed, and that there is probable cause to charge the accused therewith, the said Edmund Clore is remanded for trial in the Circuit court of this county; and he is remanded to the jail of this county there to remain till the sitting of said Circuit court." The Court overruled the motions. To the several opinions of the Court, 1st. In rejecting the said pleas; 2d. In refusing to quash the said indictment; 3d. In refusing to defer all further proceedings at present upon said indictment, the prisoner excepted.

Upon the trial of the case James W.

Twyman, one of the venire, being called and sworn stated, "that he had not heard any of the evidence, nor any report of it, but from what he had heard spoken of the case in the neighbourhood, he had formed an opinion to a certain extent. The Court asked him if there was partiality or prejudice on his mind for or against the prisoner; he replied that he could not say there was any, but if any it was in favour of the prisoner."

"Upon further interrogation by the attorney for the Commonwealth the venireman stated, that he had conscientious scruples about the propriety of capital punishment, and was opposed to it. He was then asked by the attorney for the Commonwealth, whether if the testimony in the cause proved the prisoner to be guilty of murder in the first degree he would convict him of it. He replied that he did not know." He was thereupon
609 *challenged by the attorney for the Commonwealth for cause, and the challenge was sustained by the Court. To which the prisoner excepted.

Another venireman, Henry Huffman, being called and sworn stated, "that he had not heard any of the evidence, nor had he heard any report of it from those who had heard it; but from the rumour of the neighborhood he had formed an opinion which was now existing upon his mind, and which he should stick to, unless the evidence should turn out to be different from what rumour had reported it to be. That he had no prejudice nor partiality for or against the prisoner, and believed he could give him a fair and impartial trial according to the evidence that should be given in." The juror was objected to by the prisoner for cause, but the objection was overruled by the Court; and the prisoner again excepted.

The jury found the prisoner guilty of murder in the first degree; when he moved the Court to set the verdict aside, and grant him a new trial; but the Court overruled the motion; and having spread the facts upon the record, sentenced the prisoner to be hung. Whereupon he applied to this Court for a writ of error: and in his petition stated as ground of error:

1st. The rejection by the Circuit court of both and each of his pleas in abatement.

2d. The refusal of the Court to quash the indictment upon the grounds stated in his motion.

3d. The refusal to defer proceedings upon the indictment.

4th. The Court's setting aside as a juror James W. Twyman.

5th. The refusal of the Court to set aside as a juror Henry Huffman.

6th. The refusal of the Court to set aside the verdict and award a new trial.

610 *The facts spread upon the record are not stated here, because they do not present a case which can be of any importance in defining what constitutes murder in the first degree.

William Green, for the prisoner.

LOMAX, J., delivered the opinion of the Court.

The three first grounds of error alleged in the petition of the prisoner may be considered together. They are,

1st. The rejection of the two pleas in abatement that were tendered by the prisoner.

2d. The refusal of the Court to quash, upon motion, the indictment, upon grounds, the same that are stated in the pleas in abatement, with an additional ground, that the prisoner had not been duly examined before a Court of examination upon the charge of murder set forth in the indictment.

3d. The refusal of the Court to defer proceedings upon the indictment, in the event of the refusal to quash, till there should be a regular commitment of the prisoner before a justice and a due examination before the proper Court of examination.

The objection urged in this defence upon the motion to quash, because the prisoner had not been duly examined before an examining Court, is at once disposed of by reference to the record of the proceedings of the examining Court, which was submitted to the inspection of the Court, and forms a part of the record in the case. It is stated in the former, that "Edmund Clore who stands charged with the murder of Thomas Carpenter was brought to the bar in custody &c. &c." Now although in the final sentence of the examining Court he is not remanded for trial of the said murder, yet the judgment is sufficiently certain, when it is therein stated that

witnesses had been examined and
611 *the arguments of counsel heard, upon consideration whereof, that it appeared to the Court that a felony had been committed, and that there was probable cause to charge the accused therewith; and that the said Edmund Clore be remanded for trial &c. The felony can fairly be understood only to have reference to the murder, wherewith it was before stated he had been charged, and upon which charge the examination had been held.

The matters embraced in the pleas, which were the same matters taken as grounds for quashing the indictment, besides that above noticed, were irregularities alleged to have been committed by the justice of the peace before awarding the warrant of commitment. No precedent has been referred to for sustaining either a plea in abatement or a motion to quash, upon the ground of such irregularities in the initiatory proceedings of the justice, which are designed merely to ascertain that there is a degree of suspicion against the accused, requiring that he should be held in custody until a more solemn examination can be had as to the probabilities of the charge, and a trial had of his guilt or innocence. Whatever inconveniences he may complain of as to the examination, or want of examination before the justice, they can have no rele-

vancy as objections to the indictment, which has given the sanction of the grand inquest of the county to the charge for which the justice committed him. At that stage of the proceedings, after the finding of the grand jury upon the examinations and proofs before them, charging him with the murder, what defence in reason or in law, can or ought it to be to the prisoner, that the justice who committed him for the crime with which the grand jury have charged him, did not in his prior examination, examine the case according to legal rules of evidence? The answer to that question is so decisively pronounced in the

case of the Commonwealth v. Murray, 612 2 Va. Cas. 504, as to *render any discussion upon the subject wholly unnecessary. In that case upon a motion to quash the indictment, among other grounds, upon objection taken to the warrant of commitment, the General court pronounced the opinion, "that even if the warrant of commitment were bad in the particular adverted to, it would be no ground to quash the indictment; because the indictment charges the prisoner with an offence for which he had been previously examined: And whether the original mittimus was legal or not; yet clearly, after he had been remanded to jail by the examining Court, his second commitment was entirely regular." The principle of that decision is not at all varied, because of any subsequent amendments of the law in chap. 204, Code of 1849, relating to arrest, commitment and bail. It was not error, therefore, in the refusal of the Court below to admit the pleas, or in the refusal to quash the indictment, even supposing the grounds stated for quashing were established by proper proofs, whatever might be in such cases the proper proofs; but in this case no proof at all was offered to sustain the grounds or to defer the proceedings, as was asked for upon the indictment.

The fourth error insisted upon is the setting aside as a juror James M. Twyman.

When, upon the Commonwealth's challenge, one of the venire is erroneously excluded from the panel of the jury, the effect upon the trial is materially different from that produced by erroneously overruling the prisoner's challenge to a venireman. In the former case the exclusion of a particular man from the jury does not throw any obstacle in the way of empaneling an impartial jury of qualified jurors. The effect is only to set aside one alleged to be disqualified, and to put in his place one that is qualified. This exclusion and substitution can in no wise affect the fairness and impartiality of the trial; because the trial is still had before a jury all the members of which are free from exception.

613 Not *so, in the other case. Then a disqualified juror is imposed upon the accused. He has not been tried by twelve qualified jurors as the law entitled him; and the disqualification of the juror, thus imposed upon him, vitiates the verdict. Overruling his challenge, therefore, is a

just ground of exception on his part; and he is allowed to complain of the error, because he has thereby been aggrieved. He has not been tried as he was entitled to be, by twelve duly qualified jurors. But in the other case, notwithstanding the exclusion complained of of one of the venire, he has had all that any prisoner can be entitled to demand, a fair and impartial trial before twelve jurors, free from all exception. And again if the exclusion of the venireman upon the Commonwealth's challenge be a matter of exception and a ground of error on the part of the accused, how can the supposed wrong that the error has inflicted upon him be repaired? It is only upon reversal of the judgment to award a new venire facias; not that he may have the excluded venireman empaneled on his jury, but that he may again be tried by twelve qualified jurors; in other words that he may have another trial, such precisely in all respects, as that fair and impartial trial before a jury free from exception, that he has already had. Even if we could suppose that the law entitles him in any sense to an election of his jurors out of the panel of the venire, so that the Judge ought not arbitrarily to deprive him of it, yet if he has enjoyed the benefit of the great object of all trials, his wrong can at most amount only to *damnum absque injuria*. We are strongly disposed to think that the exclusion of a venireman upon the Commonwealth's challenge, as stated in this record, ought not to have been allowed as a matter of exception, or to be entertained as error. Henry's Case, 4 Humphr. R. 270, (Tennessee,) and Arthur's Case, 2 Dev. R. 217, (N. Carolina,) are strong to support these views of the Court. The remarks made by

614 Henderson, *Ch. J., in the latter of these cases are exceedingly forcible.

But was there any error in excluding Twyman from the jury? This venireman, "being called and sworn, stated that he had not heard any of the evidence, nor any report of it; but from what he had heard spoken of in the case in the neighbourhood, he had formed an opinion to a certain extent." Thereupon "the Court asked him if there was partiality or prejudice on his mind for or against the prisoner? He replied that he could not say there was any, but if any, it was in favour of the prisoner." Now, as to the opinion stated upon this examination, this Court upon the principles herein afterwards stated, does not think that such opinion as it is presented in the bill of exceptions, could furnish a ground for the Commonwealth's challenge. But the interrogatory, propounded by the Court, seems to be upon a matter distinct from the formation of a preconceived opinion; it is in regard to his feelings. It might be a question deserving grave consideration whether any degree of favour towards the accused, however doubtfully felt or expressed, ought not to exclude the juror upon the Commonwealth's challenge from sitting upon the jury; because if it should not, the correlative challenge on the part

of the prisoner, because of a prejudice similarly felt, might be forestalled in all cases hereafter, and precluded by our decision. That point is therefore waived, to consider another ground of challenge for cause on the part of the Commonwealth. Upon further interrogation by the Commonwealth's attorney, Twyman "stated that he had conscientious scruples about the propriety of capital punishment, and was opposed to it. He was then asked by the Commonwealth's attorney whether if the testimony in the cause proved the prisoner to be guilty of murder in the first degree, he would convict him of it; he replied

that he did not know. He was there-
615 upon challenged for *cause by the Commonwealth, and the challenge sustained. No case has been found in the English books, deciding the question upon this last mentioned matter of conscientious scruples, as a cause of challenge for the crown. It is not often that the crown, according to the English practice under their statutes, is put to the necessity of shewing cause of challenge. The postponement of the cause of challenge and setting aside the jurors excepted to by the crown, until the panel is entirely gone through without obtaining a qualified jury from the rest of the venire, operates generally, perhaps in all cases, as a sort of peremptory challenge by the crown, though it be restricted to challenge for cause only. In New Hampshire in a case of misdemeanor, *Pierce v. State*, 13 New Hamp. R. 555-6, and in Pennsylvania, in a case of murder, *Commonwealth v. Lisher*, 17 Serg. & Rawle 155; such cause of challenge, independent of statute, has been allowed. A recent provision in a statute in Virginia, Code of 1849, ch. 208, § 8, declares that "any person whose opinions are such as to prevent his convicting any one of an offence punishable with death, shall not be allowed to serve as a juror on a trial for such offence." Now what is a conscientious scruple, as spoken of by the venireman, but an opinion, and more than an opinion. For it is not merely a speculation established in the mind, but it has pierced into the conscience and fastened itself there, as a scruple to regulate his life and actions, and stirring opposition to the propriety of capital punishments which had been enacted by law. And so deeply rooted was this conscientious scruple opposed to a legal punishment, that he did not know whether even the sacredness of the oath to decide in his verdict according to the evidence, could overcome this conscientious scruple. Was this opinion or scruple of such influence as to "prevent" him from "convicting the prisoner?"

The Court could not know; and the
616 juror himself, *according to his examination, did not know that the evidence proving murder in the first degree, or his loyalty, or the obligations of the oath to find according to evidence, would control or overcome the influence of his conscientious scruples. Such being the state of the juror's mind, it was most proper to regard

him as excluded by the spirit and even by the terms of the provision of the act referred to, from serving as a juror.

The 5th error assigned is the refusal of the Court to set aside as a juror Henry Huffman.

We are again brought to the consideration of the question of the disqualification of veniremen to be sworn as jurors, in consequence of their preconceived impressions or opinions, in regard to the crime or to the accused to be tried. To secure, as far as possible, the impartiality of jurors, such only should be empaneled as will strictly decide, according to the proofs offered at the trial, and according to them alone. Whatever considerations may have recommended juries of the vicinage, it is, if it were practicable, desirable that the men constituting the jury should never, previously to the trial, have heard of the offence or the offender.

When the venireman is called before the Court and offered as a juror it seems to be a fair presumption that he has intelligence to know his duty and integrity to perform it; and that he is under no influences impelling him to do wrong. That presumption is not less fair and reasonable though it should be deemed proper to test the state of his mind and of his feelings in regard to the matter to be tried through the more searching detection of an examination upon oath. If there be no extraneous proofs offered as in this case, we are bound, according to every principle of justice and of law, to credit the disclosures which he makes, as to his own belief of the state of his mind, which can only be known to himself; and not to disbelieve an unimpeached witness, made a witness, not

617 by his own act but by the act of *the Court, and who is subjected to those sanctions of truth, the most solemn that can be applied to the consciences of men. Where no positive inconsistencies appear in his examination, suspicion should not be indulged in unnecessarily creating them. At the same time, that there should be no overstrained efforts to overlook inconsistencies, the whole of the examination should receive a candid and a reasonable construction. If there be no irreconcilable inconsistencies discovered, then there is a concurrence of presumption and of testimony which should overrule and silence every objection to the qualification of the juror.

When therefore the juror states, as he does in this case, "that he had no prejudice nor partiality for or against the prisoner; and he believed he could give the prisoner a fair and impartial trial according to the evidence that should be given in," we are bound so far to regard that to be true, which he has so stated. The credit paid to that statement must be conclusive, unless repelled by other parts of the examination, that may conflict with and disprove it. Is there any such conflicting disclosure made by the juror?

He states "that he had formed an opin-

ion." It is not expressly stated the extent of that opinion: whether it was an opinion extending to the whole case, in all its facts and circumstances as it would be expected to be submitted to the jury upon the trial, or extending only to some part of the case: nor does he expressly describe the nature of that opinion, in the power and influence that it would be likely to have over his judgment, as being a decided or substantial opinion: nor does he state that its power and influence, whatever they might be, had derived any adventitious strength from the circumstance, that the opinion had been expressed to others. There are infinite shades of opinion between that degree in which it is an impression too slight to

restrain the free exercise of the judgment *when called to a graver consideration of the case; and that degree amounting to a deep settled conviction. When it is stated merely that an opinion has been formed, in which of these classes would a fair presumption place that opinion, in its operations and its influence upon the judgment of a man who swears, notwithstanding the formation of that opinion, "he believes he can give the prisoner a fair and impartial trial, according to the evidence that should be given in?" If it was of the latter kind, the juror must have been perjured in the statement which he makes of his impartiality, or infatuated into an unnatural dullness, in the statement which he makes of his belief. It would seem therefore a reasonable presumption, to place the opinion alluded to in the former class, and thereby give consistency to this sworn examination in all its parts: and moreover as the juror felt conscious that, notwithstanding the opinion, he retained the power to give an impartial trial to the case made out according to the evidence that should be given in, it would be fair to presume that the opinion was limited in its extent; or was based, not upon the facts and circumstances which the trial would develop, but upon facts and circumstances he had heard that might be materially different. So that the opinion could not be regarded as one formed of the true case, which he may not yet have heard; and as to which therefore his judgment had not as yet been compromised.

In the anxiety of the Courts to select impartial and upright jurors, a test has been applied to ascertain the extent and nature of the preconceived opinion, by ascertaining what had been the sources of the information which had given birth to the opinion: Not that a decided or substantial opinion, when stated to be decided and substantial, would be reduced to any thing less, in the consideration of the Court, according to the means of information.

619 Such an opinion, howsoever *formed, with or without any information, will always be a disqualification of a juror. But that state of opinion is not to be presumed, where such is not stated to be the case; for such a prejudication of the criminality of a fellow being is not consistent with ordi-

nary humanity, and is regarded as offensive to the law. But where the nature and influence and extent of the opinion are undisclosed, the test alluded to, may very properly be referred to. If the opinion of the juror was formed upon hearing the evidence upon some former occasion, it would be in vain to believe otherwise than that it was a decided and substantial opinion. He had had the facts and circumstances of the case, the credibility of the testimony and every thing materially tending to produce a fixed judgment in the case, all of them, under consideration, and the decision in which they resulted in his own mind would not be likely to be changed upon a repetition of the same proofs at the trial upon which he was to be placed; nor should the preconceived opinion be otherwise regarded, when it was formed upon conversations with the prosecutor or the witnesses, or upon reports communicated to him of what had been testified or would be testified, and a full credence had been given to the statements, through whatever channel so made to him. In making these enquiries into the state of the juror's mind, the degree of credence which he reposed in the persons from whom, or through whom, he has derived the information leading to his decision, is also a consideration which must always be entitled to much weight. But in the present case the juror swears "that he had not heard any of the evidence; nor had he heard any report of it from those who had heard it; nor does he say that he had placed any credence in the truth of what he had heard. But the juror may have received impressions upon his mind by means much less authentic than those that have been just alluded to. He

620 may not have been informed or *made up his opinion upon the whole case, but upon a statement of what might be entitled to be regarded by him as a material part of it. He may be ignorant of other parts not yet disclosed to him. His mind may not have been exercised, or may not have had the opportunity of being exercised, either as to the case in full, or the credibility of those whence his information may have been derived. There is in every bosom an irrepressible casuistry, ever ready to exercise the judgment upon every representation of criminality; more especially in crimes of a deep atrocity, such as homicide, which seems instinctively to rouse all the faculties of the mind and the sensitiveness of the soul. Upon such occasions the minds and the feelings of none are more apt to be roused into the formation of opinions upon what they may have heard that is material in the case, than those who are the most intelligent, and discreet and upright, and, at the same time, the most discriminating; such as are of all the community, the most fit to sit in trial upon the criminal. They may upon the intelligence which they have received, have formed opinions on the case, and even strong ones, but they were formed upon the hypothesis of the case as it was presented to them. If

they are disqualified as jurors then those best qualified will be excluded from passing between the Commonwealth and the prisoner in cases where vindication of guilt or innocence will be most vital. Courts should be careful in laying down rules as to the qualification of jurors, which will throw jury trials and the administration of criminal justice, into the hands of the most senseless and ignorant and least competent to pronounce a just and legal verdict. A hypothetical opinion, though it may be a strong one, and upon whatever information formed, unless it be such as overpowers the mind with conviction, has never been considered as a disqualification. I say, unless

621 it overpowers the mind with conviction, because there may *be cases, as where the opinion has been formed upon listening to the evidence in the case upon another occasion; and there it would be vain to treat it as hypothetical. But when it is ascertained, either by the express declaration of the juror or by palpable implication from his examination, that the opinion is only hypothetical upon the truth of the matters which he has heard, (less authentic than such as has just been referred to,) then the juror is to be deemed not unfitted for the rendering a fair and impartial verdict. When the juror swears himself free from prejudice or partiality, and that he can give the prisoner a fair and impartial trial, is it an unreasonable presumption that the opinion he has formed, to whatever extent or in whatever degree, is no more than a hypothetical opinion?

We would not at all events be warranted in presuming more in this case, when it is stated in the examination of the juror "but from the rumour of the neighbours, he had formed an opinion." In *Armistead's Case*, 11 Leigh 657, it was held that "generally opinions founded on hearsay or common reports in the country ought to be regarded as hypothetical, or so slight as not to disqualify the person entertaining them; unless upon further examination, it should appear that this was not the true state of the juror's mind; but that he had been so inconsiderate and unjust, as upon insufficient evidence or no evidence at all, to have prejudiced the prisoner's cause: and then he is doubly unfit to be trusted with it! This principle was afterwards unanimously acted upon by this Court in the case of *McCune & others*, 2 Rob. R. 771.

Nor can we find anything in the further examination of the juror to shew that the above was not the true state of the juror's mind. The presumption that the opinion, founded on hearsay or common report of the neighbourhood, was merely a hypothetical opinion, is not repelled by the disclosure that the opinion was still existing

622 *upon his mind. An opinion "regarded as hypothetical or slight," does not become less so because it may be existing in the mind for six or seven months, or a year, or for any period. The continued existence of impressions upon the mind which do not in themselves amount

to disqualification, cannot become such by reason of their continuance on the mind.

Nor is it repelled, because the juror in speaking of the opinion so formed, and such, as it was so far upon the matters above noticed to be considered, said, "which he should stick to, unless the evidence should turn out to be different from what rumour had reported it to be." The mind that has formed an opinion, though hypothetical or slight, cannot be expected to relinquish that opinion, if upon a revision of the case, with better lights to guide the judgment, the facts and circumstances should exactly or materially correspond with those which made the first impression. The judgment is not on that account less impartial or more prejudiced, because the same opinion recurs when the same elements are presented for the formation of an opinion at the trial, as had given birth to the first opinion. The hypothesis or slight impression resting on the mind may have rested there without any prejudice or partiality, without any prejudication of the weight and credibility of the testimony or the inferences to be deduced from the facts and circumstances in all their combination and the variety of views of which they might be susceptible in the proceedings at the trial. Several cases have occurred where the jurors, entertaining hypothetical opinions, have stated that, if the evidence should correspond with what they had previously heard, their opinions would remain: Nevertheless they have not been held to be thereby disqualified on the ground that they would adhere or stick to their former opinion. But it is supposed that a stronger obstinacy of opinion is expressed when the juror says in this case that he will

623 stick to *his previous opinion, unless the evidence should turn out to be different from what it had been reported to be. But still the remark even in this shape, must be reasonably understood to imply that the juror's mind was not made up. For in the form in which the declaration of the juror is stated, it is fair to imply that if, e contra, the evidence should be different, he would adopt an opinion conformable with the testimony. We are however saved the necessity of considering critically the similar import of the two forms of expression. For in the case of *McCune & others* and also in *Moran's Case*, the statements made by the jurors as to their preconceived opinions, was in a form of expression the same, or similar to that in the examination of the juror in that respect in the present case. It is therefore considered that there was no error in admitting this juror.

The 6th error assigned in the petition is the overruling the application to set aside the verdict rendered by the jury.

On what ground this application was made, the bill of exceptions does not state, nor was any particular ground stated in the argument of the counsel in error. Indeed none, as all the facts appear in the bill of exceptions, can justly be stated as a

ground for such application. The jury have found the homicide to be murder in the first degree, and the Court ought not but upon the strongest objections to disturb their finding. Every fact stated by the Judge sustains the propriety of that finding; the previous grudge; the previous threatenings; the express malice; the deliberation and premeditation with which the deadly means of killing were provided by the prisoner; his coming with these deadly means to the house of the deceased, and his insults offered to him at his own door, as if to exasperate the deceased to an attack upon him, to justify or mitigate the killing upon which he had deliberated and premeditated;

624 these all shew a murder which upon the finding of *this jury this Court would have no warrant for pronouncing to be less than murder in the first degree; no, not even if the acts of the deceased as shewn in this case, under that resentment which was provoked by the prisoner, could be regarded as an assault upon the prisoner. Upon the whole record the Court can discover no error whatever committed by the Court below; and the Judges are unanimous in refusing the writ of error.

ESTILL, J., concurred in the opinion, except on the first ground of error stated in the petition. He was of opinion that the rejection of the special pleas in abatement was error, on account of which the writ of error should be awarded.

Writ of error refused.

Erskine v. The Commonwealth.

Commonwealth v. Erskine.

December Term, 1851.

1. Malicious Burning of Owner's House While in Possession of Another—Statute.—The malicious burning by the owner, of a house on his own land, the house being then in the legal occupancy of another, is a violation of the act of 1847-8, ch. 4, § 7, p. 99.*
2. Malicious Burning of Wheat—Statute.—The malicious burning of wheat threshed from the straw is not a violation of the 6th section of the same act.

The case is sufficiently stated in the opinion of the Court delivered by Field, J.

The defendant was indicted in the Circuit court of Ohio county at its May term 1850, for felony. The indictment 625 *contains seven counts. Upon that indictment he was tried and acquitted upon the 3d count. He was found guilty upon the other six counts, as to which the finding of the jury was special; and it is upon that finding that the questions we are called upon to decide arise. The verdict of the jury is in these words: "We the jury find the defendant guilty under the first and fourth counts of the indictment, pro-

*The provisions of the 6th and 7th sections of the act are given in the opinion of the Court.

vided the Court shall be of opinion that he can rightfully be so found guilty on both or either of the said counts, under evidence proving that the out house, or old out house, mentioned or described in the said counts, was not adjoining any dwelling house, nor under the roof of any, nor in the curtilage of any, but was in the field, isolated, separate and apart from any dwelling house; there being no dwelling house on the farm at all. We find him guilty also under the second and seventh counts of the indictment, provided the Court shall be of opinion that the said counts or either of them are good and sufficient in law, and not to be disregarded by the jury. We further find if the prisoner can be convicted and judgment given against him as aforesaid, on all or any of the said counts, that he be fined five hundred dollars, and imprisoned three months in the county jail. But if he cannot be so rightfully convicted, and judgment be given against him on all or any of the said counts, then we find him not guilty on the same. We further find the prisoner guilty of the fifth and sixth counts, if he can be lawfully convicted under the said fifth and sixth counts of a misdemeanor, and assess his fine at one hundred and twenty-five dollars. And we find the prisoner at the bar not guilty upon the third count of the said indictment." Upon the verdict as to the 1st, 2d, 4th and 7th counts of the indictment, the Court rendered judgment against the prisoner for the fine and imprisonment so ascertained by the jury. Upon the verdict of the 626 jury as to the fifth *and sixth counts the Circuit court adjourned these questions to this Court for decision:

- "1st. Whether the Court ought to give judgment for the Commonwealth as for a misdemeanor upon the said finding of the jury upon the said fifth and sixth counts of the indictment; or shall arrest the same.
- "2d. What judgment ought to be given on the said finding upon the said fifth and sixth counts."

To the judgment rendered by the Circuit court upon the verdict upon the 1st, 2d, 4th and 7th counts, a writ of error has been awarded by a Judge of this Court; and thus the whole case comes before us. Upon looking into this record we are clearly of opinion that the 7th count is good; and this relieves us from the necessity of taking any notice of the 1st, 2d and 4th: For whether they are good or bad, is rendered wholly immaterial by the finding of the jury, provided the 7th is good. The 7th count of the indictment charges that the said John Erskine on the 30th day of February in the year of our Lord eighteen hundred and fifty, between the hours of ten o'clock in the night of the same day, with force and arms at the county aforesaid, one building on a farm of the said John Erskine situated in Ohio county aforesaid, and which was then and there in the occupation and possession of one Ely Prettyman, and of the value of sixty dollars, feloniously and maliciously did set fire to, and the said

building then and there situate, by such firing as aforesaid, feloniously and maliciously did burn and consume, against the statute in such case made and provided, and against the peace and dignity of the Commonwealth.

The statute under which this indictment was made, is the 7th section of the 4th chapter of the Criminal Code, in the Session Acts of 1847-8, p. 99. After specifying in previous sections, dwelling houses, jails, prisons, churches, town houses, colleges, academies and other buildings erected for public use, banking houses,

627 *ware houses, store houses, manufactories and mills, barns, stables, corn houses and tobacco houses, the 7th section provides that any free person who shall maliciously burn any building whatsoever, not mentioned in this act, if the value thereof be one hundred dollars or more, shall be punished by confinement in the penitentiary for not less than three nor more than ten years. And if the value be less than one hundred dollars, by confinement in the penitentiary for not less than one nor more than three years, or in the discretion of the jury, by confinement in the jail not exceeding twelve months, and by fine not exceeding five hundred dollars. The house in question appears to have been situated upon the farm of the prisoner. But it was at the time of being burnt in the occupancy and possession of another man, who had a qualified ownership therein, and therefore the burning of that house maliciously by the prisoner was a violation of the said 7th section, and renders him liable to prosecution and punishment under that law. We are therefore of opinion that there is no error in the record and the judgment is to be affirmed.

The two adjourned questions arise upon the special finding of the jury upon the 5th and 6th counts of the indictment. The 5th count charges a felonious, wilful and malicious burning at night of a large quantity of hay and wheat, threshed and cleansed, of the value of 165 dollars, in a barn situated on a tract of land belonging to the said John Erskine, but then in the occupancy and possession of Ely Prettyman. The 6th count charges a burning at night, feloniously, wilfully and maliciously 165 bushels of wheat, threshed and cleansed, of the value of 160 dollars, of the goods and chattels of Ely Prettyman, in a building situated on a tract of land belonging to the said Erskine in the occupancy and possession of Prettyman. These two counts were based upon the 6th section of the same law

628 which makes the malicious *burning of a stack of wheat, barley, oats, corn, or other grain, or any stack of fodder, straw or hay, felony. But as the wheat and hay charged in these counts to have been burnt were not in stacks, the burning was not a felony under the 6th section. The jury convicted the prisoner not of the felony, but of a misdemeanor, in burning the wheat and straw. This conviction upon an indictment under the statute for punishing

wilful trespasses might have been proper; but the counts above referred to are not good under that statute. We are therefore of opinion and respond in answer to the questions adjourned, that judgment should not be entered for the Commonwealth upon the finding of the jury upon the 5th and 6th counts of the indictment; but should be arrested, and judgment entered thereon for the prisoner: which is ordered to be certified, &c.

Commonwealth v. Pickering.

December Term, 1851.

Perjury — Indictment — Averment — Jurisdiction.*—An indictment for perjury must shew that the evidence which the defendant gave was material. And therefore if the evidence which the defendant gave before the grand jury is not shewn clearly on the face of the indictment to relate to an offence committed within the county, the indictment is defective.

This was an indictment for perjury in the Circuit court of Wirt county against Nelson A. Pickering. The defendant demurred to the indictment, and the Circuit court with his consent adjourned to this Court eight questions. Of these the sixth was, Does the materiality of the defendant's evidence given before the grand jury sufficiently appear in the indictment?

629 *And the eighth was, What judgment ought to be rendered in this case upon the demurrer to the indictment?

The indictment is stated in the opinion of the Court.

The Attorney General, for the Commonwealth.

Fisher, for the defendant.

LEIGH, J., delivered the opinion of the Court.

The defendant was indicted in the Circuit court of Wirt for perjury in giving evidence to the grand jury empaneled in that Court. The defendant demurred to the indictment, and upon the argument of the demurrer, the Court adjourned eight questions to this Court.

The indictment alleges that on the day of 1850, a grand jury was summoned and empaneled for the county of Wirt, and whilst they were examining and investigating the violations of the laws of the Commonwealth committed within the county, the defendant appeared in open Court, and at his own instance was sworn

*Perjury—Indictment—Averment of Jurisdiction.—The principal case is overruled in *Fitch v. Com.*, 92 Va. 824, 24 S. E. Rep. 272, which holds that, under sec. 3993, Code 1887, it is now unnecessary to set forth, in an indictment for perjury, the facts necessary to show the jurisdiction of the court over the case upon the trial whereof the alleged perjury was committed, or expressly to aver it. See monographic *note* on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

by the Court that the evidence he should give to the grand jury should be the truth, the whole truth and nothing but the truth, the Court having then and there competent authority to administer the said oath; and that whilst the defendant was being examined by the grand jury it then and there became material to enquire whether Alfred Fought Esq., (a justice of the peace for the Commonwealth of Virginia in and for the county of Wirt,) was present and was called upon to suppress a fight between the defendant and one John Hickman; and the defendant being sworn as aforesaid, did then and there in the said county before the grand jury, falsely, wilfully and corruptly depose, swear and testify that Alfred Fought Esq., (a Commonwealth's justice of peace for the county aforesaid,) was present and was called to suppress a fight be-

630 between *the defendant and John Hickman, and that Fought did then and there refuse to assist in quelling the said fight: Whereas the said Alfred Fought was not present at the time and place the said fight took place, and was not called upon to suppress the fight.

We shall first consider the question which submits to us, whether the materiality of the defendant's evidence given before the grand jury sufficiently appears in the indictment. The criminal jurisdiction of the Circuit court of Wirt was limited to offences committed in the county: and the Court had no authority to swear a witness to give evidence before the grand jury of the said Court of an offence committed out of the county. It was therefore necessary to shew on the face of the indictment that the offence of which the defendant gave evidence, was committed within the county: otherwise it would not appear that the Court had jurisdiction of the offence, and the evidence could not be material, as no evidence given in a Court having no jurisdiction to determine the case can be material. This indictment does not allege that the offence of which the defendant gave evidence was committed within the county of Wirt. It alleges that this offence was committed at the time and place at which the fight took place, but where the fight took place is nowhere stated. It might possibly have taken place in Wirt, but if the indictment shews on its face only that the evidence might have been material, it is not sufficient: it must shew that it was material. For this reason we are of opinion that the materiality of the evidence given by the defendant does not sufficiently appear in the indictment.

There are other objections to this indictment. It does not appear what was the question the grand jury was examining into, or for what purpose the examination was made. We may conjecture that it was made to ascertain whether Fought

631 either as a justice or *individual had been guilty of a neglect of duty, but whether as magistrate or individual we cannot with any certainty say. He is in the indictment called a justice of the peace,

and it may be that the enquiry was whether he as a justice had been guilty of neglect of duty; but the allegation that he was a justice of the peace is made in such a manner that it does not certainly appear that he was a justice at the time the fight took place. If he was proceeded against as an individual, the indictment is defective for not shewing that he had been called on by any person who had authority to call upon him. For this uncertainty as to the question before the jury, the indictment may be bad, but we have not deemed it necessary to examine this question with much care, as the judgment must be entered for the defendant for other defects. One of the Judges however is decidedly of opinion, that the particular enquiry before the jury and the object of it, ought to have been set out in the indictment in order that the Court might see whether or no the evidence of the defendant was material.

In answer to the sixth and eighth questions adjourned, this Court is of opinion and doth decide, that the materiality of the evidence given by the defendant to the grand jury does not sufficiently appear in the indictment; and that judgment on the demurrer ought to be entered for the defendant. And this Court does not deem it necessary to decide any other of the questions adjourned: Which is ordered to be certified to the Circuit court.

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***Commonwealth v. Kelly.**

December Term, 1851.

1. **Roads—User—Effect.**—The mere user of a road by the public for however long a time, will not constitute it a public road.
2. **Same—Permission to Pass over—Regarded as License.**—A mere permission to the public, by the owner of land, to pass over a road upon it, is, without more, to be regarded as a license; and revocable at the pleasure of the owner.
3. **Same—Dedication—How Accepted.***—A road dedicated to the public must be accepted by the County court upon its records, before it can be a public road.
4. **Same—When Inferred to Be Public—Case at Bar.**—If a County court lays off a road before used, into precincts, or appoints an overseer or surveyor for it, thereby claiming the road as a public road; and if after notice of such claim the owner of the soil permits the road to be passed over for any long time the road may be well inferred to be a public road.

The case is sufficiently stated in the opin-

***Roads—Dedication.**—For the principles governing this question, see the principal case cited in *foot-note* to *Talbott v. R. & D. R. Co.*, 31 Gratt. 685; *Taylor v. Com.*, 29 Gratt. 795, and *note*; *City of Richmond v. Stokes*, 31 Gratt. 716; *Harris v. Com.*, 30 Gratt. 833, and *note*; *Buntin v. Danville*, 93 Va. 204, 24 S. E. Rep. 899; *Gaines v. Merryman*, 95 Va. 663, 29 S. E. Rep. 736; *Ball v. Cox*, 29 W. Va. 409, 1 S. E. Rep. 675; *Boyd v. Woolwine*, 40 W. Va. 287, 21 S. E. Rep. 1031; *Yates v. West Grafton*, 33 W. Va. 518, 11 S. E. Rep. 10. See 1 Min. Inst. (4th Ed.) 140; 9 Am. & Eng. Enc. Law, title "Dedication," 20.

ion of the Court which was delivered by Leigh, J.

At the Circuit court of law and chancery held for the county of Culpeper on the 4th of June 1849, John P. Kelly was indicted for erecting and placing a gate and gate posts across a public road and highway in the county of Culpeper. The defendant pleaded not guilty; and the jury rendered a verdict against him.

The facts proved on the trial were, that there was no record establishing the road as a public road and highway, nor was there any record that the County court regarded the road as a public one, either by laying it off into precincts, by appointing surveyors of it or otherwise: on the contrary, there was parol evidence which proved that no surveyor of the road had ever been appointed, and that the road had never been worked upon by any hands, public or private, but on one occasion, when a certain Staunton Slaughter, on the part of the road which run through his land, with his own hands worked on the road at a steep
633 hill near his mill; and *placed some saw mill slabs in a wet place in the road. That the road had existed for forty or fifty years, but that the owners of the soil through which it was conducted down to a period of about twenty-five years before the obstruction mentioned in the indictment, at their will and pleasure, changed the road; but that there had been no such change for between twenty and twenty-five years before the obstruction by the defendant. And it was proved that there was no reason to believe that any of the records of the County court of Culpeper had been lost or destroyed. This being the evidence, the defendant asked the Court to instruct the jury, first, that they ought to find for the defendant on account of the absence of record evidence that the road had been accepted by the County court or by the county; 2dly, that they ought to find for the defendant, unless there was something in the evidence, besides the mere use of the road by individuals, no matter how general, to satisfy them that it had been accepted by the County court or by the county as a public road; and 3dly, that they ought to find for the defendant, unless they were satisfied by the evidence that the road had been dedicated by the owners of the soil to the public use as a highway, and had been accepted as a highway by the general public of the county, and not by the local public only of a small neighbourhood around it. The Court refused to give these instructions; but instructed the jury, that a road to become a highway by dedication and long use must have been accepted by competent authority; of which dedication and acceptance they were to judge from all the circumstances before them. The defendant excepted to the opinion of the Court for refusing to give the instructions asked for, and for the instruction given to the jury.

At first the Court rendered a judgment against the defendant for the fine assessed against him, but subsequently on the

motion of the defendant to award him
634 *a new trial, set aside the judgment and adjourned the motion to this Court.

The question adjourned is an important one, since to decide it, it may be necessary to consider whether from user alone both a dedication and acceptance may be inferred. This question does not seem to have been directly submitted to this Court; nor have we met with a case in which the question has been before the Court of appeals. In *Brander v. The Justices of Chesterfield*, 5 Call 548, Judges Tucker and Roane expressed opinions that as public roads are established by matter of record, matter of record only could be admitted to prove a road a public road; and in *Clarke v. Mayo*, 4 Call 374, Lyons, J., said there could be no public road unless it appeared of record. As in this state the County courts are alone authorized to establish public roads, we would have considered these opinions as settling the law, but for the cases decided in England by which roads have been established from long use.

By the cases to which we have alluded, a road may become a public one by reason of a dedication of a right of passage to the public by the owner of the soil and an acceptance by the public. But a dedication without an acceptance will not establish a public road. Best on Pres. 47 Law Libr. 133, side paging. We have no objection to this proposition: it is indeed sustained by the case of *Clarke v. Mayo*, 4 Call 374. But the cases in England go farther, and seem to decide that from mere user both the dedication and acceptance may be inferred; as if a man open his land so that the public pass over it continually, after a very few years the public will acquire a right of way, unless some act be done to shew that he intended only to give a license to the public to pass over the land and not to dedicate a right of way to the public. Best on Pres. 47 Law Libr. 133. To this proposition we cannot give our assent, and from

the wide difference in the state of the
635 *two countries, we do not think that the decisions of the English Courts ought to have much weight with the Courts of this state on questions upon the establishment of highways. In England the price of land is high and owners prohibit with great care all trespasses upon it. And in that country it may be that it rarely happens that an owner permits a free passage over his land, without intending to dedicate it as a road to the public; and indeed, if a man with a knowledge of the decisions of the Courts, should permit a free passage over his land, the fair inference would be that he intended to dedicate it as a public road. In this country the price of land is not high; nor do owners of it guard against trespasses on it with the same care; and it is known to all who have lived in the country, that until a recent period, owners frequently permitted roads to be opened through their forests and other lands not in cultivation without the least

intention of dedicating these roads to the public. Many roads so opened remain for long periods, and indeed they are not often closed until the owners have occasion to cultivate the land through which they run. Even in England there must be an intention to dedicate the road, there must be the animus dedicandi, of which the use is the evidence and nothing more. Best on Pres. 47 Law Libr. 135. And there the use may furnish evidence, for aught we know, of an intention to dedicate. A permission to pass over land may prove an intention to dedicate or a mere license revocable at the will of the owner; and we think that the mere permission to pass over land ought in this state to be regarded as a license. For why shall we infer that an individual makes a gift of his property to the public from an equivocal act, which equally proves an intention to grant a mere revocable license? The public is not injured by this view of the subject. It has the accommodation of

the road as long as the license continues, and after *the license is revoked, 636 the road may be made public if the public convenience requires it, by making compensation to the owner.

It is clear that there must be not only a dedication, but an acceptance of the road. What is an acceptance? Is the mere passing over the road by individuals an acceptance? If so what number of persons passing over it will amount to an acceptance—ten, fifteen, twenty, or what number? It is obvious, if the acceptance depends upon the number of persons passing over the road, there will be often great uncertainty, whether the road be public or not, which may give rise to much troublesome litigation. To guard against this uncertainty and litigation, the right of acceptance ought to be vested in some public body. And we think that by the laws of this state this right is vested in the County courts. They alone are authorized to establish public roads, and they are to see that they are kept in repair. If we are right in this opinion, the acceptance of a public road must be by record; for the County courts can speak only by record. We do not mean that there must be a formal acceptance entered on the records of the Court. Any entry shewing that the Court regards the road as a highway will be sufficient, as laying it off into precincts and appointing surveyors or overseers over it and the like.

We do not wish to be understood as deciding that a road may not become a public road in any other manner than by the formal proceeding required by our laws. On the contrary we are of opinion that if the County court lays off a road, before used, into precincts, or appoints an overseer or surveyor, thereby claiming the road as a public one, and if after notice of such claim the owner of the soil permits the road to be passed over for any long continuance, the road may be well inferred to be a public one. All that we mean to say is, that a mere permission to pass over a road 637 is *without more, to be regarded as

a license, and that the acceptance of a road must be by the County court and proved by record.

We desire it to be understood that this opinion applies to roads in the country only, and not to streets and alleys in towns. As to them the acts of the corporation officers may have the same effect as the acts of the County courts. Nor is this opinion to apply to roads laid off by the owner of the soil, previous to a sale of the lands in parcels and with the view of enhancing the sale. Such roads, though not public roads, cannot be closed by the owner of the soil.

The judgment of the Court is: This court is of opinion and doth decide that a new trial ought to be awarded: Which is ordered to be certified to the Circuit court.

Thompson v. The Commonwealth.

December Term, 1851.

1. New Trial—After-Discovered Evidence—Nature of.*—

After-discovered evidence, in order to afford a proper ground for a new trial, must be such as reasonable diligence on the part of the party offering it, could not have secured at the former trial; must be material in its object, and not merely cumulative and corroborative or collateral; and must be such as ought to be decisive, and productive, on another trial, of an opposite result on the merits.

2. Same—Same.†—Where the sole object and purpose of the new evidence is to discredit a witness on the opposite side, the general rule is, subject to rare exceptions, to refuse a new trial.

3. Venireman—Unqualified—When Objection Too Late;—An objection to a venireman, that he is not quali-

*New Trial—After-Discovered Evidence—What Four Things Must Concur.—To obtain a new trial on the ground of after-discovered evidence, four things are necessary: 1st. The evidence must have been discovered since the former trial. 2nd. It must be such as reasonable diligence on the part of the party asking it could not have secured at the former trial. 3rd. It must be material in its object, and not merely cumulative and corroborative, or collateral. 4th. It must be such as ought to produce, on another trial, an opposite result on the merits. For this proposition, the principal case was cited in *Baccigalupo v. Com.*, 33 Gratt. 815; *Whitehurst v. Com.*, 79 Va. 561; *Field v. Com.*, 89 Va. 694, 16 S. E. Rep. 865; *Gillilan v. Ludington*, 6 W. Va. 145; *Carder v. Bank of West Virginia*, 84 W. Va. 41, 11 S. E. Rep. 717; *State v. Hobbs*, 37 W. Va. 894, 17 S. E. Rep. 885; *foot-note* to *Brown v. Speyers*, 20 Gratt. 236; *foot-note* to *St. John v. Alderson*, 32 Gratt. 140. See also, *Read v. Com.*, 23 Gratt. 924, and cases collected in *foot-note* to that case.

†Same—Same.—Furthermore, where the sole object and purpose of the new evidence is to discredit a witness on the opposite side, the general rule is, subject to rare exceptions, to refuse a new trial. *Gillilan v. Ludington*, 6 W. Va. 145; *State v. Bet-sall*, 11 W. Va. 738; *Hall v. Lyons*, 20 W. Va. 423, 1 S. E. Rep. 592; *Carder v. State Bank*, 84 W. Va. 41, 11 S. E. Rep. 717, all citing the principal case.

‡Jurors—Unqualified—When Objection Too Late.—See *foot-note* to *Polindexter v. Com.*, 33 Gratt. 708, where principal case is cited.

fied according to law, comes too late after he is sworn to try the issue.

4. **New Trial—Separation of Jury—Case at Bar.**—A juror called by the prisoner as a witness, states that on a certain morning during the progress of the trial, before the rest of the jury had risen, he rose, dressed himself and went down stairs to the pavement before the door of the hotel where the jury were lodged for the night, for the purpose of meeting with a passer-by to send a message to his family; and after remaining there about five minutes and seeing no one passing he returned to the rest of the jury. **HELD:** That the only proof of separation of the jury being that of the juror, the prisoner's witness, who negatives all abuse, tampering or improper influence, the act of the juror is not sufficient grounds for setting aside the verdict and granting a new trial.

5. **Same—Same—Same.**—In the progress of a trial which lasts several days, upon the adjournment of the Court at night, the jury are committed to the sheriff to be kept until next day. The most convenient and suitable accommodation which can be provided for the jury is in the third story of a large hotel, where they are placed in five different rooms opening upon a common passage which communicates with the street below by flights of stairs, the doors of their chambers being

§**Separation of Jury—Does Not Necessarily Vitate Verdict.**—In *State v. Harrison*, 36 W. Va. 729, 15 S. E. Rep. 982, it is said: "Separation merely does not necessarily annul a verdict; it does so only *prima facie*. Two Virginia cases are spoken of as holding that separation *per se* annuls the verdict. —*McCaul's Case*, 1 Va. Cas. 371; *Overbee's Case*, 1 Rob. (Va.) 756. Perhaps I may add *Wormley's Case*, 8 Gratt. 712, though *JUDGE RIVES*, in *Philips' Case*, 19 Gratt. 541, says, perhaps correctly, that it is not to be interpreted as so holding. In none of these cases is there any reasoning by the court, except in *McCaul's Case*, and in it *JUDGE NELSON*, after saying that the one view of the subject was that the law required the jury to be kept entirely inaccessible, so that communication with them would be impossible, and the other view was that mere separation, unless it be proved that there has been some conversation or tampering with a member of the jury, shall not vitiate a verdict, and there must be proof to work this effect, disclaims a decision of the general principle, saying the court was not called on to decide between the two views, and would decide only whether the separation in that particular case should overthrow the verdict. But later and well-considered cases hold that mere separation will not *per se* impair a verdict. *State v. Cartright*, 20 W. Va. 82; *State v. Robinson*, Id. 718; *Thompson's Case*, 8 Gratt. 637; *Philips' Case*, 19 Gratt. 485; *McCarter's Case*, 11 Leigh 633. Even in the old *Case of Thomas*, 3 Va. Cas. 479, the doctrine that separation *per se* is fatal to the verdict is repelled and, what is pointedly applicable to this case, it was held that 'the bare possibility of tampering with the jury is not sufficient to set aside a verdict.' " To the same effect, see the principal case cited in *Philips v. Com.*, 19 Gratt. 540.

"It is well settled, that where some of the jurors separate from the rest for an innocent purpose, being accompanied by an officer, while the others are left in charge of another officer, both officers being duly sworn and charged to keep the jury, the

unlocked during the night, the jurors being unwilling to have them locked from apprehension of fire during the night, and there being no doors or other fastenings at either end of the passage. **HELD:** This is not a separation of the jury, for which the prisoner is entitled to a new trial.

6. **Same—Same—Same.**—In the morning before the Court meets, the jury are walking out accompanied by the sheriff, for relaxation and exercise, and pass the boundary line separating the county in which the trial is progressing from an adjoining county, and remain in the adjoining county a few minutes, but there is no separation, conversation or communication with any one by any of the jurors. **HELD:** This is not a separation of the jury for which the prisoner is entitled to a new trial.

7. **Same—Misconduct of Jurors—Averaging Verdict.**—A jury in a criminal trial concur in opinion as to the guilt of the prisoner, but differ as to the length of time for which he should be sentenced to the penitentiary; and they agree that each one shall state the time for which he will send him to the penitentiary and that the aggregate of these periods divided by twelve shall be the verdict. After it is done they strike off the odd months and all agree to the verdict understanding what it is. **HELD:** This is not misbehavior in the jury for which the verdict will be set aside and a new trial awarded.

8. **Misconduct of Jurors—Drinking Spirituous Liquors.**—It is not misbehavior in a juror between the adjournment of the Court in the evening and its meeting next morning, to drink spirituous liquors in moderation.

9. **New Trial—Misconduct of Jurors—Drinking Spirituous Liquors at Invitation of Commonwealth's Witness.**—A medical witness for the Commonwealth being accidentally present at the hotel when the jury are brought there by the sheriff to be lodged

separation will not vitiate the verdict. *Massey Thomas' Case*, 3 Va. Cas. 479. See *Thompson's Case*, 8 Gratt. 637. And this is in accordance with every day's practice." *Trim v. Com.*, 18 Gratt. 983.

As to the separation of the jury, see the principal case cited also in *State v. Cobbs*, 40 W. Va. 725, 22 S. E. Rep. 812; *State v. Robinson*, 20 W. Va. 763. For further authority on this subject, see cases collected in *foot-note* to *Philips v. Com.*, 19 Gratt. 485; monographic *note* on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 733.

Verdict—Impeachment by Jurors.—In *Bull v. Com.*, 14 Gratt. 631, it is said: "In *Thompson's Case*, 8 Gratt. 637, the court waived the decision of the question as to the competency of the evidence of jurors to impeach or invalidate their own verdict (it not being necessary in that case to decide it), but took occasion to say, 'The question is now well settled in England against the competency, and the great preponderance of American authority is the same way.' " To the same effect, see the principal case cited in *Read v. Com.*, 22 Gratt. 924; *State v. Cartright*, 20 W. Va. 43; *Probst v. Braeunlich*, 24 W. Va. 360; *Elam v. Commercial Bank*, 86 Va. 96, 9 S. E. Rep. 498. See, further, cases collected in *foot-note* to *Bull v. Com.*, 14 Gratt. 614; *foot-note* to *Read v. Com.*, 22 Gratt. 925; *foot-note* to *Koiner v. Rankin*, 11 Gratt. 421; monographic *note* on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 733.

||**Misconduct of Jurors—Partaking of Intoxicating Liquors.**—In *State v. Greer*, 22 W. Va. 827, it is said:

for the night, invites the jury in the presence of the sheriff to drink with him, and some of them accept the invitation. *The act was inadvertent, but intended only as an act of courtesy, and it was all in the presence of the sheriff. This is not sufficient to set aside the verdict and award a new trial.

At the April term for 1851 of the Circuit court of Henrico county, Nicholas O. Thompson was indicted for the murder of his wife Lucy Ann Thompson. He was tried for this offence at the same term of the Court, and was found guilty of murder in the second degree; and the period of his confinement in the penitentiary was fixed by the jury at six years.

After the verdict was rendered the prisoner moved the Court for a new trial, upon various grounds founded on the conduct of the jury during the trial. These, and the facts on which they are based, are all stated by the Judge in delivering the opinion of the Court. The Court below refused to grant the new trial, and rendered a judgment upon the verdict. And thereupon the prisoner applied to this Court for a writ of error, which was awarded.

Cannon, for the prisoner.

The Attorney General, for the Commonwealth.

THOMPSON, J., delivered the opinion of the Court.

The prisoner was indicted for the murder of his wife, in the Circuit court of law for the county of Henrico, on the 17th of April 1851. The jury empaneled and sworn for his trial found him guilty of murder in the second degree, and by their verdict assessed the term of his imprisonment in the public jail and penitentiary at six years. He thereupon moved the Court to set aside the verdict and grant him a new trial. His motion was overruled; and judgment rendered on the verdict; and he took a bill of exceptions to the opinion and judgment of the Court overruling his motion. The bill of exceptions sealed by the Judge sets forth the evidence offered in support of the motion, consisting of ex parte affidavits and examinations in open Court of five of the jurors who tried the cause, the two deputy sheriffs who had charge of the jury, and of other witnesses, together with a certificate by the Judge, of all the facts

"Many decisions hold, that the mere fact, that intoxicating liquors were used by the jury while deliberating on the case, is not sufficient to set aside the verdict, if it appears that no injury resulted therefrom. *Wilson v. Abrahams*, 1 Hill 207; *Preston v. Humphries*, 6 Greenl. 379; *United States v. Gilbert*, 2 Sumn. 21; *Pelham v. Page*, 1 Eng. 535; *Davis v. The People*, 19 Ill. 74; *Westmoreland v. State*, 45 Ga. 225; *State v. Upton*, 20 Mo. 397; *Pope & Jacobs v. State*, 36 Miss. 121; *Russell v. State*, 53 Miss. 307; *Green v. State*, 50 Miss. 501; *Roman v. State*, 41 Wis. 312; *Richardson v. Jones & Denton*, 1 Nev. 405; *Thompson's Case*, 8 Gratt. 637."

See also, monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 733.

proved on the trial pertinent to the question of guilt or innocence, as well as all collateral facts supposed to have a bearing on the motion for a new trial. At the last term of the Court a writ of error was awarded on the petition of the prisoner, which has been elaborately argued at this; and the questions presented for adjudication carefully and maturely considered: And the result is a unanimous opinion of this Court, that there is no error in the judgment of the Circuit court. We proceed to state the grounds of that opinion as concisely as the number and importance of the points involved in our decision will permit.

The error assigned is, the refusal of the Circuit court to award a new trial. It does not appear from the record, upon what grounds the new trial was asked in the Court below: the grounds and reasons stated in the prisoner's petition and assignment of errors, are: 1st. "That additional evidence had been discovered since the trial which tended to shew that the witness for the commonwealth upon whose testimony the prosecution rested, was unworthy of credit or belief. 2d. Upon the ground that the venire facias which issued in this case was improperly returned and executed: two or more of the said venire not being qualified as the law requires. 3d. That there was irregularity in the conduct of the jury who tried the case, in this, that they separated after retiring from the bar and before the rendition of their verdict, and escaped from the custody of the sheriffs who had them in charge, and conversed with bystanders and persons not members of said jury. 4th. That there was misconduct of the said jury in this, that after retiring from the bar to consider of their verdict they the said jury founded their *verdict, not upon any principles known to or recognized by the law, but upon an arbitrary arithmetical calculation or process which was equivalent to the casting of lots, and to the result of which the said jury first bound themselves by a precedent agreement." To these the prisoner's counsel suggested, ore tenus at the bar, additional specifications of irregularity and misconduct in the jury, that is to say: 1st, misbehaviour or misconduct in partaking of ardent spirits at all during the time they were enclosed and charged with the case of the prisoner; and the more especially in partaking of spirits furnished as a treat by Doctor L. R. Waring, a professional witness of the Commonwealth; and 2dly, that the visit of the jury on the morning of the 19th April, in company with the deputy sheriffs, their keepers, to the county of Chesterfield amounted in contemplation of law, to a discharge or escape of the whole jury, or if not, that going out of their county with the jury, if it did not put an end to the duties, powers and functions of the deputies in relation to the care and custody of the jury, at least suspended them for the time being; so that for the period of time during which the jurors remained in the county of Chesterfield they were

under the care and in the keeping of unsworn officers.

Upon the first and second grounds stated as sufficient causes for setting aside the verdict, but little need be said. As to the first, it is well settled upon reason and authority both in civil and criminal cases, that after-discovered evidence in order to afford proper ground for a new trial, must be such as reasonable diligence on the part of the party offering it, could not have secured at the former trial: must be material in its object, and not merely cumulative and corroborative or collateral; and must be such as ought to be decisive, and productive, on another trial, of an opposite result on the merits. And furthermore, when

642 the sole object and purpose of *the new evidence is to discredit a witness on the opposite side, the general rule is, subject to rare exceptions, to refuse a new trial. These rules are for obvious reasons applied with even more stringency to criminal than civil cases. This case is wanting in most if not all of these pre-requisites of a new trial, and is certainly not entitled to any exemption from the general rule which interdicts it where the sole object is to impeach or discredit a witness on the opposite side. See Wharton's American Criminal Law at page 663, and the numerous authorities there cited.

As to the second ground, suffice it to remark there is no evidence of the existence of the fact, the disqualification of the veniremen, upon which it is predicated. It is not very obvious from the terms of the sentence, "that the venire facias was improperly returned and executed, two or more of the said venire not being qualified as the law requires," whether the objection is to the twenty-four first summoned, or the second venire which issued after exhausting the first, or the venire of twelve who were elected, tried and sworn; but whether to the one or the other, even though the disqualification appeared in the record, the objection comes too late when taken for the first time after the jury is sworn to try the issue. Code of Virginia 1849, p. 628, ch. 162, § 4.

Third. Separation of the jury. The only evidence of actual separation is that of the juror Stubbs, who swore that on the morning of the 19th of April, before the rest of the jury had risen, he rose, dressed himself and went down stairs to the pavement before the door of the hotel, for the purpose of meeting with a passer-by to send a message to his family; and after remaining there about five minutes and seeing no one passing he returned to the rest of the jury. To hold that such a separation as this, proved only by the evidence of the absent-

643 *proves that he saw and conversed with no one, and by his oath positively negatives all abuse, tampering or improper influence, leaving no room for presumptions, probabilities or possibilities even, would be to establish it as the law,

that a separation per se and irrespective of circumstances, however temporary, innocent or inadvertent, and however exempt from any presumption or probability of tampering, abuse or undue influence, is sufficient to vitiate a verdict. In support of that proposition, the counsel for the prisoner cited McCaul's Case, 1 Va. Cas. 271; Kennedy's Case, 2 Va. Cas. 510; Thomas's Case, Ibid. 479; Overbee's Case, 1 Rob. R. 756; Howle's adm'r v. Dunn & Co., 1 Leigh 455; and McCann jr. v. The State of Mississippi, 9 Smead & Marsh. 465. In opposition to it, the attorney general has cited and relied upon Martin's Case, 2 Leigh 745; McCarter's Case, 11 Leigh 633; Tooel's Case, Idem. 714; and the cases of Thomas and Kennedy, cited by the prisoner's counsel. McCaul's Case and Overbee's are the only Virginia cases cited for the prisoner, that go to the length of sustaining the proposition, or approximate it, (if indeed even they do so,) whilst the cases of Martin, McCarter and Tooel have countenanced a less rigid, and in our opinion more reasonable rule. The truth is, since criminal trials have become so much more protracted than formerly, and consequently the juries by reason of their frequent adjournments and long confinements, so much the more frequently and longer withdrawn from the supervision of the Court, and so much the more exposed to such irregularities as this, some relaxation of such a rule as is contended for, if clearly established by authority, would seem to be called for: otherwise frequent miscarriages or mistrials must inevitably occur, when there is not the lightest presumption or probability or even possibility of injury or injustice to the prisoner. But this

644 case is distinguishable *from McCaul's and Overbee's in the character and circumstances of the separation and absence of the jurors; and in a more important point still, in this, that whilst in those cases the separation was proved by other witnesses, in this it is proved by the juror alone, as a witness of the prisoner, who in the same breath, negatives communication or conversation with any one; and by consequence not only negatives the presumption or probability, but even possibility, of tampering or abuse of any kind. It is not necessary therefore to overrule those cases in order to sustain this verdict. It will be time enough to decide whether or not they shall stand when a case similar in all respects shall arise. When it does, if those cases shall be interpreted to have decided that a separation per se will vitiate a verdict, there will be against them and in the one scale reason, an unwavering current of English authority, ancient and modern, the overwhelming weight of American authority from our sister states, with the Virginia adjudications before referred to; and in the other, only the argument of the stare decisis.

In the next place it has been argued, if Stubbs's temporary absence from the jury be not a separation fatal to the verdict, that

the jury were not kept together and enclosed as required by law; that lodging them apart, distributed in five different rooms in the third story of the hotel, opening upon a common passage, which communicated with the street below by flights of stairs, the doors of their chambers being unlocked during the night, and there being no doors or other fastenings at either end of the passage or at both ends, (as in Kennedy's Case,) amounts to or is equivalent to a separation in contemplation of law: not that the jurors did in fact leave their lodging and separate by going elsewhere out of the hotel, but that they might have done so if they had been so minded, in disregard of their duty and the injunctions of their keepers and of the

645 *Court. If by keeping together and enclosing, it be meant that jurors must be so kept and enclosed as to render separation and improper communication and conversation impossible, in many, if not in all cases, it would scarcely be within the compass of possibility, without resorting to the securities afforded by the four walls and the locks and bars of a prison and a prison guard in addition. Such rigour as this or any thing approximating it, would no more be tolerated now than the practice which prevailed in the olden time of keeping juries together "without meat or drink, fire or candle," or holding them in duress and carting them around the circuit, until they should agree in a verdict. They are now, instead of being dealt with and treated as anciently very like prisoners and culprits, entitled by law whilst engaged in the performance of their necessary and important, but at the same time gratuitous and onerous duties, to needful and reasonable refreshments, and to have their comforts and convenience provided for and consulted, so far as is compatible with those salutary precautions, safeguards and restraints deemed conducive to the pure and impartial administration of justice. One of these is that in criminal cases they shall be kept together and enclosed in the custody or under the guardianship of the sheriff or his deputies. In Kennedy's Case it was held a sufficient compliance with this requirement when they were kept in the same number of rooms and similarly situated in all respects as in this case, save only that in Kennedy's Case there were at both ends of the passage doors which were constantly kept closed and fastened; whereas in this, there were no doors or other fastening at either end of the passage whereby it could be made secure from intrusion. Now we readily concede, when it is practicable it is preferable to have the jury lodged together in the same room, and on the circuit it is the practice of some of

646 us always so to direct, if it be practicable; and it must be conceded *that in Kennedy's Case there was a very near approximation to it, if it was not tantamount to keeping them in the same room. But shall we therefore hold that it was indispensably and absolutely necessary in a case wherein we are certified by the

oath of the deputy sheriffs that such accommodations could not be procured at any hotel in the city of Richmond? We think not. The officer swears he procured the most convenient and suitable accommodation for the purpose the city afforded. He did all that was practicable; and we think that satisfied the requirements of the law; and in consideration of the circumstance that the jury were lodged in the third story of a large hotel, in the heart of a populous city, and the consequent peril from fire from being so situated, it was but reasonable so far to respect their fears and apprehensions as to leave the doors of their chambers unlocked during the hours of the night. Our opinion is therefore, that the jury in this case was substantially kept and enclosed as required by law.

The last ground or allegation of separation is predicated upon the visit of the jury accompanied by the sheriffs across the river to the county of Chesterfield, on the morning of the 19th of April, before the meeting of the Court. It is not denied but that the object of this excursion was innocent and legitimate, relaxation and exercise; and it is not pretended that it was attended with any irregularity such as actual separation, conversation or communication with any one. Doubtless neither jurors nor the deputies dreamed of any impropriety or violation of law and duty in crossing over the boundary line between the two counties, any more than if for a like object they had been travelling in any other direction in the county of Henrico. But it is argued the moment the deputies crossed into Chesterfield by going beyond their territorial jurisdiction, their powers, duties and

647 functions of sheriff ipso facto ceased, their oath to keep the jury was cancelled, and by consequence, there was a constructive dissolution, discharge or escape of the jury; or if not, that they were for the time during which they remained in Chesterfield, in the custody or charge of unsworn officers; which is equivalent to a separation, or amounts to a constructive separation of the jury. It was not assumed as a proposition in the argument that the jury, by passing the limits of their county, was ipso facto discharged or dissolved: That such could not be the consequence of such an act, might be safely affirmed, because of the total absence of a reason for such a rule of law. But if authority and precedent were necessary on such a point, it is furnished by the ancient practice of the English Judges, of carting disagreeing juries around the circuit from county to county to coerce a verdict. Nor can we very well comprehend how it would determine the powers, functions and duties of the sheriff quoad hoc; or how it could absolve him from or cancel his oath to keep them. The most that could be urged with any degree of plausibility, is that if the jury had chosen to separate or escape, the officers might not have had the power whilst out of their own county to prevent it; but the answer to such an argument is they did not

so choose. Neither the jurors nor the officers could have dreamed there was any the least interruption or suspension of their respective functions and duties occasioned by an innocent promenade; nor was there in our opinion any. Nor can we very well comprehend the idea of a constructive discharge of the jury, effected by a constructive abrogation of the sheriff's powers, and constructive cancellation of his oath. But we can understand what is meant by the constructive escape of a prisoner arrested under a ca. sa. by the sheriff's carrying him out of his county or jurisdiction, and the reason upon which the doctrine is

648 founded: and it is to be presumed it was a fanciful or *forced analogy between the two cases which suggested this point to the prisoner's counsel; and he has laboured for the purpose, if successful in maintaining it, of bringing this case within the influence of the decision of *McCann jr. v. The State of Mississippi*, 9 *Smead & Marsh*. 465, wherein it was ruled "that where a jury on a trial for murder, were during a portion of the trial in the charge of an unsworn officer, and after the retirement of the jury were for a long time wholly under his charge; and nothing what ever appeared as to his conduct towards the jury nor as to their demeanour, and the jury afterwards found the prisoner guilty of murder, the verdict must be set aside." This case has no bearing on ours; certainly none favourable to the prisoner's cause, if the analogy fails, as in our opinion it manifestly does, but on the contrary it sustains the opinion of the Court. It appears from it that in Mississippi the sheriff is authorized to employ bailiffs to take charge of juries in criminal cases, but before he is qualified to act he must either take an oath to keep the jury in each particular case, or a general oath to keep all juries that may be committed to him during the term; whilst with us the sheriff or his deputies are ex officio the lawful keepers, charged under the sanctions of their official oath, to the performance of that duty, and though it is our practice and one to be commended, out of abundant caution, and because it reminds the jury and the officer of his and their duty, at each adjournment of the jury to repeat the oath, it has been held by this Court not to be indispensably necessary. In the case of *McCann jr.* before cited, the bailiff (as proved by himself, and his was the only affidavit, and this the only fact proved on the record), supposing the warrant of his appointment by the sheriff sufficient authority for him, failed to take any oath either general or special: and the consequence of

649 that failure was to vitiate the verdict as before mentioned, *and the operative reasons for this decision, it is manifest from the opinion of the Court were, that nothing whatever appeared as to the conduct of the officer towards the jury and as to their demeanour, leaving the adverse presumption of sinister influence to arise, spoken of in another part of the

opinion, where it is laid down that if "a jury in a criminal case, or any portion of it, have been exposed to undue influence either by the whole jury being under the charge of an unsworn officer, and any of the jury have separated from the rest, and had intercourse or opportunity of intercourse with third persons, and it does not affirmatively appear that no consequences were effected upon the jury by such exposure, and the possibility of undue influence be not wholly negatived, the verdict of such jury will be set aside. It seems, however, said the Court, to be otherwise if the record shewed that no undue influence had been exerted or attempted." If we are right in assuming that no separation but Stubbs's temporary absence, is proved in this case, and that he as the prisoner's own witness, has wholly negatived all undue influence either attempted or exerted, this may be well claimed as authority to sustain the opinion of the Court, but not the cause of the prisoner.

Having disposed of the question of the separation, let us proceed to the consideration of another species of irregularity upon which in the prisoner's petition and assignment of errors he predicates his fourth ground of objection to or cause for setting aside the verdict, viz:

Misbehaviour or misconduct of the jury. This objection is of a threefold character. 1st. To the mode adopted for taking the sense of the jury and arriving at or making up their verdict. 2d. Because on the night of the 18th and morning of the 19th of April, some of the jurors partook of ardent spirits. 3d. Because the ardent spirits of which they partook on the night of the 18th

650 was furnished at the cost of Dr. *Waring who had been examined by the Commonwealth as an expert or professional witness in the cause.

1st. As to the mode by which the jury arrived at a verdict. The evidence on this point consists of the depositions of five of the jurors. We waive the consideration and decision of the preliminary question discussed at the bar, as to the competency of the evidence of jurors to impeach or invalidate their own verdict: and we purposely abstain, (it not being necessary in our view of this case to decide it,) because of the gravity and importance of the question; and because it has never yet been so maturely considered and solemnly adjudged in Virginia in any case brought to our attention, as to render it a settled question in causes either civil or criminal. The question is now well settled in England against the competency, and the great preponderance of American authority is the same way: and Chief Justice Hosmer, 5 Conn. R. 348, said, "The opinion of almost the whole legal world is adverse to the reception of such testimony, and in my opinion on invincible foundations." But proceeding upon the hypothesis of its competency, let us see if the evidence of the jurors be sufficient to establish misbehaviour or misconduct, and not only so, but such misbehav-

iour as will vitiate their verdict: for it must be borne in mind, in considering every branch of this enquiry as to irregularity or misbehaviour, that many irregularities or species of misconduct may intervene in the progress of a trial, which may expose juries or others to the penalties of a misdemeanor or contempt, and yet be insufficient per se to disturb the verdict. By far the greater part of irregularities and misbehaviours are of this character, where it appears they could have had no sinister influence upon the verdict, affecting its integrity, purity and impartiality.

651 *Unquestionably every verdict, whether in a civil or criminal case, but more especially in a criminal case, should be the result of reason, deliberation and honest conviction, and not the offspring of chance or accident. If a jury therefore, should so far forget a sense of duty and the obligations of their oath, as to determine their verdict by casting of lots, whether for whom to find or the measure of damage, or degree of guilt and quantum of punishment, as the case may be, there is no doubt upon reason or authority, as to the right and duty of the Court to set aside the verdict, and award a new trial, if the fact be established to its satisfaction by competent testimony. But on the other hand when a jury has deliberated and made up and returned their unanimous verdict, a verdict neither in conflict with the law or the evidence, it is due alike to public and private interests, and to the sanctity of and a becoming respect for the jury trial, that Courts should not upon trivial grounds interfere or meddle with that verdict. The power to award new trials should be exercised with caution and circumspection, and only for good and sufficient cause. It is certainly a desideratum both to the parties and to the public that juries should agree upon their verdicts if possible, and as speedily as practicable. "Expediit reipublicæ ut sit finis litium" is as applicable to a protracted continuing as to the renewal or repetition of it when once determined, differing, if differing at all, not in the principle but the degree. So expedient was it deemed in the early periods of English jurisprudence, that consent in a verdict was even extorted from the jury under the pains and penalties of hunger and thirst and other privations, and of being carted around the circuit with the Judge, and held in a sort of duress, until they agreed. If it be sound policy to end litigation by the rendition of a verdict as soon as practicable, consistently within the purity, impartiality and integrity of the jury trial, though we may very properly nullify

652 a verdict *which was the result of a lottery, we should certainly be running counter to that policy, to place a verdict like this in the same category. There is no real analogy between the two cases: or if any but seeming and remote. One thing is certain, as the experience of every one conversant with trials will attest, in

some cases, and these not a few, we have to choose between the alternatives of tolerating the practice resorted to by the jury in this case, and the indefinite postponement of a verdict. If every jurymen is to adhere pertinaciously to his own judgment regardless of the opinions of his fellows, especially upon the question of measure of damage or degree of guilt or quantum of punishment; if jurors are denied the privilege of harmonizing discording and reconciling extreme opinions by concession and compromise, and meeting on middle ground, a failure of justice, or what is tantamount, indefinite delay, is the inevitable consequence. What more we would ask, have the jury done in this case, than what we know is of every day occurrence in trials in Courts of equity, where when a question of damage or value or compensation arises before the master, and when witnesses of equal credibility, or integrity and intelligence, differ in their estimates, the master adopts as his assessment an average of the estimates of such witnesses; and this practice is sanctioned by a Court of equity, which is a Court of conscience, as it is by law and justice. Indeed in some cases it may be considered a rule of necessity as well as convenience. Would it not be an anomaly, an inconsistency in our jurisprudence, amounting almost to an absurdity, to hold that a commissioner in chancery may thus perform a duty in its nature judicial, with the approval of the Chancellor, whilst for so doing the same duty in the same way the verdict of a jury is to be set aside by the Court of law. Why may not the jury deal with the estimates of each other which must be presumed to be honest

653 and bona fide, *until the contrary is proved, as does the master in chancery with the differing estimates of witnesses equally entitled to credence. We do not mean to say it is the bounden duty of the jurors in all or any cases to adopt such a rule, that is a question to be settled by their own consciences. It is for each to determine for himself according to the intensity of his own convictions, the greater or less confidence he may entertain in the absolute correctness of his own standard of right, or in the infallibility of his own judgment, how far he can conscientiously yield and surrender up his own in deference to the conflicting opinions and judgments of his fellow jurors. That the jury have done nothing more in this case, than, after first deciding the question of guilt, to adopt as their verdict as to the quantum of punishment, the average of their assessments, we consider substantially proved by the two dissentient jurors, (we mean dissentient upon the question of guilt when the jury first retired,) Peay and Stubbs, upon whom the prisoner's counsel mainly, if not exclusively, relied to prove misconduct. Stubbs it seems gave one deposition and Peay three, the first an ex parte affidavit out of Court, the second and third upon examinations in open Court. We have deemed it unnecessary to analyze critically their

statements, or to advert particularly or in detail to the confusion which pervades them, and the discrepancies between the several statements of Peay, especially between the third and the first two, because if there were any doubt upon their evidence as to what transpired in the jury room, the depositions of three other jurors, Blair, James and Ball, called and examined at the instance of the Court, and who if not more honest, appear from their examinations to be certainly more intelligent than the first two named, relieve the question of fact of all doubt and difficulty. From these concurring statements it appears when the jury

first retired, the question of guilt or
654 innocence was formally taken; *there

is a diversity of recollection as to the number for acquittal, it was either two, three or four, the probability is in favour of two; of those for conviction one was for murder in the first degree, the rest for a lower grade of homicide, murder in the second degree, and it may be some for manslaughter; though that does not clearly appear. After conference and discussion among the jurors upon the main question of guilt or innocence, according to the explicit and concurring evidence of these three jurors, all the jurors consented to find the prisoner guilty; and then arose the question of the degree of guilt and the quantum of punishment. It seems that no formal question was taken as to the degree of homicide; but it being understood that the juror who was for hanging was willing to come to those in favour of a lower grade of offence, and below a capital felony, they proceeded at once to the enquiry as to the term of imprisonment. It was proposed that it should be ascertained by each juror setting down the number of years he thought the offence merited, adding these numbers, dividing the aggregate by twelve, and adopting the quotient for their verdict. If in this process each and every juror fairly and bona fide set down a number of years within the minimum and maximum prescribed by law to the degree of guilt, in his judgment commensurate to the offence, the same process would ascertain as well the degree of guilt as the measure of punishment, and render unnecessary the formal decision of the preliminary question as to the degree of homicide; for it was substantially decided by the length of the term of imprisonment being over five years the maximum of manslaughter, it was murder in the second degree, and so they all understood it, as all who have been examined expressly state. We are told by James that the proposition to set down, add up and divide by twelve was not a precedent agreement binding the jury to acquiesce in the result of the experiment. That two calculations

were *in fact made; the first
655 by way of mere experiment to see how near the result would come to satisfying all. That when the last was made, he added up the estimates of the other eleven before setting down his own, in order to ascertain what number he should set down

to produce the result or the nearest practicable approximation to it, his conscience approved. He thought six years the proper term of imprisonment, but he set down one year to reduce the average to six years or thereabouts. If by adding up the eleven numbers before setting down his own he thus acquired an advantage over his fellows, the prisoner surely has no cause to complain, since it was used not to his injury but in his favour. When the second and last estimate was made which resulted in six years and some months, Peay and Stubbs expressed some dissatisfaction with the result: The odd months were then stricken off and they acquiesced in the verdict for six years. They both say they consented to it in the jury room, and afterwards in open Court, with a perfect knowledge of the character and effect of the verdict; that it was murder in the second degree, and for six years imprisonment; and this freely and voluntarily without any undue influence from any quarter. It has been well remarked by a learned Judge that the law requires jurors to unite in their verdict, but not in their reasons or motives. Establish it as the law that the jury room may be invaded, an inquisition held over the consciences of jurors, an enquiry instituted into their deliberations in order to find matter of impeachment in the mental processes by which they arrived at their conclusions and results, and the mutual concessions and compromises or other means by which they were enabled to reconcile conflicting opinions and meet on middle ground, and then hold that the mode adopted by this jury in arriving at their verdict was illegal and sufficient to vitiate it, and few verdicts will henceforth stand the test of such a

656 scrutiny. In support *of our opinion on this point we cite *Shobe v. Bell*, 1 Rand. 39; *Price v. Warren*, 1 Hen. & Munf. 385; *Cowperthwaite v. Jones*, 2 Dall. R. 56; and *Grinnell v. Phillips*, 1 Mass. R. 542. The last two are persuasive authorities. The reasons of the Judges who delivered the opinions in these cases are so pertinent to the question under consideration, we conclude this part of our opinion with a quotation from both. In the case in *Dallas*, *Shippen*, President, said, "The first objection as to the manner of the jury collecting the sense of its members with regard to the quantum of damages, does not appear to us to be well founded, or at all similar to casting of lots for a verdict. In torts and other cases where there is no ascertained demand it can seldom happen that jurymen will at once agree upon a precise sum to be given in damages: There will necessarily arise a variety of opinions, and mutual concessions must be expected. A middle sum may in many cases be a good rule, and though it is possible this mode may sometimes be abused by a designing jurymen fixing upon an extravagantly high or low sum, yet unless such abuse appears the fraudulent design will not be presumed." And in that from 1 Mass. R. 542, *Sewell*, Justice, said, "The record of a ver-

dict implies an unanimous consent of the jury, and is conclusive and incontrovertible evidence of the fact. Besides, the secret intention and mental act of a juror can never be a subject of legal enquiry, and from the necessity of the case his conduct before the Court is the best and only evidence that can be admitted of his assent to a verdict delivered in his presence. The members of a jury before they agree must argue the questions of the case committed to them, and each may be supposed to express his opinion as to the general question for which party the verdict shall be found, and if for the plaintiff for what amount of damages. It is not important as it

seems to me by what method a sum
657 for damages shall *be proposed, if finally there is unanimous assent of the jury in the sum declared by their verdict." It is true these were civil cases and ours is a criminal one; but we can perceive no reason why that difference should weaken the analogy or detract from their influence or bearing in the least.

We will now briefly consider together the second and third specifications of misconduct or misbehaviour in the jury for partaking of ardent spirits at all, and for partaking of the treat furnished by Dr. Waring. In support of these objections the prisoner's counsel cited the Code 629, ch. 163, § 12. *People v. Douglass*, 4 Cow. R. 26; *Oliver v. Trustees of Springfield*, 5 Cow. R. 283; *Bryant v. Forster*, 7 Conn. R. 562; and *Coleman v. Moody*, 4 Hen. & Munf. 1. And the attorney general relied on 21 Viner Abr. 447-8, title Trial, letter g; 2 Hale P. C. 306; *Commonwealth v. Roby*, 12 Pick. R. 496; *Everett v. Youells*, 24 Eng. C. L. R. 142; and 3 Rob. Pr. 247-8. According to the English authorities the only question ever made on the subject of refreshments in eating and drinking has been, by whom furnished? and not as to the kind: and they have holden that if furnished by a party, or the prevailing party in a cause, it is sufficient ground for setting aside the verdict; but if furnished at the cost of the jury or a third party a stranger in interest to the cause, whilst it might constitute misbehaviour and subject him to fine and imprisonment for the irregularity, it would not affect the validity of the verdict; unless in addition to the mere irregularity it was attended with such circumstances of excess, abuse or otherwise as to create a reasonable presumption that it injuriously influenced the impartiality and purity of the verdict: And there is no Virginia authority that lays down a different rule and countenances the proposition that the fact of ardent spirits entering into and forming part of the refreshments, if

used with moderation and temperance,
658 *constituted misconduct in a jury; and if misconduct for which the jury might be fined, such an irregularity as to vitiate the verdict. The case of *Coleman v. Moody*, cited for that purpose, is not only not authority for such a proposition, but if not expressly, by strong implication

decides the contrary. Nor do we consider the New York adjudications referred to as clearly establishing such a rule; though it must be confessed that some of the dicta of the Judges in those cases go to that extreme. In the case of *The People v. Douglass*, the decision was "when the jury separate contrary to the instruction of the Court, make use of strong drink, and converse upon the matter they are empaneled to try;" and this it appears was whilst they were sitting as a jury and during the progress of the trial. But even in that case the rule is laid down, that the mere separation of a jury without farther abuse is not sufficient ground of new trial, and that it is not every irregularity that will render a verdict void. *Bryant v. Forster* was a case where a jurymen while engaged in the course of a cause, was permitted to leave the Court in charge of an officer, and who improperly separated himself from that officer and drank about one third of a gill of brandy. The Court said, "We cannot allow jurors thus of their own head to drink spirituous liquors while engaged in the course of a cause."

But grant that the New York cases cited from Cowen have firmly settled the law in that state as contended; whilst it is admitted they are entitled to the most respectful consideration on account of the high character of the tribunal and the learning and ability of the Judges whose reasoned opinions they contain, and always proper to be consulted as lights to inform and guide our deliberations, and weighed, adopted and followed so far as they persuade and convince, they cannot bind this Court as authority. And not being so

bound, we must say, with all due re-
659 spect, they have *not convinced our judgment and cannot receive our approval. We find the law laid down on this subject far more to our satisfaction in a case in 6 Greenleaf 37, in the following terms: "If ardent spirits constitute part of the refreshments and appear to have operated upon any juror so far as to impair his reasoning powers, inflame his passions or have any improper influence upon his opinions, the verdict would probably be set aside;" and in choosing between the New York and Massachusetts decisions on this point, we have no hesitation in preferring the latter as the most reasonable. In times past when criminal trials were more summary, when they were generally decided in a day or at a sitting, when all refreshments were withheld until a verdict was rendered, it might have been a very wise and proper precaution and one productive of but little if any hardship or inconvenience, certainly no more than the deprivation of other refreshments, to deny even the moderate and temperate use of ardent spirits whilst they were engaged in Court sitting as a jury, or retired to their jury room to deliberate and consult of their verdict; but now when trials are protracted and spun out for successive days and sometimes weeks, and since the law has provided that reasonable

refreshments shall be furnished at the public expense, we do not know where this Court will find its authority for imposing upon jurors the interdict of total abstinence during their confinement. It has the undoubted right and it is its bounden duty to require of those who are not given to total abstinence the strictest moderation and temperance in the use of ardent spirits, and to hold them, their keepers, and those who supply them, responsible criminaliter as for a contempt, for any abuse or excess of indulgence; but in our judgment, however much we may approve and commend total abstinence in all, and on all occasions and more especially on such an occasion as

660 that of being engaged in performing the *grave duty of a juror, deliberating upon an issue involving the life or liberty of a fellow being, we neither can nor ought, if we could, go farther. It is the right of jurors to be permitted to exercise the discretion and free will on the subject which belong to them out of the jury box; and ours both the right and the duty of holding them responsible to strict accountability for any abuse or excess: and when there is reason to suspect that such excess or abuse has exerted a sinister influence, of annulling their verdict and awarding a new trial.

The only remaining question is, whether the well-intended but thoughtless and ill-timed act of civility and hospitality on the part of the Commonwealth's witness, Dr. Waring, in treating the jury on the night of the 18th of April, (in the presence of the officers who had them in charge, be it remembered,) shall vitiate this verdict. That the act was mere inadvertence, and the intent innocent, cannot be questioned, from aught that appears in this record to the contrary. His being there was purely accidental, as appears from the deposition of the deputy sheriff: He went upon his invitation. He had no interest in the cause, and no connection with it, except as a professional witness for the Commonwealth. It does not appear that he was hostile to the prisoner, or even knew him, or desired his conviction; it does not appear that there was the least question as to his credibility; but the contrary is fairly inferrible from the record. That it was an irregularity, is not denied, in the witness, the jurors and the officers permitting it; but one, which though brought to the attention of the Court who presided over the trial, so far as appears from the record, passed without its animadversion, doubtless because of the absence of intention on the part of all concerned to commit any breach of duty or propriety. It cannot reasonably be presumed or suspected that any injury to the

661 prisoner has resulted from the inadvertence. *The jury, as we are certified by the Judge and the deputy sheriffs, were strictly temperate, a large proportion of them said to be Sons of Temperance; they demeaned themselves with the most exemplary propriety during the whole trial, and have rendered a verdict

unimpeachable upon the merits, according to the law and the evidence, and of which, if any error could be predicated, it would be an error on the side of humanity and mercy. To set aside such a verdict for such an irregularity, would, in our judgments, establish a precedent in our criminal jurisprudence much to be deprecated, because calculated to multiply miscarriages in criminal trials, and impediments in the way of the conviction and punishment of offenders, already sufficiently numerous and embarrassing.

Judgment affirmed.

Commonwealth v. Adcock.*

December Term, 1851.

1. **Embezzlement—Remanding of Examining Court—Indictment.**—A prisoner is remanded by the examining Court to be tried for embezzling the goods of W; he may thereupon be indicted for embezzling the goods of A; the embezzlement being of the same goods for which he was tried by the examining Court.

2. **Criminal Law—Discharge of Prisoner—"Three Terms of Court"†—Case at Bar.**—A prisoner is indicted for embezzling the goods of W, and at the fifth term after he was examined for the offence, he is tried and convicted; but the verdict is set aside for a variance between the allegation and the proof, as to the ownership of the goods; and the case is continued. At the next term of the Court the attorney for the Commonwealth enters a *nolle prosequi* upon the indictment: and the prisoner is indicted again for the same offence; the indictment in the first count being the same as in the former indictment,

662 and another count charging the goods embezzled *to be the goods of A. Upon his arraignment he moves the Court to discharge him from the offence, on the ground that three regular terms of the court had been held since he was examined and remanded for trial without his being indicted. The attorney for the Commonwealth opposes the motion and offers the record of the proceedings of the Circuit court upon the first indictment, to shew that he had been indicted, tried and convicted; which was objected to by the prisoner. **Held:**

1st. **Same—Same—Same—Evidence—Record.‡**—The record is competent, and the only competent, evidence upon the question.

2d. **Same—Same—Same—Case at Bar.**—The second indictment being for the same act of embezzling as the first, and the prisoner having been in-

*For monographic note on Constitutional Law, see end of case.

†Statute—Discharge of Prisoner—"Three Terms of Court"—Interpretation.—See principal case cited with approval in Benton's Case, 91 Va. 786, 21 S. E. Rep. 495; State v. Strauder, 11 W. Va. 800. See footnote to Bell's Case, 7 Gratt. 646; monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

‡Same—Same—Same—Evidence Record.—The principal case is cited with approval in State v. Strauder, 11 W. Va. 798; State v. Hudkins, 35 W. Va. 252, 253, 13 S. E. Rep. 308.

dicted, tried and convicted in time, and the verdict set aside for the variance, the second indictment was proper and in time; and the prisoner is not entitled to be discharged.

3. **Same—Same—Interpretation of Statute.**—The exceptions or excuses for failure to try the prisoner, enumerated in the statute, are not intended to exclude others of a similar nature, or *in pari ratione*; but only that if the Commonwealth was in default for three terms without any of the excuses for the failure enumerated in the statute, or such like excuses fairly implicable by the Courts from the reason and spirit of the law, the prisoner should be entitled to his discharge.

4. **Same—Effect of Code on Offences Committed before It Went into Operation.**—Though an offence committed before the Code of 1849 went into operation, must, so far as the question of guilt, degree of crime, *quantum* of punishment and rules of evidence are concerned, be governed by the law in force at the time the offence was committed, yet upon the question of the prisoner's right to be discharged from the failure to try him, arising after the Code went into operation, it must be governed by the law in the Code.

[The various acts of assembly bearing upon this question are here given, on the suggestion of the Judge who delivered the opinion of the Court:

1. Rev. Code of 1819, p. 607, ch. 169, § 28. "Every person charged with such crime, (treason or felony,) who shall not be indicted before, or at, the second term after he shall have been committed, unless the attendance of the witnesses against him appears to have been prevented by himself, shall be discharged from his imprisonment, if he be detained for that cause only; and if he be not tried at or before the third term after his examination before the justices, he shall be forever discharged of the crime; unless such failure proceed from any continuance granted on the motion of the prisoner, or from the inability of the jury to agree on their verdict."

Sessions Acts of 1847-8, p. 144, ch. 20, § 12. "Any person held in prison on any charge of having committed a crime, shall be discharged *from his imprisonment if he be not indicted before the end of the second term of the Court at which he is held to answer, unless it shall appear to the satisfaction of the Court that the witnesses on the part of the Commonwealth have been enticed or kept away, or are detained or prevented from attending the Court, by sickness or some inevitable accident, and except in the case provided for in the following section." The case provided for in the next section is the insanity of the prisoner.

P. 152, ch. 21, § 45. "Every person charged with felony and remanded by the examining Court to a Circuit Superior court for trial, shall be forever discharged from the crime whenever there shall have been three terms after his examination, at which the failure to try the case was not caused by his insanity, or the witnesses for the Commonwealth having been enticed or kept away, or detained or prevented from attending the Court by sickness or some inevitable accident, or did not proceed from a continuance granted on his own motion, or from inability of the jury to agree in their verdict."

§ Criminal Law—Effect of Code on Offence Committed before It Went into Operation.—For the proposition laid down in the fourth headnote, the principal case was cited in *State v. Strauder*, 8 W. Va. 603.

P. 122, ch. 11, § 10. "No person shall be held to answer on a second indictment, or other accusation, for any offence of which he has been acquitted by the jury, upon the facts and merits, on a former trial; but such acquittal may be pleaded by him in bar of any prosecution for the same offence, notwithstanding any defect in the form, or in the substance of the indictment or other accusation on which he is acquitted."

§ 11. "Any person indicted or otherwise accused of an offence, who on his trial shall be acquitted upon the ground of a variance between the allegations and the proof, or upon any exception to the form or the substance of the indictment or other accusation, may be arraigned again on a new indictment or other proper accusation, and tried and convicted for the same offence, notwithstanding such former acquittal."

Code of 1849, p. 770, ch. 207, § 18. "A person in jail, on a criminal charge, shall be discharged from imprisonment if he be not indicted before the end of the second term of the court, at which he is held to answer, unless it appear to the Court, that material witnesses for the Commonwealth have been enticed or kept away, or are prevented from attending by sickness or inevitable accident, and except also in the case provided in the following section." The case provided for in the next section is the insanity of the prisoner.

P. 778, ch. 208, § 26. "Every person charged with felony, and remanded to a Superior court for trial, shall be forever discharged from prosecution for the offence, if there be three regular terms of such Court, after his examination, without a trial, unless the failure to try him was caused by his insanity; or by the witnesses for the Commonwealth being enticed or kept away, or prevented from attending *by sickness or inevitable accident; or by a continuance granted on motion of the accused; or by reason of his escaping from jail or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict."

P. 751, ch. 199, § 15. "A person acquitted by the jury, upon the facts and merits on a former trial, may plead such acquittal in bar of a second prosecution for the same offence, notwithstanding any defect in the form or substance of the indictment or accusation on which he was acquitted."

§ 16. "A person acquitted of an offence on the ground of a variance between the allegations and the proof of the indictment or other accusation, or upon an exception to the form or substance thereof, may be arraigned again on a new indictment or other proper accusation, and tried and convicted for the same offence, notwithstanding such former acquittal."

The case is fully stated in the opinion of the Court delivered by Judge Thompson.

The Attorney General and Young, for the Commonwealth.

Robert G. Scott and Irving, for the prisoner.

THOMPSON, J., delivered the opinion of the Court.

The accused, the captain of a canal boat and carrier for hire on the James river canal, was on the 7th of December 1848, committed by the mayor of the city of Richmond, upon a charge of feloniously embezzling and fraudulently converting to

his own use, a box of merchandise, delivered to him for transportation to Buchanan, the property of Word, Ferguson & Barksdale, merchants of the city of Richmond. He was examined and remanded for further trial by the Hustings court on the 18th of January 1849, and being admitted to bail, he entered into a recognizance with approved security to appear at the next term of the Circuit Superior court for the county of Henrico and city of Richmond: the witnesses for the Commonwealth were recognized to appear at the same term to give evidence in behalf of the Commonwealth. The accused failed *to appear at the first of the term, his default was recorded, his recognizance estreated, and a scire facias awarded against him and his bail. At a subsequent day of the term he made his appearance; whereupon on his motion the orders of default and award of scire facias were set aside, and he was released from the breach of his recognizance: In the meantime however the witnesses for the Commonwealth, the two recognized, Ferguson and Blair, had appeared and been recognized to the next term, and the cause virtually continued: and then the prisoner was again let to bail and recognized to appear at the next term. Neither at this term nor at the first was any indictment found by the grand jury. Whether the failure to send the indictment to the grand jury at the first term was owing to the failure of the accused to appear before the Commonwealth's witnesses had been adjourned over and recognized to appear at the next term and the cause virtually continued; or whether the failure to indict at both the first and second terms was owing to the absence of the witness Roberts, the other two Ferguson and Blair, upon whose evidence the bill was eventually found, being present on both occasions, the record does not inform us; and therefore we can only conjecture. If the non-appearance of the accused at the first term was the cause of the failure then either in whole or in part, the presumption is that the cause of the second failure was the absence of the witness Roberts. At the third term, April 1850, the indictment was found; and then and at the fourth term, November 1850, the cause was continued on motion of the prisoner. At the fifth term, April 1851, the indictment which contained but one count and laid the goods charged to be embezzled as the property of Word, Ferguson & Barksdale, came on for trial, was tried, and the jury who tried it returned a verdict of guilty, and assessed the term of imprisonment in the penitentiary at one *year. The prisoner moved for a new trial, which was granted by the Court upon the ground of a variance between the allegata et probata relative to the ownership or property in the goods, which were the subject of the embezzlement. The case then necessarily stood over to the November term 1851, for the new trial. At that term the attorney for the Commonwealth, as it was his duty

to do, to avoid a second failure upon the ground of variance in the event of the same evidence being adduced on the new trial, and the opinion of the Court remaining the same upon the question of ownership, to wit, that the property of the goods was in the consignees, the Messrs. Ayres of Buchanan, and not the consignors, Word, Ferguson & Barksdale, asked and obtained leave of the Court to enter a nolle prosequi as to the first indictment, and to send up a new bill; which was found by the grand jury then in session: the prisoner, upon the motion of the attorney for the Commonwealth, being detained in custody to answer the new indictment based upon his examination by the Hustings court for the same offence, varying in nothing but in the incident of ownership or property in the goods. This new indictment contains three counts, all charging the same corpus delicti. The first embraces the old indictment in totidem verbis, laying the property of the goods in Word, Ferguson & Barksdale; the second alleges their ownership in R. M. & Francis Ayres; and the third alleges delivery by Word, Ferguson & Co. of the goods R. M. & Francis Ayres, to the accused to be carried and delivered to them at Buchanan: In short, the new indictment is the old one with two additional or superadded counts. Upon his arraignment upon this new indictment the prisoner tendered a plea in abatement, setting forth that he had not been regularly and legally examined for the offence therein charged. To his plea the attorney for the Commonwealth replied that he had been regularly and legally *examined, and remanded by the Hustings court for the offence whereof he was indicted; and vouched the record and proceedings of the examining Court. To this replication the prisoner demurred ore tenus; the attorney for the Commonwealth in like manner joined in the demurrer; and the Court overruled the demurrer: being of opinion that the prisoner had been regularly and legally examined for the offence charged. Whereupon he moved the Court to discharge him from the offence aforesaid, on the ground that three regular criminal terms of the Court had been held since he was examined and remanded for trial before the same, for the said offence, without being indicted for the same: and in support of his motion he vouched the record of the examining Court, shewing that he was examined and remanded for the offence on the 18th of January 1849, and shewing by the record of the Circuit Superior court that more than three regular criminal terms had been held since his examination to wit, on the 3d day of May 1849, 13th of November 1849, 29th of April 1850, 8th day of November 1850, and 28th of April 1851; and alleging that at neither of these terms had he been indicted for the offence aforesaid. The attorney for the Commonwealth opposed the prisoner's motion for his discharge; and for the purpose of answering and negating his allegation of a failure to indict in

three terms, offered to introduce the record of the proceedings of the Circuit court upon the first indictment, shewing or purporting to shew, that the prisoner had not only been indicted but tried upon the indictment in due time, and found guilty by the verdict of a jury; and applied for and obtained a new trial of the Court upon the ground of variance between the allegations and the proofs. To the introduction of this evidence the prisoner objected; but his objection was overruled, the evidence received and considered, and the prisoner's motion for his discharge overruled. After-

668 wards, *however, the Court upon the motion of the prisoner, and by his consent and with the consent of the attorney for the Commonwealth, waived its decision upon the motion for a discharge, and the prisoner's objection to the evidence introduced by the Commonwealth, and adjourned to the General court for its decision thereupon, because of their novelty and difficulty, the following questions:

First—"Ought the Court, on the said motion of the prisoner to be discharged, to receive and consider the record and proceedings offered by the attorney for the Commonwealth?"

Second—"Ought the prisoner, on the motion made by him, as aforesaid, to be discharged from the crime with which he now here stands indicted, or from further prosecution for the same?"

The first question is free of all doubt and difficulty, admitting of a prompt and easy solution. We are all agreed that the evidence objected to ought to be received and considered; indeed, it is the only evidence admissible or competent on such an issue. The prisoner had alleged a failure to indict within the period of three regular terms; and to sustain the allegation had introduced the records of the examining Court and of the Circuit court, shewing the date of his examination and the holding of more than three actual regular terms, and denied that he had been indicted at any of them. To such an objection or allegation, if untrue, but one answer could be given by the attorney for the Commonwealth—to traverse the failure, and allege the finding of an indictment or a trial, as the case may be, and vouch the record to prove it. Of the indispensable necessity of adducing record evidence to prove the fact of indictment or trial, there surely cannot be a doubt. The real question as to the sufficiency of the evidence to support the issue on the part of the Commonwealth. That, in truth,

669 is the issue involved *in the second question adjourned, and the only one worthy of serious consideration by this Court. It would have been the only one adjourned, but for the informal and summary manner, ore tenus, in which the questions were presented in the Court below. Had the prisoner, instead of his summary motion, pleaded specially his ground or matter of discharge, the attorney for the Commonwealth would have replied and vouched the record relied on by him; the

prisoner would have demurred to the replication, and upon joinder in demurrer the issue would have been formally and regularly developed, which the second question adjourned presents for our decision;—that is to say, whether he be entitled to his discharge in consequence of the alleged failure to indict or try within the term prescribed by law; or, on the other hand, whether the record adduced by the Commonwealth be sufficient to establish her pretension that he was indicted or tried in proper time to render him still liable to further prosecution for the offence.

This question has been elaborately and ably argued by the counsel for the prisoner, and by the attorney general and his associate, the attorney for the Commonwealth, in the Circuit court for the county of Henrico and city of Richmond. But it is worthy of remark, whilst the counsel of the prisoner have on this occasion displayed their accustomed ability and ingenuity, and have by their arguments been conducted to the same goal, the right of the prisoner to his discharge, they have arrived at one and the same favourable conclusion from very diverse and conflicting premises, and by a very dissimilar, if not adverse, course of ratiocination. The first counsel argued that the accused had not been legally examined for the offence for which he was re-indicted, upon the ground that the offences charged in the first and last indictments were essentially different, and that

670 therefore he was entitled to his *discharge. But if precluded from raising that question, as it had been decided by the Circuit court, and was not adjourned to us, and upon the hypothesis that he had been properly examined, he contended that the nolle prosequi put an end to the prosecution, sweeping off, nullifying and rendering functus officio, not only the first indictment, but the examination of the called Court, commitment and all; and that therefore the prisoner was illegally detained in custody, and was entitled to his discharge at the time he moved for it in the Court below. On the other hand, the last counsel not only admits, but insists on as concessions in the cause, not to be controverted by the prisoner or the Commonwealth, that the offence charged in the last is identical with that alleged in the first indictment, and that the prisoner was regularly and legally examined and remanded, and could not be again examined therefor; and he predicates his argument exclusively upon the Commonwealth's failure to indict in due time after the examination.

If the first counsel had been right in his premises, in assuming that the offences were not the same, that the party had not been legally examined, or that the nolle prosequi was productive of the consequences he supposed, the conclusion he drew from these premises did not follow, but the very reverse: The legitimate conclusion would be, that whilst the prisoner could not be arraigned and tried on this indictment, he was not to be discharged, but detained in

custody until proceedings *de novo* could be instituted against him. But that the counsel is totally mistaken in his premises as to the non-identity of the offence, the insufficiency of the examination, and the effects and consequences of a *nolle prosequi*, is as abundantly established by authority as it is manifest in reason. See *Halkem's Case*, 2 Va. Cas. 4; *Derieux's Case*, Ib. 379; *Mabry's Case*, Ib. 396; *Huffman's Case*, 6 Rand. 685; *Thomas's Case*, *2 Leigh 741; *Lindsay's Case*, 2 Va. Cas. 345; and *Wortham's Case*, 5 Rand. 669.

The arguments of the two counsel are direct antagonisms of each other, and both cannot be sound. One at least must be repudiated, if either can stand the test of analysis and criticism. We have shewn that the first stands condemned by reason and authority, and now let us see whether the last, (which is certainly more plausible,) is any more tenable or sound, when examined and tried by the same tests. The objection taken by the prisoner was for a failure to indict within three terms after the examination. It would have been more accurate and strictly technical to have objected for a failure to try, since the penalty or sanction for a failure to indict is only discharge from imprisonment, whether with or without bail we will not stop to enquire. But as there could be no trial without an indictment, we may consider the objection for a failure to indict for three terms as inclusive of, and tantamount to charging a failure to try; and so considering it, we come to the consideration of the ground taken by the last counsel. This ground is, that a failure to indict for three terms after the prisoner has been remanded, entitles him to be discharged from the crime, unless the Commonwealth can bring herself within some of the exceptions expressed in the statute. And that although for this offence the accused was both indicted and tried in due time at the fifth term upon the first indictment, according to the provisions and within the exceptions or savings of the statute, and was liable to be again tried at the sixth term, when a *nolle prosequi* was entered and a new indictment found; yet the Commonwealth, by abandoning the first and re-indicting him, has placed herself in the same predicament as if no indictment had been ever found or trial had or demanded until the sixth term, the time of finding the second indictment and of his arraignment thereupon, and that consequently more than three *regular

672 terms passed after his examination without indictment or trial; and the prisoner is therefore entitled to his discharge under the statute. Whilst it is admitted on all hands, and was so adjudged in *Vance's Case*, 2 Va. Cas. 132, 162, that the prisoner was triable again upon the first indictment, it is insisted, nevertheless, that he is not so liable, or to the same extent, upon the new and more perfect one.

A construction of the law that would require us to concur in such a conclusion as this, would certainly be productive of very

inconvenient consequences, if it did not convict the law itself of the grossest defect and most palpable absurdity; besides bringing its provisions in direct repugnancy and irreconcilable conflict with each other. We should need no better illustration of such effects and consequences than this case would furnish. The prisoner was charged with a high crime, for which he was prosecuted with due diligence; because a diligence that satisfied the requirements of the law. He was indicted at the third term, tried and convicted at the fifth, and verdict set aside because of a variance. Three out of four of the failures to indict and try between the examination and trial were owing to his own default. He was confessedly liable to be tried again on the same indictment, for nothing had occurred to discharge him from the offence: as liable to trial on the same indictment as if he had been indicted, tried, convicted, and the verdict set aside at the first term instead of the fifth. Had he been acquitted for the variance or by reason of a defect of form or substance in the indictment, he was by the express provisions and injunctions of the law liable to be again tried. If so, when acquitted for a variance or for a defect in the indictment, a *fortiori* must he be when convicted and the verdict is set aside by the Court for such defect or variance. In either case a new indictment would generally be

673 necessary either to make the charge quadrate *with the nature of the offence, or to adapt it to the evidence disclosed by the first trial to avoid a recurrence of the variance and a second failure to procure an effectual and final conviction. To this indictment a plea of *auterfois acquit* or *auterfois convict* would be of no avail; and yet it is said whilst the party still continues liable to be tried upon the defective indictment or the one obnoxious to the objection of variance upon which he cannot be convicted; and notwithstanding the law repudiates his plea of former acquittal or former recovery, and makes it the duty of its officers to prefer against him an indictment adapted to the offence and the evidence to sustain the charge, when the new indictment is preferred he may plead to it a failure to indict and try within three terms, and that it is no good answer to the plea for the Commonwealth to shew that from the period of the examination down to the date of her plea, she has been in hot pursuit and diligently prosecuting, and the prisoner all the while staving off and continuing and delaying a trial upon the defective indictment; and not only so, but that she indicted, tried and convicted him upon that defective indictment. To justify such a construction of the law as this, we should have to interpolate the 13th sec. of ch. 207, and the 36th sec. of ch. 208, at pages 770, 778, of the Code of 1849, and read them as provisos to sec. 16, ch. 199, page 751, of same Code, so as to authorize the trial and conviction of a party upon a new indictment or proper accusation who has been

acquitted on the ground of variance, or upon an exception to the form or substance of the indictment: provided this new indictment be found and trial had within three terms of the examination; a requirement or condition in many cases even now an impossibility to comply with or perform; and if we were to sanction the construction contended for it would be so in most or all;

because of the temptation it would
674 hold out to culprits to *stave off a trial, so that in the event of a defective indictment having been found or variance appearing on the trial, they could avail themselves of this statutory discharge. It would not only allow the accused to take advantage of his own wrong if he has been successful in keeping the Commonwealth at bay for more than three terms on the defective indictment, but it rewards him with an acquittal for it. It makes it then his interest and his policy in all cases in the first place to stave off the trial by continuances and other subterfuges as long as possible; and then after having exhausted all the delays of the law, he goes to trial upon an indictment defective in form or substance or obnoxious to the objection of variance, knowing that as the law now is, whilst upon such an indictment he cannot be effectually convicted if tried even on the merits, he can be finally and forever acquitted if so tried. He takes then the double chance of acquittal by the jury, and if he fail in that, a new trial from the Court on account of the defect or variance; and is then secure by lapse of time from further prosecution for the offence upon a new indictment: And this would be the result no matter how the delays on the first indictment were occasioned; whether by inevitable accident, continuances for the prisoner, failures of juries to agree, setting aside of their verdicts, appeals to the General court by writ of error on the part of the prisoner or otherwise. It would make the law grossly inconsistent with itself in providing that a party should be tried upon a new accusation or indictment, a party not discharged from prosecution for the offence upon the old and defective indictment, and yet to couple with it an implied proviso that would disable its officers by the use of any diligence from complying with its injunctions. It would be obnoxious to a still more glaring inconsistency. If the old indictment were so vacant in its

charges from the record of the examining Court as to be abatable *on that
675 account, or so grossly defective in form or in substance as to require another examination to justify the finding of the true indictment, it is conceded that the party is not entitled to this statutory discharge; but is liable to be proceeded against de novo by commitment, examination and indictment, to trial and conviction; and yet for a minor defect, requiring no new examination, but only a new indictment to guard against a variance upon a second trial, the prisoner is entitled to his discharge. So that the construction contended

for leads to the strange result that a prisoner's situation is better for being convicted though abortively, upon a defective indictment, or one objectionable upon the score of variance upon the merits, than if acquitted by the jury for the variance or for the defect in form or substance: and the Commonwealth's condition is worse when the indictment is good on its face both in form and substance, and only obnoxious to the objection of a variance, than when it is totally and incurably defective both in form and substance. The answer of the prisoner's counsel to all these incongruities and absurd consequences is, *ita lex scripta est*, it is so written and must be so interpreted, otherwise the provisions of the law entitling the accused to a discharge upon failure to try within the time prescribed, might be evaded by means of defective indictments preferred against him, whereby he might be imprisoned or harrassed for an indefinite time. And to guard against so remote and visionary a danger, so improbable if not impossible an evil as abuse and evasion on the part of the Commonwealth through her prosecutors, by such means and instrumentalities, we are invoked to adhere to the strict letter of this law, regardless of its reason and spirit, and of the effects and consequences of our construction, and of the controlling influence of another part of the same statute; whereby the law is rendered not only grossly defective and palpably absurd, but productive
676 of *the practical mischief of operating the acquittal and discharge from prosecution of atrocious offenders against the laws.

By adopting the construction contended for we should in truth be adhering to the letter and sticking in the bark; we should violate the just rules of construction as much as would he who should decide that the law mentioned by Puffendorf, which forbade a layman to lay hands on a priest, not only applied to him who hurts a priest with a weapon, but to him who laid hands on him for the purpose of doing him some office of kindness, or rendering him aid and assistance; or that the Bolognian law mentioned by the same author, which enacted that "whoever drew blood in the streets should be punished with the greatest severity," extended to the surgeon who opened the vein of a person that fell down in the street with a fit; or that, in the case put by Cicero or whoever was the author of the treatise inscribed to Herenius, cited by Blackstone as illustrative of a construction of law by its reason and spirit, the sick man was entitled to the benefit of the law (upon the vessel's coming safely into port though his remaining was the result of inability from sickness to escape), which law provided that those who in a storm forsook the ship, should forfeit all property therein, and the ship and lading should belong entirely to those who staid in it. 1 Black. Com. 61.

If we trace our legislation on this subject from the revolution down to the present

day, it will be apparent, as was well observed by the attorney general, that its whole purpose was and is to carry into practical operation the 8th section of the bill of rights which guaranties to every one accused of crime a speedy trial, and thereby secures him against protracted imprisonment. And this provision of the bill of rights announced or enacted no new principle or safeguard of freedom. It was but the re-affirmance of a principle declared

and consecrated by the famous habeas corpus act, 31 *Charles 2, ch. 2, that second Magna Carta of English liberty. By that act it is provided that every person committed for treason or felony shall, if he requires it, the first week of the next term or the first day of the next session of oyer and terminer, be indicted in that term or session or else admitted to bail; unless the King's witnesses cannot be procured at the time; and if acquitted or if not indicted or tried in the second term or session he shall be discharged from his imprisonment for such imputed offence. The object of this provision was to prevent the accused from being detained in prison an unlimited time before he is brought to trial. And the principal ground for bailing upon this act, and indeed the evil the act was chiefly intended to remedy, is the neglect of the accuser to prosecute in time. Even in case of high treason, where the party has been committed upon the warrant of the secretary of state, after a year has elapsed without prosecution, the Court will discharge him upon adequate security being given for his appearance. And so also after any unusual delay in case of felony or any inferior offences. 1 Chitty Cr. Law 131, 159. Here then we have the prototype of the 8th section of our bill of rights, and our subsequent legislation on the subject. The acts of 1786, 12 Stat. at Large 340, and 1792, 1 Stat. at Large, N. S., ch. 13, § 10, p. 22, are but transcripts of the habeas corpus act, so far as they entitle the party to be bailed or discharged from imprisonment upon failure to indict at the first or second term or session, with a new and additional provision for a discharge from the crime upon failure to try at the third. The revised act in the Code of 1819, ch. 169, § 28, p. 607, is but a transcript of the preceding enactments, with the addition of the exceptions or savings of the failure to try proceeding from a continuance granted on the motion of the prisoner, or from the inability of the jury to agree. And the acts

of 1847-8, sections 12 and 45, pages 144, 152, and the Code of *Virginia of 1849, p. 770, § 13, p. 778, § 36, omitting the provision as to right to bail upon failure to indict at the first term, substantially re-enact the other provisions of the Code of 1819, as to the failure to indict at the second and try at the third, with additional exceptions or savings of the prisoner's escaping from jail or failing to appear according to his recognizance. No Virginia case in point has been cited on either side of this question; and it is be-

lieved none can be found. The prisoner's counsel relied on Cawood's Case, 2 Va. Cas. 527, as a conclusive authority. But it wants one important, we might say indispensable feature, to render it at all parallel with or analogous to this. Cawood had not been indicted at all; an indictment, the finding of which is not matter of record, being tantamount to no indictment. The great question in that case was whether the accused had been indicted in legal contemplation. The Court held as there was no record of the finding, he was not; that it requires not only the foreman's endorsement of "true bill" signed by himself, but a record in Court of the fact of finding, to make the bill a legal bill of indictment: And the residue of their decision followed as a necessary consequence; that if the prisoner had been legally examined, and three terms had elapsed without a legal indictment, he was entitled to be discharged from the crime.

We have been referred by the attorney general and his associate to Barker's Case, 2 Va. Cas. 122; Vance's Case, Ibid. 132, 162; and Levi Gibson's Case, Ibid. 70, 111; not as direct authorities, but to shew a trial after three terms, and a successful re-indictment and conviction after the first had been abandoned, or after errors in arrest of judgment had been sustained. In Vance's Case, though three terms had passed, the new trial was upon the same indictment; and in Barker's and Gibson's Cases, where the trial was upon new indictments, it does not appear that three terms had
679 *passed; or that the question was raised if they had. So that, after all, we are left to decide this case without express authority to govern us, according to our views of the true construction of the law.

We are not left however, without the lights of analogy to guide us, furnished by the construction put upon the old law by the General court in Thompson's Case, 1 Va. Cas. 319; Lovett's Case, 2 Va. Cas. 74; Santee's Case, Ibid. 363; and Vance's Case before cited. They decided that the old law was not to be literally construed; that the word term used in the statute did not mean a special, but a regular stated term; and a regular or stated term actually holden, and not the expiration or lapse of the period for holding it fixed by law; and that a failure of the jury to agree was one of the exceptions or savings fairly and necessarily implicable though not enumerated in the statute. And in Vance's Case where three terms had passed, the Court said, it was not proper to let the prisoner have the benefit of the reversal of a sentence pronounced at one of these terms, and then put him in a better condition in consequence of his having been convicted, than he would have been if the jury had been unable to agree upon a verdict against him. The exceptions implied by the Courts in the old law and subsequently incorporated with additional ones in the Code of 1819, the criminal statute of 1847-8, and the Code

of 1849, so far from favouring the conclusion contended for, that upon the maxim of *expressio unius exclusio alterius*, they operated as a limitation upon or denial of the power and authority of the Court to imply other exceptions than those enumerated, in our judgment rather favour the opposite conclusions: They shew a legislative approval of the interpretation of the Courts by engrafting them in the Code and incorporating them into the written text from time to time as the decisions were made; not that they thereby intended
 680 to enact that they were the *only exceptions that might occur or should be allowed, but that they were inserted out of abundant caution, and as declaratory provisions of what the law had been decided to be, and by fair and necessary implication would have been decided by the Courts to be without these provisions or express exceptions.

It is a very immaterial question whether this case is to be considered as coming under the operation of the act of 1847-8 or the Code of 1849, for whether considered under the laws of 1819, 1847-8 or 1849, the decision would be precisely the same; but we deem it proper, since the question has been raised and discussed, to express the opinion we have formed, that although the offence was committed under the law of 1847-8, and so far as the question of guilt, degree of crime, quantum of punishment, and rules of evidence are concerned, would be triable under that statute; yet upon the question of discharge arising after the repeal of that statute, when the Code of 1849 was in operation, it must be governed by the Code.

The sole object and purpose of all the laws from first to last, was to ensure a speedy trial to the accused, and to guard against a protracted imprisonment or harassment by a criminal prosecution, an object but little if any less interesting to the public than to him, and the means, sanctions or penalties it employed for stimulating prosecutors and officers of the law to diligence in the prosecution, was by declaring that the consequence of a failure to indict or try in three terms should operate a discharge from the crime or acquittal, unless it appear that the failure proceeded from no default or delinquency on the part of the Commonwealth, but from causes such as insanity of the prisoner, or the witnesses of the Commonwealth being enticed or kept away, or prevented from attending by sickness or inevitable accident, or by a continuance granted on the motion
 681 of the accused, or by reason of his escaping from *jail or failing to appear in discharge of his recognizance, or the inability of the jury to agree on their verdict. Now if the law is to be construed literally, and we are to hold that the legislature has enumerated all the exceptions or savings that will excuse delay, by what authority was Vance tried after the lapse of three terms; by what authority could persons be tried a second term or

oftener after much longer delay occasioned by abortive trials, setting aside of verdicts, or arrests of judgments upon writs of error in the General court; as it is admitted on all hands they may be on the same indictment. It might be enquired what would be done in a case where the prisoner was too sick to be tried within the three terms, or were to ask for a continuance, or did not choose to do so if he could. The statute has in terms provided for the mental malady of insanity, but not for sickness or corporeal infirmity or disability. And finally, it might be asked how the absurdity could be reconciled of making the inability of a jury to agree upon a verdict a sufficient excuse, and at the same time holding a trial and conviction, and setting aside of the verdict by the Court upon the motion of the prisoner, placing the law, to say the least, in as favourable a position to the Commonwealth in regard to diligence as the disagreement of the jury, to be no excuse. If a failure of the jury constitute a good excuse a fortiori should a trial and conviction, as was held in Vance's Case, as to reversal of the sentence upon errors in arrest of judgment. The truth is the statute never meant by its enumeration of exceptions, or excuses for failure to try, to exclude others of a similar nature or in pari ratione; but only to enact if the Commonwealth was in default for three terms without any of the excuses for the failure enumerated in the statute, or such like excuses, fairly implicable by the Courts from the reason and spirit of the law, the prisoner should be entitled to his discharge.

682 *When it is admitted that the Commonwealth had the right to have tried the prisoner again upon the old and defective indictment, that he was not discharged from but still triable for the offence, we cannot understand how it is she has lost that right by resorting to a new and more perfect indictment. There was not the least necessity for the attorney for the Commonwealth to dismiss or quash, or enter a nolle prosequi, before he sent to the grand jury the new one. The pendency of the old would have formed no ground of objection to the new; and the counsel for the prisoner is wholly mistaken in supposing that a plea in abatement would have lain to the new. No such plea for such a cause is known to the criminal law. 1 Chitty Cr. Law 446-7 in margin, 304 top paging; Foster's Discourses on Cr. Law 104-5-6. Instead of the single indictment now found, the attorney for the Commonwealth, had he so elected, might have had a separate indictment for each count,—might have had all found at one and the same term, or at three successive terms; might, the instant the Court set aside the verdict on the first, have elected, without dismissing, quashing or entering a nolle prosequi, to have him arraigned and tried on the second or third, instead of proceeding, as he now more properly claims to do, upon a single indictment with three counts. All these indictments for the same offence,

no matter when found, if found before the party has become entitled to his discharge by reason of the Commonwealth's delay or failure to try, constitute, like so many counts in a single indictment, part and parcel of the same prosecution for the same identical offence; and like a new or amended declaration filed upon leave to amend, avail to the same extent in protecting the Commonwealth against the bar of this statute, as the new or amended declaration avails to protect the cause of action in a civil case from the bar of the statute of limitations, if the suit were instituted in time. Indictments,

683 *it is true, being the act of the inquest, are not amendable like declarations in a civil suit, which are the work of the suitor or his counsel; but new indictments found for the same offence are substituted in the place of the old, and quoad hoc operate like the new or amended declaration. So that when a prisoner pleads to a new or second indictment, that he has not been indicted or tried in time, the new indictment having been found and he being arraigned thereon when still liable to be tried for the offence, it is an all-sufficient answer to reply, and shew by the record, an indictment found in time, though a defective one, or to reply and shew by the record, as in this case, a trial, though an abortive one, and rendered so by the action of the Court in setting aside the verdict and awarding a new trial, upon the prisoner's motion. Whatever objections he could have made to being again tried upon the old indictment, upon the score of failure to indict or try in due time, he can make to the new, and none other.

We do not agree with the prisoner's counsel that he has any cause to complain, because the old indictment forms one of the counts of the new. It was but a proper measure of precaution on the part of the attorney for the Commonwealth to insert it. The prisoner was not acquitted, but had been convicted on that indictment, and the verdict set aside for variance. Peradventure upon the second trial, the evidence might vary from the first, and render a conviction proper on that count. It was therefore not only admissible, but altogether proper and regular so to frame the indictment that the prisoner, if guilty, might be convicted upon whichever of the three counts the evidence should sustain.

Although we have chosen to base our opinion and rest our construction upon the reason and spirit of the law rather than the letter, we are far from admitting that it

684 does violence to the letter: for it is questionable, *to say the least,

whether it is not as well if not better warranted by the words of the statute, taking its provisions in connection and construing them together in order to avoid conflict or repugnance, as that contended for by the prisoner's counsel. It requires a trial to be had within three terms unless for some of the savings or grounds of exception mentioned: a trial has been had

within the time required. The statute neither expressly says, nor can it be fairly interpreted to mean by implication, that it must be an effectual or final trial; because the same statute contemplated that another sort of trial, an abortive one, might take place, improperly convicting or acquitting, upon an indictment defective in form or substance, or in consequence of a variance; and to meet that emergency, proceeds to require that the accused shall be liable to be again tried upon a new or more perfect indictment, without any proviso or condition that this shall be within three terms from the examination: And to imply such a proviso or condition would in most cases operate a repeal of the enactment requiring the new trial. It would certainly be as legitimate and fair to imply that after the trial had upon the first and defective count, the provision about discharge was exhausted and functus officio, and the Commonwealth, in all cases, remitted to proceedings de novo, as to hold that you must imply a requirement in many cases impossible to be complied with, that the new trial upon the new indictment must be had within three terms after the examination. If a proviso or condition must be implied, and we admit one is fairly inferrible, it is this, and it is a proper medium between the extremes, that where the party is not entitled to a discharge from the crime by any default, failure or delay on the first indictment, he shall be tried on the new one, with the same diligence and the same diligence only, as would have been re-

685 quired of the Commonwealth upon the old one, had she continued to *prosecute upon that indictment. That when the charge in the new count is so variant from the old, or from the record of the examining Court, as to require the interposition of the examining Court by new examination, there the Commonwealth is not only entitled to, but bound to resort to proceedings de novo; but when the charge is so identically the same as to render a new examination neither necessary nor proper, then the new indictment is to be based upon the examination had, and to be proceeded on to trial and conviction or acquittal as the case may be, subject to precisely the same objections for default or failure to try, and no other, that would have been applicable to the old indictment.

A question of considerable practical importance arising upon the construction of this statute, but not in this case, was mooted or incidentally discussed at the bar, applicable alike to a prosecution whether upon the old or a new indictment: and that is whether there must be three successive failures to try or defaults at three consecutive terms, on the part of the Commonwealth, to entitle a prisoner to his discharge; or whether any three occurring dispersedly or sparsedly in a series of alternate continuances or defaults, as well on the part of the prisoner as the Commonwealth, will suffice; as for instance, suppose a case where ten terms have passed

without trial or indictment, the Commonwealth continued the cause at the first term, the prisoner the 2d, 3d and 4th, the Commonwealth the 5th, the prisoner the 6th, 7th, 8th and 9th, and the Commonwealth the 10th, is the prisoner discharged by these three continuances, to wit, 1st, 5th and 10th? The judgment of this Court in Green's Case, 1 Rob. R. 731, would seem to favour the construction which holds three consecutive terms or failures to be necessary, because in that case five terms had passed without trial. It was continued

at the first term for the Commonwealth, at the 2d for the prisoner,

and at the 3d, 4th and 5th for the Commonwealth; and the Court said, "His right (the prisoner's) to his discharge upon the adjournment of the Circuit court, at its last term, (which was the 5th,) became complete and was consummated:" and

"That Court however upon its adjournment ceased to have a capacity to pronounce by its order the discharge to which the prisoner was entitled by law," and therefore it discharged him upon habeas corpus; whereas if three consecutive failures were not necessary he would have been entitled to his discharge at the end of the fourth term, instead of the fifth. But it does not appear from the report of the case that this very question was directly raised, discussed or considered by the Court; and may be said, if adjudged or intended to be adjudged, to have passed sub silentio; or the Court may have deemed it supererogatory to consider whether or not he was discharged after the 4th term, when the 5th had passed, which entitled him to it a fortiori and upon either construction. If this case does not rule the point it must be confessed it is a question of novelty and difficulty, upon both sides of which much may be urged; and that its decision either way is beset with doubts difficult of solution, and objections not a little embarrassing. We have come to no settled conclusion in our own minds either way; and as any opinion we might now pronounce, had one been formed, would be obiter, we purposely abstain from the intimation even of our present impressions or inclinations of opinion upon the subject. It will be time enough to decide it when it shall directly arise, and we shall be called on to pronounce an authoritative decision, when it can be more thoroughly investigated and discussed by counsel, and more maturely and deliberately considered by the Court than it behoves us or is now practicable for us to consider it.

687 *For the reasons set forth and assigned in the foregoing opinion, we have come to the conclusion: First. That the Circuit court ought, on the motion of the prisoner to be discharged, to receive and consider the record and proceedings offered by the attorney for the Commonwealth. Second. That the prisoner's motion for a discharge from the crime with which he stood indicted, or from further prosecution for the same, ought to be over-

ruled: and we respond to the questions adjourned accordingly. We are unanimous on the first: and Judge Field is the only dissentient on the second question.

FIELD, J. The only question which I deem it material to consider in this case is whether the prisoner is entitled to be forever discharged from prosecution for the offence with which he now stands indicted under the 36th section of the Criminal Code, chap. 208, Code of 1849, p. 778. For if he be entitled to such discharge, it is, as I shall presently shew, to be done under the provisions of that section; although the offence is charged to have been committed at a time when the Criminal Code of 1847-8 was in operation, and under which this prosecution commenced. The act of 1847-8, will be found in the Sessions acts of that session, page 102, section 28. The present law in relation to the like offence will be found in the Code of 1849, page 730, section 21. The provisions of both are substantially the same, though there is some slight change in the words of the law, but such as does not change the effect of those sections. I will also remark that the act of 1847-8, above referred to, had been repealed, except as to offences committed whilst it was in operation; prosecutions for which, however, must be conducted under the present law for regulating criminal proceedings.

688 *On the 13th of December 1848 the first Court was held for the examination of the prisoner upon the charge of embezzling merchandise of the goods and chattels of Word, Ferguson & Barksdale. The examination was put off until January Court 1849, when the prisoner was examined and remanded to be tried for the felony with which he stood charged before the Circuit Superior court of law and chancery for the county of Henrico and city of Richmond.

After this examination had taken place and the prisoner remanded for further trial, it was competent for the attorney for the Commonwealth in the Circuit Superior court of law and chancery of the county of Henrico to prefer an indictment against the prisoner containing one or more counts, or several separate and distinct indictments for the same felony, provided that the same fact, i. e., the same embezzlement, be set forth in each count of the one indictment, or in all the several indictments: and none other but that same fact of embezzlement for which the prisoner had been so examined. He might in each count or in each indictment have charged the merchandise so embezzled as the goods and chattels of different persons other than Word, Ferguson & Barksdale. Mabry's Case, 2 Va. Cas. 396. But in whatever form he might think proper to present the case to the grand jury, it was certainly his duty to make his election and prefer his indictment within some period of time; and not to detain the prisoner in custody for an indefinite period to await his pleasure or convenience. Nor could he

prolong the period by eking out his form of prosecution in driblets; as would be the case if he could be allowed to prefer an indictment at one term charging the merchandise as the property of Word, Ferguson & Barksdale, at another term as the property of Robert M. & Francis Ayres, at another term as the property of some other person, and so on from term to term

689 presenting a new indictment, *varying only from those previously found in the ownership of the property. By such means the prisoner would be harassed until the end of time, and would be without redress; because, and this is allowable, as is said, the prisoner was not discharged of the crime at the time of presenting these several indictments, in consequence of the finding and the pendency of a previous indictment for the same fact. That these monstrous consequences may result from such an interpretation of the law, are in my opinion, sufficient to shew that such is not its true construction. Let us now enquire and see within what time is it that the indictment should be preferred; and from the failing to do which the prisoner is entitled to be discharged from further prosecution for the offence.

The 36th section of the act above referred to is in these words: "Every person charged with felony, and remanded to a Superior court for trial, shall be forever discharged from prosecution for the offence, if there be three regular terms of such Court after his examination without a trial; unless the failure to try him was caused by his insanity; or by the witnesses for the Commonwealth being enticed or kept away, or prevented from attending by sickness or inevitable accident; or by a continuance granted on the motion of the accused; or by reason of his escaping from jail, or failing to appear according to his recognizance, or the inability of the jury to agree in their verdict." This section does not prescribe, in terms, the time within which the indictment is to be found, but as the finding of the indictment necessarily precedes the trial, it follows as a corollary that the law requires that he shall be indicted before the expiration of the third term after his examination; unless the failure to do so is to be excused upon some ground specified in the law. What are they? One is for the failure of the prisoner to appear according to his recognizance. I think the

690 meaning of *this is a failure to appear at a trial or at a time when a trial should be had upon the indictment. But let it be conceded that it means his failure to appear when the grand jury could have taken cognizance of the indictment. This was at April term 1849, which was the first term that was held after the date of the examination. At that term the prisoner forfeited his recognizance by failing to appear. Then therefore let us pass by this term as one at which the attorney was excusable for not preferring his indictment against the prisoner.

This brings us to the October term 1849.

At this term the witnesses for the Commonwealth failed to appear: and although it does not appear, for what cause they failed to appear, yet the record in that respect in the absence of proof to the contrary shews a sufficient reason for excusing the attorney from presenting the indictment at October term 1849. The next term was in April 1850. The witnesses then attended on behalf of the Commonwealth, and an indictment was found by the grand jury, upon which the prisoner was arraigned and plead not guilty; and on his motion the trial was continued until the next term. In this indictment the merchandise is charged as the property of Word, Ferguson & Barksdale, conforming in that respect to the description of the offence for which the prisoner had been examined in the County court. But as before remarked, the attorney could nevertheless have varied the charge as it respected the ownership of the property, and if he had thought proper to do so, might have charged the merchandise as the property of twenty or more different individuals in twenty or more different counts in the same indictment, or in twenty or more different indictments; all of which, whether different counts or different indictments, would have been separate, distinct and wholly foreign from and independent of each other; so much so that no defect, omission or error in one could be supplied or corrected by a reference *to any other of the said counts or indictments; a principle in pleading which should not be lost sight of in considering this case; indeed it should be decisive of it. The attorney adopted this course. He presented his indictment, charging the merchandise as the property of Word, Ferguson & Barksdale, at April term 1850; and as there was no excuse for his not then presenting the very same indictment which was afterwards found at October term 1851, (the fourth term thereafter,) the time from the lapse of which the prisoner claims immunity from prosecution then began to run. That was in my estimation the first term to be counted in favour of the prisoner.

At October term 1850, also, the last mentioned indictment might have been presented. There is no reason assigned for its not being then done. It is true, that at that time the trial was postponed at the instance of the prisoner; but this continuance was a continuance of the trial upon the indictment which had already been found at April term 1850, and had no reference whatever to any other or future indictment, not at that time even in contemplation of the prosecuting attorney or any other person. The prosecutor was then satisfied with the form of his prosecution, and was full handed with his testimony, as we must infer from his throwing upon the prisoner the necessity of getting a continuance of the cause, and which the prisoner obtained by his own affidavit shewing good cause for the continuance. Being full-handed as to evidence, there appears to be nothing to excuse him from then prefer-

ring the second indictment. This, then, I count as the lapse of the second term in estimating the delay, and the prisoner's claim to exemption from further prosecution. The next term was held in April 1851, when the attorney had all his witnesses before the Court, and had no sort of excuse for not then preferring before the grand jury the second indictment; for 692 it was at this *term that the prisoner was tried and convicted upon the first indictment, and at this term that the verdict of conviction was set aside, because it had been found out upon the trial of the prisoner that the merchandise which had been embezzled by him was not the property of Word, Ferguson & Barksdale. And thus it appeared that the previous proceedings against the prisoner in the Superior court were wholly ineffectual for the purposes intended, and that the indictment was useless and unavailing, because of the mistake in the indictment as to the ownership of the merchandise. This was the third term, or the last link in the prisoner's title to be discharged from the crime by reason of the failure to try him at or before the third term after his examination. At this date the Code of 1849 was in force, under the 36th section of which, before recited, the prisoner has a right to claim his discharge.

But much reliance has been placed on the 16th section of chapter 199, Code of 1849, page 751. That section is in these words: "A person acquitted of an offence on the ground of a variance between the allegations and the proof of the indictment or other accusation, or upon an exception to the form or substance thereof, may be arraigned again upon a new indictment, or other proper accusation, and tried and convicted for the same offence, notwithstanding such former acquittal." Now this is no new law; it is an old principle clothed in a new dress. At first it appeared in the form of decisions by this Court, and relates to a defence upon the plea of autrefois acquit. 1 Va. Cas. 164, 232; 2 Va. Cas. 89, 111, 273, 345; and 5 Rand. 669. The principle of these cases now assumes the form of a statute law. But, nevertheless, that statute should receive the same construction which the decided cases intended to establish. That statute was not designed to have the effect of repealing that law, which I will call the three term law, a law intended to protect a prisoner from un- 693 reasonable *delay, by ensuring him a trial at or before the end of the third term of the Court which should be held after his examination. Under the eighth article of the Bill of Rights of Virginia, a prisoner is entitled to a speedy trial; and this law was intended to secure to him the benefit of this principle. Can it for a moment be supposed that this great and humane article in the fundamental law of the land, is to be disregarded and repudiated in all cases in which, from the mistake, (as is the case here,) the error, whim, conceit or ignorance of an attorney, the prisoner

would be enable to escape from punishment, if allowed to enjoy the benefit of this benevolent principle of the Bill of Rights.

Benjamin W. Green was indicted for felony. His trial was not had within the three terms, because there was not time to try him at either of the three terms. Here was no default on the part of the Court, or its officers. The delay resulted not from the want of diligence on the part of the attorney for the Commonwealth, nor from any other cause within the control of man, but altogether from the fact that for want of time the prisoner could not be tried. Yet upon an application to the General court, made on behalf of the prisoner, that Court discharged him from all further prosecution for the crime. 1 Rob. R. 731. This decision accords with the spirit of the Bill of Rights and the laws in relation to criminal prosecutions, and serves to shew that prosecution, conviction and punishment, when brought against the truths set forth and declared in the venerated instrument before referred to, are but as dust in the balance. The intention of the legislature was to deprive the prisoner of the right of pleading in bar of a new prosecution any of the matters specified in the said 16th section; but not to deprive him of any other matter of defence which should arise upon other and independent considerations, such as a failure to indict within the three terms.

It was neither more nor less than a 694 *legislative recognition of what has been laid down in Vance's Case, Barker's Case, Gibson's Case, and others to be found in our books of reports, in none of which had the three terms been held subsequent to the Court of examination. And I defy a reference to a single case in which a new indictment had been allowed after the three regular terms at which the indictment could be found had passed by. Cawood's Case is, I think, a good authority to shew that it could not be done.

I am, for these reasons, in favour of discharging the prisoner from further prosecution.

CONSTITUTIONAL LAW.

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Cross References to Monographic Notes.

Antrefois, Acquit and Convict (Jeopardy), appended to Page v. Commonwealth, 26 Gratt. 948.
 Eminent Domain.

Homestead Exemption, appended to Hatorff v. Wellford, Judge, 27 Gratt. 256.
 Intoxicating Liquors, appended to Thon v. Commonwealth, 31 Gratt. 887.
 Judgments, appended to Smith v. Charlton, 7 Gratt. 425.
 Juries, appended to Chahoon v. Commonwealth, 20 Gratt. 733.
 Municipal Corporations, appended to Danville v. Pace, 26 Gratt. 1.
 Municipal, County and State Bonds, appended to DeVoss v. City of Richmond, 18 Gratt. 338.

I. ADOPTION OF CONSTITUTIONS.

Constitutions Are Enacted by Constitutional Conventions.—Constitutions are not enacted by an ordinary legislature, but by a convention of delegates elected by the people. Kamper v. Hawkins, 1 Va. Cas. 20; Loomis v. Jackson, 6 W. Va. 618.

Powers of Constitutional Convention Derived from People.—A constitutional convention lawfully convened does not derive its powers from the legislature but from the people; and being in their nature sovereign, the legislature can neither limit nor restrict the exercise of this power. Loomis v. Jackson, 6 W. Va. 618. See also, Kamper v. Hawkins, 1 Va. Cas. 20.

And the people of the state in their sovereign capacity have the right, in adopting a constitution for their government, to do anything which they are not prohibited from doing by the federal constitution, which was made and ratified by the states themselves. Peerce v. Kitzmiller, 19 W. Va. 564; White v. Crump, 19 W. Va. 583.

Law Which Governs Where a New Constitution Is Adopted.—Where legislation is necessary to give effect to a constitutional provision, laws in existence when a new constitution is adopted, remain the law until legislation is had to enforce the provisions of the constitution which conflict with the old law. Supervisors v. Stout, 9 W. Va. 708; Chahoon v. Com., 20 Gratt. 733.

Effect of Adoption upon State Officers.—The incumbents of office at the time of an organic change of government, continuing to hold over after such change (in the absence of a provision of the new constitution, or of an act of the legislature of the new government giving them such authority), hold by sufferance only and upon a principle of public necessity or convenience, not in virtue of any individual or private right. They cannot set up any claim against the legislature, which has ample power to put an end to their official authority at any time, and appoint others to take their places, subject only to any constitutional restrictions which may plainly appear to exist. Richmond Mayoralty Case, 19 Gratt. 673.

II. CONSTRUCTION AND INTERPRETATION OF CONSTITUTIONS.

1. GENERAL RULES.

Where Text Is Plain, Extrinsic Aid Inadmissible.—When the text of a constitutional provision is plain and unambiguous, the courts in giving construction thereto are not at liberty to search for its meaning beyond the instrument itself. C. & O. Ry. Co. v. Miller, 19 W. Va. 408.

Construed as a Whole.—In construing a constitution the whole is to be examined with a view to arriving at the true intention of each part. State v. Kyle, 8 W. Va. 711.

General Provision Adopting Common Law.—A constitutional provision declaring in general terms the

adoption of the common law should be deemed to adopt it, only so far as it accords with existing institutions, and as its principles are applicable to the state of the country and the condition of society. Such a provision will not be construed to oblige the courts to uphold the English doctrine of ancient lights, as this doctrine is not in harmony with our institutions. *Powell v. Sims*, 5 W. Va. 1, 18 Am. Rep. 629.

Distinction between State and Federal Constitution.—There is an important distinction to be observed between the construction of state and federal constitutions. The constitution of the United States is a source and grant of power to the congress of the United States. It is an enabling, and not a restraining, instrument, and congress can do nothing except what the constitution, either directly or by reasonable construction, authorizes it to do. On the other hand, the constitutions of the states are restraining instruments, and the legislature of the states possess all legislative power not prohibited to them by the constitution. *Brown v. Epps*, 91 Va. 726, 21 S. E. Rep. 119; *Miller v. Com.*, 88 Va. 618, 14 S. E. Rep. 161. This distinction is well illustrated by the different constructions placed upon grants of power to congress by the federal constitution, and grants of power to the state legislature by the state constitutions. In the first case the grant is construed strictly, as this is the sole source of congressional power. In the second case the grant is merely declaratory of the power already existing in the legislature and is construed liberally. *State v. McAllister*, 88 W. Va. 485, 18 S. E. Rep. 770; *Bridges v. Shallcross*, 6 W. Va. 562.

2. CONSTRUCTIONS OF PARTICULAR PROVISIONS.

Meaning of Householder as Used in Virginia Constitution.—The terms "householder" and "head of the family," as used in the constitution of Virginia and statutes passed in pursuance thereof, are convertible terms, and are employed as explanatory the one of the other. They involve the idea of dependence and support, coupled with a moral or legal obligation to support the dependent. Hence, a married woman whose husband lives out of the state but visits her at intervals of two or three years, and occasionally makes her a small remittance of money and who has no children to support, is not a householder or head of a family in contemplation of the constitution and the statutes. *Oppenheim v. Myers*, 99 Va. 582, 39 S. E. Rep. 218.

Mail Carrier a "Laborer" within Constitution.—A mail carrier is a "laboring man" within the meaning of the clause of the constitution of Virginia which provides that the homestead exemption of a debtor shall not extend to any execution, order, or other process issued on any demand for services rendered by a laboring person. *Farinholt v. Luckhard*, 90 Va. 986, 21 S. E. Rep. 817.

Provision as to Terms of Courts.—Section 14, article 6 of the Virginia Constitution which directs the corporation court to be held as often, and as many days in each month, as may be prescribed, does not require that the whole term shall be held in the same calendar month. And under the act of April 7, 1870 (Acts 1869-70, p. 44), which fixes the terms of the corporation court of Richmond to commence on the first Monday, and continue so long as the business before the court may require, the court may continue its session from the first Monday in one month until the first Monday in the next. *Chahoon v. Com.*, 21 Gratt. 822; *Sands v. Com.*, 21 Gratt. 871.

Provision Elevating Corporation Courts.—And the provision of the same section that corporation courts shall have similar jurisdiction which may be given by law to the circuit courts of the state, was not entitled to restrict, but to enlarge, the jurisdiction of these courts, and to elevate them to the grade and dignity of circuit courts. And it is competent, therefore, for the legislature to give to the corporation courts jurisdiction, to try cases of felony, though the jurisdiction in such cases is taken away from the circuit courts. *Chahoon v. Com.*, 21 Gratt. 822; *Watson v. Blackstone*, 98 Va. 618, 38 S. E. Rep. 939. But an act of legislature attempting to give an appeal from the corporation to the circuit court is unconstitutional because in conflict with this provision. *Watson v. Blackstone*, 98 Va. 618, 38 S. E. Rep. 939.

Provision to Prevent Heredity in Office.—The provision of the bill of rights which declares "that no man or set of men, are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services, which, not being descendible, neither ought the offices of magistrate, legislator or judge, to be hereditary," has no application to the private relations of the citizen, nor to the power of the legislature to pass laws regulating the domestic affairs of the people, but was only intended to provide against heredity in offices. *Smoot v. People's, etc., Assoc.*, 95 Va. 688, 39 S. E. Rep. 746.

III. OPERATION AND EFFECT OF CONSTITUTIONS.

1. **THE SUPREME LAW.**—The constitution of the United States was adopted by the whole people of the United States and is a grant of powers acquiesced in by the states themselves; hence the constitution and the laws passed by congress in pursuance thereof, are the supreme law of the land. Next in order of supremacy come the state constitutions, the provisions of which are absolutely binding upon all of the departments of the state government. The legislature has no power to pass laws in conflict with either state or federal constitutions. As has been said "the Constitution is law to the lawmakers." *Kemper v. Hawkins*, 1 Va. Cas. 20; *Case of the Judges*, 4 Call 135; *Shell v. Cousins*, 77 Va. 328; *Eckhart v. State*, 5 W. Va. 515; *Blair v. Marye*, 80 Va. 485. See *post*, "Power of Judiciary—Power to Annul Statutes."

2. WHAT CLAUSES ARE SELF-EXECUTING.

General Rule.—Constitutional provisions are self-executing where there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given or the enforcement of a duty imposed. 6 Am. & Eng. Enc. Law (3d Ed.) 912. See also, *White v. Crump*, 19 W. Va. 583; *Peerce v. Kitzmiller*, 19 W. Va. 581; *Watkins v. Venable*, 90 Va. 440, 39 S. E. Rep. 147; *Speldel v. Schlosser*, 18 W. Va. 686; *Oppenheim v. Myers*, 99 Va. 582, 39 S. E. Rep. 218; *Chahoon v. Com.*, 20 Gratt. 733.

Provision against Taking Private Property.—Applying this rule, it will be seen that the constitutional provision that private property shall not be taken for public use without just compensation is self-executing. *Johnson v. City of Parkersburg*, 16 W. Va. 402.

Clause Granting Amnesty to Participants in Civil War.—And the provision of the West Virginia constitution that "no citizen of West Virginia, who participated in the war between the government of the United States and a part of the people thereof

on either side, shall be held liable civilly or criminally; nor shall his property be seized or sold under final process issued on judgments heretofore recovered, or otherwise, because of an act done according to the usages of civilized warfare, in the prosecution of said war by either of the parties thereto," operates *ex proprio vigore*. *White v. Crump*, 19 W. Va. 583.

Provision Conferring Original Jurisdiction on Supreme Court.—On the other hand, the constitutional provision conferring original jurisdiction upon the supreme court in certain specified cases is not self-executing, but the court exercises this jurisdiction, within the constitutional limitation, by virtue of statutory enactments made in pursuance of this provision. *Cook v. Daugherty*, 99 Va. 590, 30 S. E. Rep. 223; *Price v. Smith*, 93 Va. 14, 24 S. E. Rep. 474; *Prison Association v. Ashby*, 93 Va. 607, 25 S. E. Rep. 893; *Gresham v. Ewell*, 84 Va. 784, 6 S. E. Rep. 134; *Page v. Clopton*, 30 Gratt. 417.

Clause Allowing Homestead.—And the provision of the Virginia constitution allowing a homestead exemption is not self-executing, but is carried into effect by ch. 178 of the Code. *Oppenheim v. Myers*, 99 Va. 583, 30 S. E. Rep. 218. See also, *Spedel v. Schlosser*, 18 W. Va. 686. As to other provisions which are held not self-executing, see *Chahoon's Case*, 20 Gratt. 733; *Watkins v. Venable*, 99 Va. 440, 30 S. E. Rep. 147.

3. EFFECT OF PARTICULAR PROVISIONS.

First Ten Amendments to Federal Constitution.—The first ten amendments to the United States constitution have reference solely to the powers exercised by the United States government, and do not apply to the powers exercised by the state governments. *So. Exp. Co. v. Walker*, 92 Va. 50, 22 S. E. Rep. 809; *Baker v. Wise*, 16 Gratt. 139.

Application of Bill of Rights to Convicts.—The bill of rights, though made a part of the present constitution, has the same force and authority, and no more, than it always had. And the principles which it declares have reference to freemen, and not to convicts in the state penitentiary. *Ruffin v. Com.*, 31 Gratt. 790.

Provisions Applicable to Officers Chosen under It.—The clause of the Virginia constitution which provides among other things, that a mayor shall be chosen by the electors of every city, applies only to a mayor to be chosen under the constitution, at and after the time therein prescribed for the purpose; and not to one appointed to perform the duties of mayor before one could be chosen to enter upon the duties of the office under the constitution. *Richmond Mayoralty Case*, 19 Gratt. 673.

And a provision in a state constitution that no person shall be eligible as a juror who is not entitled to vote and hold office, applies only to disabilities imposed by the instrument making it, and not to those imposed by the fourteenth amendment to the United States constitution. *Sands v. State*, 21 Gratt. 871.

Clause Requiring Court to Decide All Points on Record.—The clause in the constitution of West Virginia requiring the supreme court of appeals to "decide every point arising upon the record, and give its reason therefor in writing" is directory and does not affect the common-law rule of *res judicata*. *Hall v. Bank of Virginia*, 15 W. Va. 323; *Henry v. Davis*, 13 W. Va. 230.

IV. GOVERNMENTAL POWERS AND FUNCTIONS.

1. POWER OF LEGISLATURE.

a. PLENARY UNLESS RESTRAINED.—See *post*, "The Police Power."

The legislature of the several states have plenary legislative powers, except where it is restricted by the constitution of the state, or of the United States. *Prison Assoc. v. Ashby*, 93 Va. 607, 25 S. E. Rep. 893.

For example, the legislature may remove the seat of the state government when they think that the state will be pecuniarily benefited by the removal, and the statute authorizing the removal is not void because showing on its face that the legislature was induced to act by reason of pecuniary considerations, and not by their wisdom and discretion. *Slack v. Jacob*, 8 W. Va. 612.

But, after the passage of a bill in the legal and constitutional form, by both houses of the legislature, and the transmission of it to the governor in the manner provided in the constitution, the legislature has exhausted its power over it, and it cannot recall the bill by resolution and revest themselves with power to further act upon it. *Wolfe v. McCaull*, 76 Va. 876.

Legislature No Power to Change Qualifications of Voters.—The right of suffrage is derived from the constitution of the state, and to it we look to ascertain who may, or who may not, vote. The legislature cannot, directly or indirectly, prescribe any qualifications additional to those found in the constitution, and, as no qualification is prescribed by the constitution, none can be required by the legislature. The sole function of the legislature, with respect to the exercise of the right of suffrage, is to provide the method of voting, and to this end it may adopt reasonable rules and regulations. But a regulation which virtually establishes a test of qualifications of the voter, additional to those prescribed in the constitution, is unconstitutional, and therefore void. *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. Rep. 483.

Legislature May Declare Cases in Which an Office Shall Be Deemed Vacant.—Where no provision is made for that purpose in the constitution, the legislature may declare the cases in which any office shall be deemed vacant. *Gallalee v. Calvert*, 1 Va. Dec. 561, Va. Law J. 1884, p. 418; *Vaughan v. Johnson*, 77 Va. 300.

b. TO PASS RETROSPECTIVE LAWS.

(1) In General.

Retrospective Laws Valid unless Prohibited.—The legislature may give a statute retrospective operation unless it violates that provision of the federal constitution relating to *ex post facto* laws and the obligation of contracts, or unless it is repugnant to some express provision of the state constitution, or unless it interferes with vested rights of property, so as not to come within the limits of the law-making power. Independently of these exceptions, retrospective laws are within the scope of the legislative authority and will not be interfered with by the judiciary. *Town of Danville v. Pace*, 25 Gratt. 1, 18 Am. Rep. 663. See *post*, "Obligation of Contract Protected."

Statutes Construed Prospectively.—A statute will not be construed to have a retroactive effect unless there is something on the face of the act showing beyond a doubt that this was the purpose of the legislature. *Merchants' Bank v. Ballou*, 98 Va. 112, 33 S. E. Rep. 481; *Myers v. Com.*, 90 Va. 785, 20 S. E. Rep. 152.

Applying this rule, a provision in the constitution that "the legislature may authorize municipalities to lay taxes" is not to be construed as retrospective. *Douglass v. Town of Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548.

Imposing Qualification for Office Holders.—No one has a natural or inalienable right to an office; all who seek it must accept the office with all the restrictions imposed by law. Therefore a law providing that certain officers shall take a test oath of loyalty to the state is not retroactive and is constitutional. *Ex parte Stratton*, 1 W. Va. 305; *Randolph v. Good*, 3 W. Va. 551.

(2) *Ex Post Facto Laws.*

What Laws Are Ex Post Facto within the Meaning of the Constitution.—The states are expressly inhibited by the federal constitution from passing *ex post facto* laws. Laws fall within the meaning of this inhibition when they impose a punishment for previous acts which were not punishable at all when committed or not punishable to the extent or in the manner prescribed, or when they change the rules of evidence so that less or different testimony is required to convict. *Danville v. Pace*, 25 Gratt. 1; *Ex parte Hunter*, 2 W. Va. 122; *Ex parte Quarrier*, 4 W. Va. 210; *Turner v. Turner*, 4 Call 234.

Always Relate to Crimes and Punishments.—*Ex post facto* laws always relate to penal and criminal proceedings, and never to civil proceedings. Hence, a law requiring a person who has already qualified as an attorney at law to take an oath before he can continue to practice at law, is not an *ex post facto* law. *Ex parte Hunter*, 2 W. Va. 122; *Ex parte Quarrier*, 4 W. Va. 210; *Perry v. Com.*, 8 Gratt. 632.

Imposition of Increased Punishment for Second Offence.—A statute imposing a greater punishment for a second offence, than for the first offence of the same character, is not unconstitutional as being an *ex post facto* law. *Rand v. Com.*, 9 Gratt. 788.

Rules of Practice May Be Changed.—And it is always competent for the legislature to change the rules of practice without violating this inhibition. Hence, a statute changing the mode of summoning and making up juries in trials for felony, applies to all cases tried after the act, though the offence was committed, and the examining court had passed upon the case, before the passage of the act. *Perry v. Com.*, 8 Gratt. 632.

And though an offence committed before the Code of 1849 went into operation, must, so far as the question of guilt, degree of crime, *quantum* of punishment and rules of evidence are concerned, be governed by the law in force at the time the offence was committed, yet upon the question of the prisoner's right to be discharged from the failure to try him, arising after the Code went into operation, it must be governed by the Code. *Adcock v. Com.*, 8 Gratt. 661.

Law Not Made Ex Post Facto by Charges in Indictment.—The fact that an indictment charges the commission of an offence both before and after the statute making it an offence was passed is not sufficient to make the law *ex post facto*, but the part of the indictment charging the offence before the passage of the law making it an offence, will be disregarded. *Morgan v. Com.*, 98 Va. 812, 35 S. E. Rep. 448.

(3) *Bills of Attainder.*—The states are also forbidden by the federal constitution to pass bills of attainder. A statute requiring a party to take a certain oath therein prescribed as prerequisite to a rehearing in the matter of a judgment suffered by default, in attachment, called the "sultor's test oath," and in effect to purge himself from all complicity with

the rebellion, is in the nature of a bill of pains and penalties, and unconstitutional, as a bill of attainder and *ex post facto* law. *Kyle v. Jenkins*, 6 W. Va. 371; *Peerce v. Carskadon*, 6 W. Va. 383; *Ross v. Jenkins*, 7 W. Va. 284.

And an act of congress providing for the forfeiture of land for the nonpayment of taxes, as a penalty upon persons who were engaged in the rebellion against the United States, is a legislative conviction and punishment without trial and is a bill of attainder and void. *Martin v. Snowden*, 18 Gratt. 100.

(4) *Laws Affecting Vested Rights.*—Legislation cannot divest or impair rights of property already vested, nor the right of alienation, nor any of the essential incidents to the estate in such property. *Johnson v. Sanger* (W. Va.), 38 S. E. Rep. 645. And a legislative interpretation changing title founded on existing statutes is subject to every objection which lies to an *ex post facto* law, since it would destroy vested rights. *Turner v. Turner*, 4 Call 234.

Husband's Right to Curtesy.—But a husband's right to curtesy initiate, and his right to reduce into possession his wife's choses in action, are not vested rights, and they may be impaired or taken away by legislation. *Alexander v. Alexander*, 85 Va. 353, 7 S. E. Rep. 335, 1 L. R. A. 126; *Thornburg v. Thornburg*, 18 W. Va. 522; *Wyatt v. Smith*, 25 W. Va. 813.

No Vested Right in Statutes.—And an act authorizing state bondholders to invest bonds in tax-receivable coupons does not create in the bondholder any vested right, so as to prevent the repeal of the statute, before the acceptance by them of its benefits. *Paulsen v. Rogers*, 32 Gratt. 654. See *post*. "Property Guaranties"—"Due Process of Law"—"Obligation of Contract Protected."

(5) *Curative Laws.*

Statutes Validating Contracts Void for Usury.—Legislative acts validating invalid contracts will be sustained, when these acts go no further than to bind the party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law. Thus, the defence of usury, being in the nature of a penalty or forfeiture, may at any time be taken away by the legislature in respect of previous as well as subsequent contracts, without trenching upon any vested rights. *Town of Danville v. Pace*, 25 Gratt. 1, 18 Am. Rep. 663; *Ewell v. Daggs*, 108 U. S. 143; *Bosang v. Iron Belt, etc., Assoc.*, 96 Va. 119, 30 S. E. Rep. 440; *Smoot v. People's, etc., Ass'n*, 95 Va. 686, 20 S. E. Rep. 746.

Legitimizing Children.—And where the legislature passed a law, declaring that the issue of a marriage deemed null in law should nevertheless be legitimate, it was held to legitimate children born before the act, so as to entitle them to share the estate, and as next of kin to entitle them to administration, where the father had died after the act took effect. *Stones v. Keeling*, 3 H. & M. 228, and *note*; *Rice v. Efford*, 3 H. & M. 225.

Curing Defective Acknowledgment.—But a statute which attempts to validate deeds, made for the benefit of a corporation, which have been acknowledged before a notary public or other officer who was a stockholder in such corporation, is unconstitutional and void so far as it affects the lien of a judgment recovered and docketed against the grantors in such deeds prior to the approval of the act.

Merchants' Bank v. Ballou, 98 Va. 112, 32 S. E. Rep. 481.

Void Judgment Cannot Be Validated.—So, also, where persons without authority to act as judges hear and decide causes, their judgment is of no effect, and it cannot be validated by a subsequent statute, as this would be taking one man's property from him and giving it to another. *Griffin v. Cunningham*, 20 Gratt. 31.

Curing Failure to Exercise Condition Precedent.—Where the legislature has given a county or municipality authority to subscribe to stock of a corporation, and through mistake or otherwise, the conditions precedent to the purchase are not complied with by the county or municipality, the legislature can cure this defect by subsequent legislation. *Redd v. Supervisors*, 31 Gratt. 605; *Supervisors v. Randolph*, 89 Va. 614, 16 S. E. Rep. 723; *Bell v. Farmville, etc., R. Co.*, 91 Va. 99, 20 S. E. Rep. 942. See *post*, "Obligation of Contract Protected."

C. ENCROACHMENT UPON JUDICIARY.

Usurping Judicial Functions.—The legislature must not usurp the functions of the judiciary. Thus, a statute directing the assessor and county clerk in making out the land-books, to disregard all changes made by the county court in the value of any tract of land, is unconstitutional and void. *Ex parte Low*, 24 W. Va. 620; *Selbert v. Linton*, 5 W. Va. 57. And an act of legislature purporting to legalize an order of the board of supervisors opening a road is void, because it attempts to determine a question essentially judicial. *Selbert v. Linton*, 5 W. Va. 57.

But a statute allowing an appeal from a decision of a board of public works to the circuit court is not in violation of the constitutional provision requiring legislative, executive and judicial functions to be kept separate. *Wheeling Bridge, etc., R. Co. v. Paull*, 39 W. Va. 142, 19 S. E. Rep. 551.

New Trials.—The legislature has no power to grant new trials or rehearings, or to authorize the opening of a judgment previously rendered, after that remedy under the general law has expired. A statute authorizing the opening of judgments rendered since an anterior date impairs vested rights and infringes on the judicial department. *Ratcliffe v. Anderson*, 31 Gratt. 105; *Peerce v. Kitzmiller*, 19 W. Va. 564; *Griffin v. Cunningham*, 20 Gratt. 31; *Teel v. Yancey*, 23 Gratt. 691; *Marpole v. Cather*, 78 Va. 239; *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. Rep. 591; *White v. Crump*, 19 W. Va. 583.

Setting Aside Judgments.—The legislature has no power to set aside a judgment, or to empower a court to do so, rendered before the passage of the act, no matter how erroneous the judgment may be. *Arnold v. Kelley*, 5 W. Va. 446; *Ratcliffe v. Anderson*, 31 Gratt. 105; *Marpole v. Cather*, 78 Va. 239; *Marshall v. Cheatham*, 88 Va. 31, 13 S. E. Rep. 308.

Statutes Authorizing Review of the Decisions of Military Court.—The legislature has no authority to confer upon the court the power to set aside, annul or affirm "as to the court may seem proper" the decisions of a court established by the military authorities under the reconstruction laws of congress, even though the exercise of such power be limited to the first term of the newly-constituted court. *Griffin v. Cunningham*, 20 Gratt. 31; *Teel v. Yancey*, 23 Gratt. 691.

Forfeiture without Trial.—The legislature has constitutional power to pass laws for the forfeiture of any vessel employed in violating the laws of the state, without regard to the guilt or innocence of the owner of such vessel. *Boggs v. Com.*, 76 Va. 989.

No Power to Nullify Judgment by Pardon.—In *Com. v. Caton*, 4 Call 5, the supreme court held void a resolution adopted by the state senate, but not concurred in by the lower house, whereby a pardon was sought to be granted to certain parties convicted of treason.

Compelling Trial of Causes by Allowing Mandamus.—The supreme court of appeals has no jurisdiction, whether under the constitution or the statute, to issue a mandamus to a judge of a circuit court to compel him to try a cause depending in his court. *Barnett v. Meredith*, 10 Gratt. 650.

Statute Allowing Removal.—But a statute, directing that on motion on twenty days' notice by any party, any suit or proceeding pending in a corporation court shall be removed to the circuit court having jurisdiction of the corporation, is not unconstitutional, and mandamus is the proper remedy for a refusal to remove. *Town of Danville v. Blackwell*, 80 Va. 38.

D. DELEGATION OF POWER.

(1) *To the Judiciary.*—The legislature cannot delegate its power to the judiciary, as such a delegation is impliedly prohibited by the separation of powers in the constitution. Applying this rule, a statute attempting to confer upon the circuit courts the power to "supersede, revoke or annul" an ordinance of a city upon the petition of ten taxpayers residing in said city, is unconstitutional for the reason that such power is legislative, and, therefore forbidden to be exercised by the courts. *Shepherd v. City of Wheeling*, 30 W. Va. 479, 4 S. E. Rep. 635.

But a statute conferring on courts functions in their nature judicial and administrative, although in furtherance of the legislative department of the state government, is constitutional and valid. *In re Town of Union Mines*, 39 W. Va. 179, 19 S. E. Rep. 398; *Elder v. Central City*, 40 W. Va. 222, 21 S. E. Rep. 738.

And the legislature may authorize the appointment of additional justices of the peace by the county court if the court shall be of the opinion that others are needed. *Ex parte Bassitt*, 90 Va. 679, 19 S. E. Rep. 453.

(2) To Local Authorities

Local Option.—The legislature has the power to delegate to the voters of a particular district or county the power to adopt a statute. Thus, the question of authorizing the sale of liquor within a given locality may be left to the determination of its voters. *Savage v. Com.*, 84 Va. 619, 5 S. E. Rep. 565.

Conditional Legislation.—And an act providing for the establishment of a system of free schools in a county may be made conditional upon its approval by the people of the county. *Bull v. Read*, 13 Gratt. 78. See also, *Kuhn v. Board of Ed.*, 4 W. Va. 499; *Neale v. County Court*, 43 W. Va. 96, 27 S. E. Rep. 373; *Savage v. Com.*, 84 Va. 621, 5 S. E. Rep. 565; *Ex parte Bassitt*, 90 Va. 682, 19 S. E. Rep. 453; *Langhorne v. Robinson*, 20 Gratt. 665; *Gilkeson v. Frederick Justices*, 13 Gratt. 584; *Goddin v. Crump*, 8 Leigh 120; *City of Richmond v. Richmond, etc., R. Co.*, 21 Gratt. 604; *Rutter v. Sullivan*, 25 W. Va. 427.

The legislature has the exclusive power to create independent school districts, without the assent of the citizens residing therein, and to authorize by law the election of a board of education for such district, by the qualified voters resident therein, and to give such board power to make the annual levies for buildings and the support of schools therein. *Kuhn v. Board of Ed.*, 4 W. Va. 499; *Pumphrey v. Brown*, 77 Va. 569.

2. POWER OF JUDICIARY.

a. AS DISTINGUISHED FROM LEGISLATIVE POWER.—

It is the province of courts to decide what the law is, and determine its application to particular facts in the decision of causes; the province of the legislature is to decide what the law shall be in the future. *Shepherd v. City of Wheeling*, 30 W. Va. 479, 4 S. E. Rep. 635. The judiciary alone has power to determine whether or not a statute is in harmony with the constitution, and to declare that statutes which conflict with the constitution shall be void. *Crenshaw v. Slate River Co.*, 6 Rand. 245.

b. POWER OF ANNULING STATUTES.

(1) *When Constitutionality Will Be Considered.*

Law Must Be Directly Brought in Question.—A court will not pass upon the constitutionality of a statute, unless a decision upon that very point is necessary to the determination of the case. *Edgell v. Conaway*, 24 W. Va. 747.

Need Not Be Specially Pleaded.—The unconstitutionality of a law or an ordinance of a municipal corporation need not be specially pleaded. The question may be raised by a general demurrer in the trial court, and the error assigned for the first time in the supreme court. *Adkins v. City of Richmond*, 98 Va. 91, 34 S. E. Rep. 967.

On Appeal.—When the constitution of the state requires an indictment to conclude in certain forms and words, an indictment is not good unless it concludes in the exact language of the constitution. And a prisoner, by failing to object at the trial, does not thereby waive the objection, but, the right being a constitutional one, objection may be made by the prisoner for the first time on appeal. *Lemons v. State*, 4 W. Va. 755.

One who has restrained an oyster inspector from collecting fees under a statute, on the ground that the statute is unconstitutional, cannot dispute the jurisdiction of the supreme court of appeals, to which an appeal may be taken in all cases involving the constitutionality of a statute. *Thomas v. Rowe*, 2 Va. Dec. 113, 23 S. E. Rep. 157.

(2) *Who May Raise Question.*

Party Interested.—The question must be raised, in all cases, by a party who is affected by the law in question, as courts cannot be empowered by the legislature to pass upon the constitutionality or validity of a legislative act or city ordinance as a general and abstract question; the question must be whether the act or ordinance furnishes the rule to govern the particular case before the court. *Shepherd v. City of Wheeling*, 30 W. Va. 479, 4 S. E. Rep. 635.

Joint Suit to Test Constitutionality.—One of a number of parties affected by law may file a bill in behalf of himself and all the other parties similarly situated, to test the constitutionality of the law and the propriety of proceedings under it. *Bull v. Read*, 13 Gratt. 78; *McClung v. Livesay*, 7 W. Va. 333; *Corrothers v. Board of Education*, 16 W. Va. 540; *Christie v. Malden*, 23 W. Va. 670; *Williams v. County Court*, 26 W. Va. 500; *City of Richmond v. Crenshaw*, 76 Va. 940; *Roper v. McWhorter*, 77 Va. 216; *Blanton v. Southern, etc., Co.*, 77 Va. 339; *Shen. Valley R. Co. v. Supervisors*, 78 Va. 276; *Buffalo v. Town of Pocahontas*, 85 Va. 225, 7 S. E. Rep. 238; *Lynchburg, etc., Ry. Co. v. Dameron*, 95 Va. 546, 28 S. E. Rep. 951; *Redd v. Supervisors of Henry County*, 81 Gratt. 698; *Eyre v. Jacob*, 14 Gratt. 424; *Johnson v. Drummond*, 20 Gratt. 428; *Douglass v. Town of Harrisville*, 9 W. Va. 166; *Kuhn v. Board of Education*, 4 W. Va. 511; *Osburn v. Staley*, 5 W. Va. 85;

Doonan v. Board of Education, 9 W. Va. 246; *C. & O. Ry. Co. v. Miller*, 19 W. Va. 408; *Perkins v. Seigfried*, 97 Va. 444, 34 S. E. Rep. 64; *Coffman v. Sangston*, 31 Gratt. 263.

(3) *When Statutes Will Be Annulled.*

Annulment a Delicate Task.—To declare a legislative enactment void is the exercise of a judicial function of the most delicate character, never to be done except upon the clearest conviction of the unconstitutionality of the law. *Helfricks' Case*, 29 Gratt. 847; *Bridges v. Shallcross*, 6 W. Va. 570; *Com. v. Byrne*, 20 Gratt. 175; *Slack v. Jacob*, 8 W. Va. 627; *Eyre v. Jacob*, 14 Gratt. 423, and *foot-note*.

Statute Must Conflict with Constitution.—In determining the constitutionality of a statute, the courts have nothing to do with the question whether or not the legislation contained in its provisions is wise and proper. The only question they have to deal with is one of power. If the statute, the validity of which is attacked, is not in conflict with the state or federal constitution, the courts have no power to declare it invalid, however well satisfied they may be that it is unwise or vicious legislation. *Prison Assoc. v. Ashby*, 98 Va. 607, 25 S. E. Rep. 893; *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640; *Slack v. Jacob*, 8 W. Va. 612; *State v. Workman*, 35 W. Va. 367, 14 S. E. Rep. 9, 14 L. R. A. 600; *Peel Splint Coal Co. v. W. Va.*, 36 W. Va. 802, 15 S. E. Rep. 1000, 17 L. R. A. 385.

Unconstitutionality Must Clearly Appear.—The unconstitutionality of a statute must be clear and manifest before a court will declare it void; and where any reasonable doubt exists as to its constitutionality it will be upheld. *Gutman v. Virginia Iron Co.*, 5 W. Va. 22; *Com. v. Moore*, 25 Gratt. 951; *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640; *Bridges v. Shallcross*, 6 W. Va. 562.

It is the duty of the court to uphold a statute when the conflict between it and the constitution is not clear, and the implication, which must always exist, that no violation has been intended by the legislature, may require it, in some cases, where the meaning of the constitution is in doubt, to lean in favor of such a construction of the statute as might not at first view seem most obvious and natural. Where the meaning of the constitution is clear, the court, if possible, must give the statute such a construction as will enable it to have effect. *Slack v. Jacob*, 8 W. Va. 627; *State v. Ellison (W. Va.)*, 28 S. E. Rep. 574; *State v. Workman*, 35 W. Va. 367, 14 S. E. Rep. 9.

In *C. & O. Ry. Co. v. Miller*, 19 W. Va. 408, the rule is laid down as follows: "When doubts arise in the minds of the court as to the interpretation to be put upon the provision of a constitution, if after a careful examination of the provision, and after all the lights, to which it is proper to resort, have been made use of for the purpose of ascertaining its true meaning, the court construing the provision still has doubts whether the legislation complained of is an infraction of the instrument, the court, upon such doubts alone, is bound to pronounce in favor of the validity of the act. The court does not, in such case, sustain the validity of the act, because other persons or courts have doubted its constitutionality, but because the court itself, after using all the aids that it has a right to use, in its own mind acting for itself and upon its own responsibility, is not able to say beyond a reasonable doubt that the act is unconstitutional. The presumption is in favor of the constitutionality of the act, and in a doubtful case that presumption is sufficient to sustain the act."

Statutes—Prima Facie Valid.—Any legislative act which does not encroach upon the powers apportioned to other departments of the government, being *prima facie* valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the constitution, and the case shown to come within them. *State v. Dent*, 25 W. Va. 19; *State v. Swann*, 46 W. Va. 128, 33 S. E. Rep. 89; *State v. McAllister*, 88 W. Va. 485, 18 S. E. Rep. 770; *Virginia, etc., Co. v. McClelland*, 98 Va. 424, 36 S. E. Rep. 479.

While the legislature is governed by the spirit of the constitution, the courts cannot declare an act invalid unless its invalidity is placed beyond a reasonable doubt. A reasonable doubt must be solved in the favor of the legislative action, and the act be sustained. The court must be guided by the express words of the constitution, and not by its supposed spirit. Whenever an act of the legislature can be so construed as to avoid conflict with the constitution and give it the force of a law, such construction will be adopted by the courts. *Osburn v. Staley*, 5 W. Va. 85.

And where two constructions may be given a statute, one of which is clearly within the legislative power and the other beyond it, the legislature will be held to have intended to do that which it had a right to do, and not that which was beyond its power. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. Rep. 591.

State Court May Declare Law in Conflict with Federal Constitution.—A state court has jurisdiction to decide that a provision of the state constitution is in conflict with the constitution of the United States. *Homestead Cases*, 23 Gratt. 266.

(4) *Effect of Unconstitutionality.*

(a) *Entire Unconstitutionality.*

Renders Statute Void.—Where a law is totally in conflict with the constitution the law is void in entirety, and it is the duty of the court to so declare it. *Robertson v. Preston*, 97 Va. 296, 33 S. E. Rep. 618; *Black v. Trower*, 79 Va. 123; *Trimble v. Com.*, 96 Va. 818, 32 S. E. Rep. 786; *Isaacs v. City of Richmond*, 90 Va. 30, 17 S. E. Rep. 760; *Kamper v. Hawkins*, 1 Va. Cas. 20.

Unconstitutionality as Ground for Injunction.—An allegation in a bill for an injunction that the act complained of is being committed under an unconstitutional statute, will not, of itself, confer jurisdiction on a court of equity to grant the relief, where the other allegations do not make a case for such relief. *Thomas v. Rowe*, 2 Va. Dec. 113, 22 S. E. Rep. 157.

(b) *Partial Unconstitutionality.*—Where a part of an act is unconstitutional, that fact does not authorize the courts to declare the other provisions of the act void, unless they are so connected in subject-matter, depending on each other, operating for the same purposes, or otherwise so connected in meaning, that it cannot be presumed that the legislature would have enacted the one without the other. If the act attempts to accomplish two or more objects, and is unconstitutional as to one, it may still be complete in all respects and valid as to the other; but if the purpose of the act is to accomplish a single object only, and some of its provisions are void, the whole must fall, unless the remainder of the act is sufficient to effect the object, without the aid of that which is invalid. *Robertson v. Preston*, 97 Va. 296, 33 S. E. Rep. 618; *Black v. Trower*, 79 Va. 123; *Trimble v. Com.*, 96 Va. 818, 32 S. E. Rep. 786; *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. Rep. 483; *Eckhart v.*

State, 5 W. Va. 515. See, in this connection, *post*, "Rules Regulating Enactment of Statutes."

3. POWER OF EXECUTIVE.

Pardoning Power.—The power to reprieve is vested in the governor by the constitution, in all cases of felony where the necessity therefor exists. He is the sole judge of such necessity, and his conclusions are not reviewable by the courts, but are binding on the other departments of government. *State v. Hawk* (W. Va.), 84 S. E. Rep. 918. And the pardoning power is vested solely in the executive. The legislature has no power to grant a pardon to a person convicted of crime. *Com. v. Caton*, 4 Call 5.

Approval of Legislative Acts.—Article 5 of the Constitution of West Virginia provides that "the legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise powers properly belonging to either of the others; nor shall any persons exercise the powers of more than one of them at the same time." It follows from this section that the governor has no legislative function, and his approval of an act, which is to take effect not at its passage but after the expiration of ninety days, relates back to the date of its passage. *State v. Mounts*, 86 W. Va. 179, 14 S. E. Rep. 407.

No Power to Remove Justice of Peace.—The executive has no power to remove a justice of the peace from office; but he may be removed by the judgment of a superior court of law. *Edmiston v. Campbell*, 1 Va. Cas. 16.

Taking Care That the Laws Are Faithfully Executed.—The constitutional provision that the governor shall take care that the laws be faithfully executed, grants no power other than that implied in the imposition of the duty, and this provision does not generally, if ever, make it the duty of the governor to execute the laws. But, as the language implies, it makes it his duty to observe the manner in which the different officers of the government exercise their proper functions and execute the laws committed to their charge. *Shields v. Bennett*, 8 W. Va. 74.

V. RULES REGULATING ENACTMENT OF STATUTES.

1. NO LAW SHALL EMBRACE MORE THAN ONE OBJECT.

The Constitutional Provision.—The state constitutions usually contain a provision to the effect that no act passed by the legislature shall embrace more than one object which shall be expressed in its title; and that no act shall be amended or repealed with reference to its title, but the act revived or the section amended shall be re-enacted and published at length. See Va. Const., art. 5, § 15; W. Va. Const., art. 6, § 30; *Lacey v. Palmer*, 98 Va. 159, 24 S. E. Rep. 980; *Cahoon v. Town of Iron Gate*, 92 Va. 367, 23 S. E. Rep. 767.

Rationale of Rule.—The object of such a provision is to prevent the members of the legislature from being misled by the title of law; to prevent the use of deceptive titles for vicious legislation; to prevent the practice of bringing together in the one bill for corrupt purposes subjects diverse and dissimilar in their nature, and having no necessary connection with each other; and to prevent surprise or fraud in legislation by means of provisions in bills of which the title gives no intimation. On the other hand, it is not intended to obstruct honest legislation, or to prevent the incorporation into a single act of the entire statutory law of one general subject. It was not designed to embarrass legislation

by compelling the multiplication of laws by the passage of separate acts on a single subject. It is therefore to be liberally construed and treated, so as to uphold the law if practicable. *Com. v. Brown*, 91 Va. 762, 21 S. E. Rep. 357; *Cahoon v. Iron Gate*, 92 Va. 367, 23 S. E. Rep. 767; *Lacey v. Palmer*, 93 Va. 159, 24 S. E. Rep. 980; *Fidelity, etc., Co. v. Shenandoah, etc., R. Co.*, 86 Va. 1, 9 S. E. Rep. 759; *Pearson v. Supervisors*, 91 Va. 323, 21 S. E. Rep. 483; *Shields v. Bennett*, 8 W. Va. 74; *Supervisors v. McGruder*, 84 Va. 828, 6 S. E. Rep. 232.

When Rule Is Satisfied.—It may be stated as a general rule that the title of an act will be sufficient if the things authorized to be done, though of a diverse nature, may be fairly regarded as in furtherance of the object expressed in the title. All that is required is that the subjects embraced in the statute, but not specified in the title, are congruous, and have natural connection with, or are germane to, the subject expressed in the title; and the constitution is to be liberally construed so as to uphold the law, if practicable. *Com. v. Brown*, 91 Va. 762, 21 S. E. Rep. 357; *Lacey v. Palmer*, 93 Va. 159, 24 S. E. Rep. 980; *State v. Mines*, 38 W. Va. 125, 18 S. E. Rep. 470; *State v. Brookover*, 38 W. Va. 141, 18 S. E. Rep. 476; *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. Rep. 239; *Fidelity, etc., Co. v. Shen., etc., R. Co.*, 86 Va. 1, 9 S. E. Rep. 759; *Com. v. Drewry*, 15 Gratt. 1; *Anderson v. Com.*, 18 Gratt. 295; *Lescallett v. Com.*, 89 Va. 878, 17 S. E. Rep. 546; *Prison Assoc. v. Ashby*, 93 Va. 667, 25 S. E. Rep. 893; *Ingles v. Straus*, 91 Va. 209, 21 S. E. Rep. 490.

The title need not be a detail or index or abstract of the contents of the act. The act may include numerous provisions which are reasonably indicated by the title. The generality of the title is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intent can be considered as having a necessary and proper connection. *State v. Mines*, 38 W. Va. 125, 18 S. E. Rep. 470; *State v. Brookover*, 38 W. Va. 141, 18 S. E. Rep. 476. For example, a statute, having as its object the suppression of gambling upon the speed or endurance of animals, may make unlawful, and provide for punishing, every device for making, receiving, forwarding or registering any bet or wager upon the speed or endurance of animals. *Lacey v. Palmer*, 93 Va. 159, 24 S. E. Rep. 980.

Illustrations of the Rule.—A statute entitled "An act to prevent poolselling and so forth, upon the result of any trials of speed of any animals or beasts taking place without the limits of the commonwealth," and which makes it unlawful for any person, association or corporation, by any means or device, to make any bet or wager, or to receive, record, register or forward, purport or pretend to forward, any money, thing or consideration of value to be bet or wagered upon the result of any trials of speed, power of endurance, or skill of animals which is to take place beyond the commonwealth, conflicts with this provision as it prohibits acts which are not included in the term "poolselling." *Lacey v. Palmer*, 93 Va. 159, 24 S. E. Rep. 980.

And where the object of a statute as expressed in its title is to secure the wages of certain employees of railway and other corporations, and it contains a provision securing liens to persons furnishing iron, fuel, and other supplies, such provision is not within the object of the act as stated in the title, and is therefore inoperative. *Fidelity, etc., Co. v. Shen., etc., R. Co.*, 86 Va. 1, 9 S. E. Rep. 759.

But an act, the title of which is "An act to provide a new charter for the Iron Belt Building and Loan Association," is not unconstitutional on the ground that its title embraces more than one object, or that the title is broader than the act, in so far as it validates legal contracts previously made by the association. This provision is germane to the title, and in furtherance of the object expressed therein. *Bosang v. Iron Belt, etc., Assoc.*, 96 Va. 119, 30 S. E. Rep. 440.

The title to an act which imposes a tax sufficiently defines the object to which the tax is to be applied when it declares it to be "to obtain revenue." *Com. v. Brown*, 91 Va. 762, 21 S. E. Rep. 357.

And where an appropriation is mentioned in the title as the object of the act, this is sufficient to sustain the validity of the provision indicating an officer on whose requisition the appropriation shall be made. *Shields v. Bennett*, 8 W. Va. 74.

Effect Where Statute Includes Several Matters.—If the title is so framed as to include only certain matters, the other legislation beyond the matters named is inoperative, although it might with propriety have been embraced in the same act with the matters indicated by the title, if the title had been more comprehensive. *Supervisors v. Alexandria*, 95 Va. 469, 28 S. E. Rep. 882; *Martin v. So. Salem Land Co.*, 94 Va. 28, 26 S. E. Rep. 591; *Cahoon v. Town of Iron Gate*, 92 Va. 367, 23 S. E. Rep. 767; *Fidelity, etc., Co. v. Shen. R. Co.*, 86 Va. 1, 9 S. E. Rep. 759; *Shields v. Bennett*, 8 W. Va. 74. This rule, however, does not operate to make a statute wholly void when any part of the act is indicated by the title, and such part is capable of being separated from the part not so indicated, and is left complete in itself, and capable of being executed as the will of the legislature. *Bd. of Supervisors v. McGruder*, 84 Va. 828, 6 S. E. Rep. 232; *Shields v. Bennett*, 8 W. Va. 74. See *ante*, "Effect of Unconstitutionality."

The Rule as Applied to Amendatory Acts.—The rule as to the title and matters of an original act applies to an amendatory act. If the title of the first act is broad enough to cover the matters embraced by the amendatory act, it is unnecessary to enquire whether the title of the amendatory act would itself be sufficient, for, if the title of the first act is broad enough to have covered the new matters of the amendatory act, it is enough. *Roby v. Sheppard*, 42 W. Va. 286, 26 S. E. Rep. 278; *Bridges v. Shallcross*, 6 W. Va. 563; *State v. Mines*, 38 W. Va. 125, 18 S. E. Rep. 470; *State v. Brookover*, 38 W. Va. 141, 18 S. E. Rep. 476; *Com. v. Brown*, 91 Va. 762, 21 S. E. Rep. 357.

Hence, an amendatory act which merely continues a tax, which has been imposed by a previous act is valid though the amendatory act does not state the object to which the tax is to be applied. *Com. v. Brown*, 91 Va. 762, 21 S. E. Rep. 357.

Amending the Code.—Where an act of assembly has been incorporated in the Code, this act may be amended, re-enacted or repealed by an act which simply refers to the number of its section. *Com. v. Brown*, 91 Va. 762, 21 S. E. Rep. 357.

Amendment by Implication.—Statutes which amend each other by implication are not within the provisions of this clause, and it is not essential that they even refer to the acts or section which, by implication, they amend. *State v. Cain*, 8 W. Va. 720; *Roby v. Sheppard*, 42 W. Va. 286, 26 S. E. Rep. 278.

When Title Is Restricted.—The title to an act may be so restricted as to exclude matters indicated in

the title. In such case, the matter excluded by the restrictive words of the title cannot be inserted in the body of the statute without making it void. *Fidelity, etc., Co. v. Shen., etc., R. Co.*, 86 Va. 1, 9 S. E. Rep. 759.

Employment of "And So Forth" to Enlarge Title.—The use of the term, "and so forth" cannot enlarge the meaning of other words employed in the title of an act nor supply any omission therein. *Lacey v. Palmer*, 98 Va. 159, 24 S. E. Rep. 980.

Rule of Construction.—Generally, the language of title should be construed in its most comprehensive and liberal sense favorable to the validity of the act, so as to bring the contents of the act within the title; and only when it is very manifest that the contents of the act is not within the title, should the act, or any part of it, be deemed invalid. *State v. Mines*, 88 W. Va. 125, 18 S. E. Rep. 470; *State v. Brookover*, 88 W. Va. 141, 18 S. E. Rep. 476; *Shields v. Bennett*, 8 W. Va. 74.

2. RECORDING VOTE ON JOURNAL OF HOUSE.

—Every resolution requires the consent of both houses, and if the constitution provides that, upon the passage of an act, the vote shall be determined by ayes and noes, and the names of the persons voting shall be entered on the journals of the respective houses, this provision must be strictly complied with, and if the vote is not taken in the manner provided, the act is of no force. *Lambert v. Smith*, 98 Va. 268, 38 S. E. Rep. 988; *Christian v. Taylor*, 96 Va. 508, 31 S. E. Rep. 904; *Field v. Auditor*, 83 Va. 882, 8 S. E. Rep. 707.

And where the constitution prescribes the precise manner in which bills shall be passed and requires that the journal shall show that these provisions have been complied with, the court may look behind the act to the legislative records and if these fail to comply with the constitution, as to the bill in question, the act cannot be sustained. *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640. But the legislative records are conclusively presumed to be true, and evidence to contradict or vary them is inadmissible. *Wise v. Bigger*, 79 Va. 269.

VI. CONSTITUTIONAL GUARANTIES.

1. TRIAL BY JURY IN CIVIL CASES.

Not Applicable to Equity Causes.—The provision in any constitution, whether state or federal, which guarantees the right of trial by jury, must be read in the light of the circumstances under which it was adopted. Unless the right of trial by jury existed at the time of its adoption, in the particular case, it cannot be contended that such a right was to be given by the constitution, unless it expressly so provides or is necessarily implied. *Pillow v. Southwest, etc., Imp. Co.*, 92 Va. 144, 23 S. E. Rep. 32; *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. Rep. 216; *N. Y., etc., Ins. Co. v. Davis*, 94 Va. 427, 26 S. E. Rep. 941.

Extension of Equity Jurisdiction.—In matters of such nature as give a right to jury trial under the constitution, the legislature cannot extend equity jurisdiction over them and deprive the parties of the trial by jury against their will. But where at the time of the adoption of the constitution, equity exercised jurisdiction over certain matters, the clause of the constitution guarantying jury trial does not relate to such matters or deprive equity of jurisdiction therein to act without a jury. *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. Rep. 216; *Pillow v. S. W. Va. Imp. Co.*, 92 Va. 144, 23 S. E. Rep. 32; *N. Y., etc., Ins. Co. v. Davis*, 94 Va. 427, 26 S. E. Rep. 941.

But it has been held that the constitutional provi-

sion that "in suits at common law the right to trial by jury, if required by either party, shall be preserved" does not prevent the legislature from passing a statute giving a court of equity jurisdiction of a case. *McKinsey v. Squires*, 82 W. Va. 41, 9 S. E. Rep. 55.

Where Jury Trial Is Optional.—Where the parties may have a jury trial if they so desire, this is a sufficient compliance with the constitutional provision that a person shall not be deprived of a right of trial by jury. *McKinsey v. Squires*, 82 W. Va. 41, 9 S. E. Rep. 55.

Nonsuit.—The court may deprive a party of his right to trial by jury, by ordering a nonsuit, but the plaintiff may refuse to suffer a nonsuit, and thus leave the whole to the jury. *Ross v. Gill*, 1 Wash. 87; *Thweat v. Finch*, 1 Wash. 219. See monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 738.

2. RIGHTS OF ACCUSED IN CRIMINAL CASES.

a. JURY TRIAL.

(1) When Rule Applicable.

Distinction between Trials in State and Federal Courts.—The provision of the United States constitution declaring that the trial of all crimes, except in case of impeachment, shall be by jury, only applies to trials held under the authority of the government of the United States, and makes the jury an indispensable requisite of the trial of a person accused of crimes in the courts of that government. But the articles of the Virginia and West Virginia constitutions which provide that a man has a right to a speedy trial by an impartial jury means that he has a legal claim to a trial by jury—that a jury trial is his privilege. But the presence of a jury is not made a jurisdictional fact, without which a court is not duly organized for the trial of criminals as is the case in all of the United States courts. *Brown v. Epps*, 91 Va. 726, 21 S. E. Rep. 119; *McKinsey v. Squires*, 82 W. Va. 41, 9 S. E. Rep. 55.

Not Applicable to Contempt Cases.—The power of courts to punish for contempt is inherent, and a statute providing for a jury trial in case of contempts is unconstitutional. *Carter v. Com.*, 96 Va. 791, 32 S. E. Rep. 780; *Com. v. Deskins*, 4 Leigh 685; *Wells v. Com.*, 21 Gratt. 500; *State v. Frew*, 24 W. Va. 416. See also, *Dandridge's Case*, 2 Va. Cas. 408.

Misdemeanor Cases.—And the constitutional right to trial by jury does not extend to a warrant before a justice for Sabbath breaking where the fine which can be imposed is only two dollars. *Ex parte Marx*, 86 Va. 40, 9 S. E. Rep. 475. See also, *State v. Griggs*, 84 W. Va. 78, 11 S. E. Rep. 741.

Where Jury Trial May Be Had in Appellate Court.—Though a charge or matter in the municipal or justice's court be one in respect of which a party is entitled by the bill of rights to a trial by jury, yet if by an appeal clogged by no unreasonable restriction, he can have such a trial as a matter of right in the appellate court, this is sufficient and his constitutional right to trial by jury is not invaded by the summary proceeding in the first instance. *Brown v. Epps*, 91 Va. 726, 21 S. E. Rep. 119, overruling *Miller v. Com.*, 88 Va. 618, 14 S. E. Rep. 161; *Jelly v. Dills*, 27 W. Va. 267; *Moundsville v. Fountain*, 27 W. Va. 182; *Beasley v. Town of Beckley*, 28 W. Va. 81.

Grand Juries.—The provision in the United States constitution that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of the grand jury, does not provide for the number of persons to constitute the grand jury, but leaves the construction

of grand juries to the state. A state may compose a grand jury in her courts as shall be provided by law, and if the law provides for a grand jury of seven, or any other number, an indictment by such number is due process of law. *Hausenfluck v. Com.*, 85 Va. 702, 8 S. E. Rep. 683.

(2) *Waiver of Right.*

Right May Be Waived in Misdemeanor Cases.—The legislature may provide for the trial of misdemeanor by the court in lieu of a jury with the consent of a defendant. And where the record shows, "that neither party required a jury, and the court is substituted in lieu of a jury to try the case," and the case is tried by the court, this is consent entered of record and the trial is valid. *King v. Burdett*, 12 W. Va. 688; *State v. Griggs*, 84 W. Va. 78, 11 S. E. Rep. 740; *State v. Cottrill*, 81 W. Va. 162, 6 S. E. Rep. 428; *State v. Denoon*, 84 W. Va. 189, 11 S. E. Rep. 1003.

Waiver of Objection to Composition of Jury.—Where the constitutional provision of a state is that a party shall be tried by a jury of twelve men, a trial by a jury composed of thirteen men is erroneous, and their verdict should be set aside. But a verdict rendered by eleven, instead of twelve jurors, is valid, where it appears that the parties consented in open court to a trial by eleven. *Roach v. Blakey*, 89 Va. 767, 17 S. E. Rep. 228; *State v. Hudkins*, 85 W. Va. 247, 18 S. E. Rep. 367.

Effect of Waiver.—The constitutionality of a statute providing for depositing jury fees before a jury can be had, cannot be raised in a case where a jury was waived. *Rutter v. Sullivan*, 25 W. Va. 427. See generally, monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 733.

b. **SPEEDY TRIAL.**

Meaning of "Speedy" Trial.—A "speedy" trial is guaranteed by the constitution to all persons accused of felony. What is meant by the "speedy trial" guaranteed by the constitution, and what is the delay in the trial of one charged with felony that shall forever discharge him from prosecution, has been construed and interpreted by the legislature of Virginia in the enactment of a statute, that "every person against whom an indictment is found charging a felony, and held in any court for trial, shall be forever discharged from prosecution for the offence, if there be three regular terms of the circuit, or four of the county, corporation, or Hustings court, in which the case is pending, after he is so held without a trial," unless the failure to try is due to certain causes mentioned in the statute. *Benton v. Com.*, 91 Va. 782, 21 S. E. Rep. 495; *Nicholas v. Com.*, 91 Va. 741, 21 S. E. Rep. 364; *Adcock v. Com.*, 8 Gratt. 661; *Benton v. Com.*, 90 Va. 328, 18 S. E. Rep. 282; *Com. v. Cawood*, 2 Va. Cas. 527; *Brown v. Epps*, 91 Va. 726, 21 S. E. Rep. 119.

What Is Not a Denial of a Speedy Trial.—But the fact that one term of the county court has passed without an order in the case is not a denial of a speedy trial. *Nicholas v. Com.*, 91 Va. 741, 21 S. E. Rep. 364; *Benton v. Com.*, 90 Va. 741, 21 S. E. Rep. 364; *Benton v. Com.*, 90 Va. 328, 18 S. E. Rep. 282. And a prisoner is not entitled to be discharged from prosecution for an offence merely because a new trial has been granted him on the ground that his case has been erroneously continued at one term of the county court on the motion of the commonwealth, against his protest. *Benton v. Com.*, 91 Va. 782, 21 S. E. Rep. 495. See also, *Benton v. Com.*, 90 Va. 328, 18 S. E. Rep. 282.

c. **TO BE PRESENT AT TRIAL.**

In What Cases Prisoner Must Be Present.—In felony

cases the accused must be present throughout all the proceedings, and that fact must appear from the record. *Hooker v. Com.*, 13 Gratt. 763; *State v. Conkle*, 16 W. Va. 747; *State v. Suttin*, 22 W. Va. 773; *State v. Greer*, 23 W. Va. 811; *Shelton v. Com.*, 89 Va. 453, 16 S. E. Rep. 365; *Coleman v. Com.*, 90 Va. 635, 19 S. E. Rep. 161; *Younger v. State*, 2 W. Va. 579; *Jackson v. Com.*, 19 Gratt. 656; *State v. Strander*, 8 W. Va. 691; *Snodgrass v. Com.*, 89 Va. 688, 17 S. E. Rep. 238; *Bond v. Com.*, 83 Va. 585, 3 S. E. Rep. 149; *Lawrence v. Com.*, 30 Gratt. 851; *Boswell v. Com.*, 20 Gratt. 865; *State v. Allen*, 45 W. Va. 65, 30 S. E. Rep. 209; *State v. Parsons*, 39 W. Va. 464, 19 S. E. Rep. 876; *Gilligan v. Com.*, 99 Va. 816, 37 S. E. Rep. 962; *Sperry v. Com.*, 9 Leigh 623.

Does Not Apply to Misdemeanor Cases.—In Virginia the verdict of guilty upon an indictment for a misdemeanor may be rendered in the absence of the accused, even though the penalty is imprisonment. *U. S. v. Shepherd*, 1 Hughes (U. S.) 520; *Price v. Com.*, 33 Gratt. 819, 26 Am. Rep. 797; *Shiflett v. Com.*, 90 Va. 836, 18 S. E. Rep. 838.

At What Time Prisoner Must Be Present.—Upon a trial for felony it is the right of the prisoner to be present from the arraignment to the verdict; and this right cannot be waived by him. And if the evidence of a witness on the trial, which has been reduced to writing, or any part of it, is read to the jury in the absence of the prisoner, it is error for which the verdict will be set aside. *Jackson v. Com.*, 19 Gratt. 656; *Sperry v. Com.*, 9 Leigh 623; *Gilligan v. Com.*, 99 Va. 816, 37 S. E. Rep. 962. But after the prisoner has been sentenced, and has been carried to jail, it is no error to hear the statements of his counsel that he has no bill of exceptions to offer. *Gilligan v. Com.*, 99 Va. 816, 37 S. E. Rep. 962.

But the statute (Va. Code, ch. 208, § 3), which provides that a person tried for felony shall be personally present during the trial, does not apply before his arraignment, and therefore before arraignment an order may be made in his absence. *Boswell v. Com.*, 20 Gratt. 860; *Kibler v. Com.*, 94 Va. 804, 26 S. E. Rep. 858; *Anderson v. Com.*, 84 Va. 77, 3 S. E. Rep. 803.

Presence Inferred from Record.—The presence of the accused must appear from the record, and no presumption that all things were rightly done by the trial court will supply the omission. This rule is satisfied, however, when the record shows the presence of the prisoner and declares that the jury "retired to their room to consider of their verdict, * * * whereupon the prisoner, by his counsel, moved the court not to proceed to judgment upon the verdict aforesaid" but to set it aside as contrary to the law and evidence. *Gilligan v. Com.*, 99 Va. 816, 37 S. E. Rep. 962. See also, *Lawrence v. Com.*, 30 Gratt. 845; *Benton v. Com.*, 91 Va. 794, 21 S. E. Rep. 495; *Cluverius v. Com.*, 81 Va. 848; *Com. v. Cross*, 44 W. Va. 815, 29 S. E. Rep. 527; *Sperry v. Com.*, 9 Leigh 622.

Where at the end of the record of the proceedings of the court on the day of the conviction of the prisoner, it is stated "and thereupon the accused was remanded to jail," this is conclusive that he had been personally present during all of the proceedings had that day. *Cluverius v. Com.*, 81 Va. 787; *Lawrence v. Com.*, 30 Gratt. 851.

But an entry upon the record, "This case was continued for the defendant," does not show that he was personally present, as it is a settled principle that the presumption that a court of general jurisdiction acts rightly cannot supply an essential

part of the record. *Shelton v. Com.*, 89 Va. 450, 16 S. E. Rep. 365.

And upon a recital in the record that the defendant appeared by attorney, it will not be presumed that he was personally present. *Sperry v. Com.*, 9 Leigh 623.

Continuance and Amendment May Be Made in Absence of Accused.—Where the prisoner is not prejudiced, it is not error to continue an indictment against him for a felony in his absence. *O'Boyle v. Com.* (Va. 1901), 7 Va. Law Reg. 691. And the court may amend the judgment, during the same term in which it was rendered, in the absence of the accused. *Price v. Com.*, 83 Gratt. 819.

d. TO BE CONFRONTED WITH ACCUSERS.

Reading Former Testimony of Absent Witness.—Both state and federal constitutions provide that in all capital or criminal prosecutions a man has a right to be confronted with his accusers and witnesses. Under this clause it is held in Virginia that the fact that the accused was confronted with his accusers at a former trial, at which their testimony was written down, is not sufficient to allow this testimony to be read in evidence on a second trial where the witnesses are absent from the commonwealth at the date of the second trial. *Finn v. Com.*, 5 Rand. 710; *Crite v. Com.*, 1 Va. Dec. 423; *U. S. v. Angell*, 11 Fed. 34.

Reading Testimony Where Witness Has Died Since First Trial.—While the rule above laid down may be the true one where the witness is absent from the commonwealth at the date of the second trial, the supreme court of the United States has held that where the witness has died since the first trial his testimony given at that trial may be read in evidence at the second trial. *Mattox v. U. S.*, 156 U. S. 237. This view is based upon the ground that the substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witnesses face to face, and of subjecting them to the ordeal of a cross-examination. No case has arisen in Virginia where the witness was dead at the date of the second trial.

In *U. S. v. Angell*, 11 Fed. 43, the court said: "The fair meaning of the constitution is that wherever and whenever he [the accused] is put on his final trial he shall be confronted with the witnesses against him, if they are alive."

Rule Does Not Apply to Misdemeanor Cases Where Accused Has Been Summoned.—Where a person has been duly summoned to answer a prosecution for a misdemeanor and fails to be present, proceeding in his absence with the trial and sentencing him to imprisonment, is no violation of this constitutional provision as he will be deemed, in such case, to have waived the benefit of the provision. *Shiflett v. Com.*, 90 Va. 386, 18 S. E. Rep. 838.

Application Limited to Criminal Cases.—In civil cases this provision has no application, as the constitution expressly limits it to capital or criminal prosecutions. Va. Const. art. 1, sec. 10; *Finn v. Com.*, 5 Rand. 710; *Caton v. Lenox*, 5 Rand. 31; *Carrico v. W. Va.*, etc., R. Co., 89 W. Va. 86, 19 S. E. Rep. 571. In this connection, see *foot-note* to *Brogy v. Com.*, 10 Gratt. 723.

e. TO BENEFIT OF COUNSEL.—The constitutions of the states usually contain a provision that the accused in felony cases shall be entitled to the benefit of counsel. The constitution of Virginia, however, contains no such provision. But in Virginia it is held that argument by counsel cannot be prohibited in a criminal case, however plain the

case. *Word v. Com.*, 3 Leigh 743; *Early v. Com.*, 86 Va. 921, 11 S. E. Rep. 795; *Jones v. Com.*, 87 Va. 63, 12 S. E. Rep. 226; *Barnes v. Com.*, 92 Va. 794, 23 S. E. Rep. 784. In West Virginia the benefit of counsel is guaranteed to accused by sec. 14, art. 8 of the constitution.

f. THE PRIVILEGE OF SILENCE.

To What Cases the Privilege Is Applicable.—Another right guaranteed by both state and federal constitutions, is that no person shall be compelled in any criminal case to be a witness against himself. This constitutional provision, however, is not limited to those cases where witnesses are called so testify in criminal prosecutions against themselves. But the privilege is as broad as the mischief against which it seeks to guard, and insures that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime. *Cullen v. Com.*, 24 Gratt. 624; *Kendrick v. Com.*, 78 Va. 490; *Murphy v. Com.*, 23 Gratt. 960; *Temple v. Com.*, 75 Va. 892.

Examination of Prisoner's Garments Does Not Violate the Rule.—While the defendant in a criminal case cannot be compelled to criminate himself by acts or words, by the better doctrine he, or his garments, may be examined for evidence of the crime. Thus, in *State v. Baker*, 83 W. Va. 319, 10 S. E. Rep. 639, the trousers of the accused, which had been delivered to the sheriff by the prisoner without objection, were examined and found to contain blood stains. This was held admissible in evidence upon a trial for murder.

Testifying before Grand Jury Not a Waiver of Privilege.—The privilege of silence is not waived by the witness by testifying before the coroner, or grand jury, even though the crime is established and the indictment found solely on his testimony, and he may still decline to testify on the trial of the party indicted. *Temple v. Com.*, 75 Va. 892; *Cullen v. Com.*, 24 Gratt. 624.

Abridgment of Privilege—Indemnity against Prosecution.—This constitutional privilege of silence cannot be taken away by statute, unless absolute indemnity is provided, and nothing short of complete amnesty to the witness, an absolute wiping out of the offences as to him so that he can no longer be prosecuted therefor, will furnish that indemnity. But if he is thus fully protected by statute, he may be compelled to answer, though his testimony may show that he has committed a crime. This indemnity, however, must be positively guaranteed to him by statute, and an offer of indemnity by the court or prosecuting attorney is not sufficient. *Kendrick v. Com.*, 78 Va. 490; *Cullen v. Com.*, 24 Gratt. 624; *Temple v. Com.*, 75 Va. 892; *Murphy v. Com.*, 23 Gratt. 960.

g. EXEMPTION FROM BEING PUT TWICE IN JEOPARDY.—The constitution of the United States provides that no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb. This provision being one of the first eight amendments only applies to proceedings in the courts of the United States. Most of the state constitutions contain a similar clause, but the constitution of Virginia contains no such provision. The common-law maxim, however, on which this provision is founded, does exist in Virginia and goes even further than that provision. For while that is confined in terms to cases involving life or limb the maxim extends to all criminal cases. *Jones v. Com.*, 20 Gratt. 848; *W. Va. Const.*, art. 8, sec. 5. For a full discussion of this subject, see monographic *note* on "Autrefois,

Acquit and Convict" appended to Page v. Com., 26 Gratt. 948.

h. EXEMPTION FROM CRUEL AND UNUSUAL PUNISHMENTS.

Whipping Post Not a Cruel Punishment.—A statute which directs that a person convicted of a crime shall be imprisoned for a time not less than one, nor more than six months, and may receive stripes, at the discretion of the court, to be inflicted at one time, or at different times, provided the same does not exceed thirty-nine at any one time, is not within the constitutional inhibition against cruel and unusual punishments. *Com. v. Wyatt*, 6 Rand. 698. See also, *Aldridge v. Com.*, 2 Va. Cas. 447.

Selling Convicts as Slaves.—And a statute providing that a free person of color, who is convicted of a crime, may be condemned to be sold as a slave, and transported and banished beyond the limits of the United States is not unconstitutional. *Aldridge v. Com.*, 2 Va. Cas. 447.

1. EXEMPTION FROM EXCESSIVE FINES.—The constitution also guarantees that excessive fines shall not be imposed. But the imposition and regulation of fines being within the discretion of the legislature, its discretion will not be questioned by the courts, except where the minimum penalty is so excessive as to shock the sense of mankind. Hence, a statute imposing a fine is not in conflict with this provision simply because it does not fix the maximum fine that shall be imposed for an offence. If the verdict of the jury, in such case, imposes an excessive fine the court may set it aside. *So. Ex. Co. v. Walker*, 92 Va. 59, 22 S. E. Rep. 809.

3. PERSONAL LIBERTY AND SECURITY.—The constitutional provision guarantying to every one the enjoyment of life and liberty, with the means of pursuing and obtaining happiness and safety, is not violated by a statute which provides that persons convicted of carrying concealed weapons shall be deemed guilty of a misdemeanor, but that persons proving themselves to be good and peaceable citizens, and that they were carrying the weapon for self-defence only, shall be acquitted. *State v. Workman*, 35 W. Va. 367, 14 S. E. Rep. 9, 14 L. R. A. 600.

And a statute directing that vessels about to sail north of the capes of Virginia be searched in order to prevent the escape of slaves, is not in conflict with the constitutional provision against unreasonable seizures and searches, as there is a distinction between the search of vessels of commerce on navigable waters, and dwelling houses or other suspected places. *Baker v. Wise*, 16 Gratt. 180.

4. FREEDOM OF SPEECH AND OF THE PRESS.—The constitutions of the several states contain provisions guarantying to their citizens the right of freedom of speech, and providing that this right shall not be abridged by any act of the legislature. Under such a provision, a law which denies to candidates for office the right to electioneer is invalid. *Louthan v. Com.*, 79 Va. 198, 52 Am. Rep. 626.

The constitutional provision guarantying freedom of speech and of the press was not intended, however, to restrict the right of taxation for the support of the government. Hence, a city ordinance which imposes a tax upon the business of publishing newspapers does not infringe upon this provision. *City of Norfolk v. Norfolk Landmark Co.*, 95 Va. 564, 28 S. E. Rep. 959.

5. EQUAL PROTECTION OF LAWS.

a. CLASS LEGISLATION IN GENERAL.—Under the amendment to the federal constitution providing

that all persons shall have equal protection of the laws and the rights and privileges of citizens shall not be abridged, the rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void. *State v. Goodwill*, 33 W. Va. 179, 10 S. E. Rep. 285.

What Are Privileges and Immunities Guaranteed by This Clause.—The immunities and privileges secured to citizens of the United States by the constitution, are the right to protection by the government; the enjoyment of life and liberty; the right to acquire and possess property of every kind, and to pursue happiness and safety. They do not include the right to share the property belonging to the people of the state; and an act which forbids the planting of oysters in the water of the state by any person not a resident, is a constitutional act. *McCready v. Com.*, 27 Gratt. 985, affirmed in 94 U. S. 391.

And it has been held that the privileges and immunities guaranteed by the fourteenth amendment to the federal constitution are those of citizens of the United States as distinguished from those of citizens of the several states. *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 15 S. E. Rep. 1000.

Contracts between Employer and Employee.—The courts of West Virginia have regarded any attempt by the legislature of that state to nullify contracts or other dealings between employers and employees as infringements of the right of the employer and employee. Thus in *State v. Goodwill*, 33 W. Va. 179, 10 S. E. Rep. 285, a statute declaring that all persons engaged in mining coal, ore or other minerals, or mining or manufacturing them, or either of them, or manufacturing iron or steel, or both, or any other kind of manufacturing, should not issue for the payment of labor, any order or other paper, unless the same purports to be redeemable at its face value in legal money of the United States, bearing interest at the legal rate, made payable to the employee or bearer, and redeemable within thirty days by the maker thereof, was held unconstitutional and void.

And a statute declaring that it shall be unlawful for any person, firm, or corporation engaged in mining or manufacturing and interested in merchandising, to knowingly and wilfully sell any merchandise or supplies to any employee at a greater per cent. of profit than when selling merchandise or supplies of like quality, character, and quantity to other customers buying for cash, and not employed by them, is void, because it is class legislation, and an unjust interference with the rights, privileges, and property of both the employer and employee. *State v. Fire Creek Coal etc., Co.*, 33 W. Va. 188, 10 S. E. Rep. 288.

But in *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. Rep. 1000, 17 L. R. A. 385, an evenly divided court affirmed the judgment of the trial court which held that a statute providing that employers should not pay the wages of their employees in other than lawful money of the United States, did not abridge the privileges and immunities of citizens, nor did it deprive any person of life, liberty or property without due process of law.

Discrimination against Certain Manufacturers.—And it is not competent for the legislature to single out owners and operators of mines, and manufacturers of every kind, and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. Such legislation cannot be sustained as an exercise of the police power. *State v. Goodwill*, 33 W. Va. 179, 10 S. E. Rep. 285, 25 Am. St. Rep. 863, 6 L. R. A. 621.

Statutes Giving Priority of Liens.—A statute confined in its operation to the giving of prior liens to parties furnishing supplies to transportation or mining companies is not unconstitutional as all persons subject to it are treated alike under the same conditions. *Va. Dev. Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. Rep. 806.

Privileges Are Personal.—The privileges and immunities guaranteed to citizens of states of the Union are annexed to their status of citizenship; they are personal and may not be assigned or imparted by them or any of them to any other person natural or artificial. *Slaughter v. Com.*, 18 Gratt. 767.

Discrimination against Foreign Corporations.—A state may forbid foreign corporations engaging in business within its limits, or it may impose reasonable restrictions upon the right to do business provided that such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. *Toledo Tie & Lumber Co. v. Thomas*, 33 W. Va. 566, 11 S. E. Rep. 37; *Slaughter v. Com.*, 18 Gratt. 767. See *post*, "Interstate Commerce."

Denying Right to Sue to Enemies.—And enemies in war have no right to enter and use the courts of the adverse party, and it is competent for the legislature to permit them to do so on such terms as it may prescribe. Hence, an act prohibiting a party against whom a judgment has been recovered as an absent defendant from appearing in court and opening the judgment unless he take the prescribed oath, in effect purging him of all complicity in the rebellion, is constitutional. *Peerce v. Carskadon*, 4 W. Va. 234.

Discrimination against Nonresidents under the Police Power.—Where, however, in the regulation of any subject of internal police, a regard to justice and the due and convenient enforcement of its laws, requires a state to adopt a different mode of proceeding, or a modification of the regulation, in respect to persons residing outside of the state, in order fairly to meet and provide for the circumstances of their nonresidence, the competency of the state to so act is not taken away by this provision of the United States constitution. For example, a Virginia statute which provided that vessels of nonresidents sailing north should be searched, before sailing, by pilots, to ascertain whether any escaping slaves were on board, and that the captain of the vessel should pay the pilot a fee for making the search, was held not in conflict with the constitution. *Baker v. Wise*, 16 Gratt. 139. See *post*, "The Police Power."

b. RACIAL DISCRIMINATION.

Statutes Denying Colored Persons the Right to Be Jurors.—A statute which, in effect, singles out and denies to colored citizens the right and privilege of participating in the administration of the law, as jurors, because of their color, though qualified in all other respects, is practically, a brand upon them af-

fixed by the law, and is a discrimination against that race, forbidden by the fourteenth amendment to the federal constitution. It is a denial of the equal protection of the laws to the race thus excluded, since the constitution of juries is a very essential part of the protection which the trial by jury is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of persons having the same legal status in society as that which he holds. *Strauder v. West Virginia*, 100 U. S. 803, overruling *State v. Strauder*, 11 W. Va. 745.

Different Schools for the Different Races.—But a statute providing that white and colored children shall not be taught in the same school is not a discrimination against the colored race within the meaning of the amendment. *Martin v. Board of Education*, 42 W. Va. 514, 26 S. E. Rep. 348. In this case, the court construing the statute referred to above, said: "The only privilege that appears to be denied to colored children in this section is that of association with white children and *vice versa*. If it had required that they should be taught in the same school, then it would have been a compulsory infringement of the rights of both, but, as it is now, it treats them both alike, and places them precisely on the same footing. It prevents the legislature and boards of education from infringing on the rights of both in compelling them to attend a common school, which might be highly detrimental to both, and injurious to the school. Social equality cannot be enforced by law."

Bequest to Educate White Children is Valid.—And a bequest of money to be used in the education of white children is not invalid on the ground that its enforcement would be a discrimination between white and colored children in contravention of the fourteenth amendment to the United States constitution. *Kinnaird v. Miller*, 25 Gratt. 107.

6. PROPERTY GUARANTIES.

a. DUE PROCESS OF LAW.

(1) In General.

Due Process Depends on Facts of Each Case.—So impossible is it to lay down any general rule of uniform application in this connection, that it may be said that each case must be decided with reference to its own particular facts. Many cases illustrate what is due process of law, and many attempt to define it, but it cannot be said that any definition has been laid down which is of universal application. *State v. Sponangle*, 45 W. Va. 415, 33 S. E. Rep. 283.

Supreme Court of United States Final Authority as to What Constitutes Due Process.—It is with the supreme court of the United States to determine finally whether legislation or action under state authority is due process of law. *State v. Sponangle*, 45 W. Va. 415, 32 S. E. Rep. 283.

Fourteenth Amendment Operates upon the States.—The provision of the original draft of the United States constitution, that no person shall be deprived of life, liberty, or property without due process of law, was designed as a limitation of the powers of the national government, and is inapplicable to the legislation of the states. But the fourteenth amendment operates directly upon the states. Before the adoption of the fourteenth amendment the state might divest vested rights of property, where such rights were not vested by contract, but since its adoption this can only be done by "due process of law." *Peerce v. Kitzmiller*, 19 W. Va. 564; *White v. Crump*, 19 W. Va. 583;

Com. v. Byrne, 20 Gratt. 165; Williams v. Freeland, 19 W. Va. 599; Griffie v. Halstead, 19 W. Va. 602; Peerce v. Adamson, 20 W. Va. 57.

Public Office Is Not Property.—A public office is not property, within the meaning of the constitutional provision that no person shall be deprived of life, liberty or property without due process of law and the judgment of his peers. It is a mere public agency, revocable according to the will and appointment of the people, as expressed in the constitution and the laws enacted in conformity therewith. Moore v. Strickling, 46 W. Va. 515, 33 S. E. Rep. 374.

(2) *In Judicial Proceedings.*

Generally.—"Due process of law" means in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights securing to every person a judicial trial before he can be deprived of life, liberty or property. Peerce v. Kitzmiller, 19 W. Va. 564; White v. Crump, 19 W. Va. 583; Williams v. Freeland, 19 W. Va. 599; Griffie v. Halstead, 19 W. Va. 602; Peerce v. Adamson, 20 W. Va. 57. See also, Rickard v. Schley, 27 W. Va. 617.

Court Must Have Jurisdiction.—In order to constitute due process of law it is necessary that the court shall have jurisdiction, and that some recognized and accustomed mode of procedure be pursued. In addition to this, the complaint must be preferred by the proper party and against the proper party, and in such manner that the defendant may avail himself of all just defences permitted him by the law of the land. A mode of procedure which does not afford the defendant an opportunity to make an intelligent defence to the demands or charges against him is not due process of law. Williams v. Newman, 93 Va. 719, 26 S. E. Rep. 19.

Opportunity to Be Heard.—"Due process of law" also requires that a person shall have reasonable notice, and a reasonable opportunity to be heard before an impartial tribunal, before any binding decree can be made affecting his rights to liberty or property. It is not enough that the owner may by chance have notice, or that he may, as a favor, have a hearing. The law itself must require notice to him, and give him a right to a hearing and an opportunity to be heard. While the legislature may prescribe the kind of notice and the mode of service, it cannot dispense with all notice. Violett v. Alexandria, 93 Va. 561, 25 S. E. Rep. 909; Boggs v. Com., 76 Va. 989; Kinney v. Beverley, 2 H. & M. 318.

But a statute providing that if alleged conspirators are present, aiding and abetting the commission of an act, it shall be presumed that the act was done in pursuance of a conspiracy, is not unconstitutional as authorizing the conviction without due process of law. State v. Bingham, 42 W. Va. 234, 24 S. E. Rep. 883.

Invalid Judgment Cannot Be Validated.—An act of legislature attempting to validate proceedings before persons who undertake to act as judges, but who were wholly without authority, is unconstitutional and void, as in effect taking one man's property from him and giving it to another. Griffin v. Cunningham, 20 Gratt. 31.

Prescribing Condition Precedent to Right of Action.—A fence law which requires a land owner to enclose his land by a lawful fence, as a prerequisite to the right to recover from damages done by trespassing animals, does not violate the constitutional provision that private property shall not be taken for public use without just compensation, nor does

it deprive him of the means of acquiring or possessing property. Poindexter v. May, 98 Va. 143, 34 S. E. Rep. 971.

(3) *In Taxation Proceedings.*

Hearing Not Essential.—But due process of law does not always require judicial hearing. It does in matters of purely judicial nature, but not in matters of taxation or other matters purely administrative. State v. Sponangle, 45 W. Va. 415, 33 S. E. Rep. 283.

Forfeiture of Land for Nonpayment of Taxes.—Where it is provided by statute that if the owner of lands fails to enter on the land and pay the taxes for five years, the land shall be forfeited, without any judicial proceeding or inquest, this does not deprive the owner of his property without due process of law. State v. Swann, 46 W. Va. 128, 33 S. E. Rep. 89; Wild v. Serpell, 10 Gratt. 405; Staats v. Board, 10 Gratt. 400; Hale v. Branscum, 10 Gratt. 418; Levasser v. Washburn, 11 Gratt. 572; Yokum v. Fickey, 37 W. Va. 762, 17 S. E. Rep. 318; King v. Mullins, 171 U. S. 404, 18 Sup. Ct. 925; State v. Cheney, 45 W. Va. 478, 31 S. E. Rep. 920; State v. Sponangle, 45 W. Va. 415, 33 S. E. Rep. 283; Twiggs v. Chevallie, 4 W. Va. 463; Smith v. Tharp, 17 W. Va. 231; Va. Coal Co. v. Thomas, 97 Va. 527, 34 S. E. Rep. 486.

Local Assessments.—Where a law authorizes a town to levy local assessments upon parties specially benefited by town improvements, the parties of whom the assessments are required must have notice of the assessments and an opportunity to resist them before an impartial tribunal, or else they will be deprived of their property without due process of law. Norfolk v. Young, 97 Va. 728, 34 S. E. Rep. 886; Heth v. Radford, 96 Va. 272, 31 S. E. Rep. 8; Violett v. Alexandria, 93 Va. 561, 25 S. E. Rep. 909; Davis v. Lynchburg, 84 Va. 861, 6 S. E. Rep. 230. See *post*, "Taxation—Local Assessments."

The Virginia Statute for Taxing Bank Shares.—The Virginia statute, providing for the taxation of bank shares, which requires the banks themselves to make returns showing the market value of their shares, and itself fixes the rate of tax which shall be levied on such valuation is not unconstitutional as depriving the shareholders of their property without due process of law, although it provides for no notice to them of the assessment, or opportunity to be heard thereon, and makes the tax bills self-executing and enforceable by levy without suit, since no judicial act is done by any officer in relation to such assessment and no action is taken after the return is made by the bank which could in any way be affected by a notice or hearing. People's Nat. Bank of Lynchburg v. Marye, 107 Fed. Rep. 570, 7 Va. Law Reg. 47.

(4) *In Condemnation Proceedings.*—In cases where private property is sought to be taken for public use, the owner of the property must have an opportunity to contest the taking, and in all cases he must have just compensation for property which is taken. Varner v. Martin, 31 W. Va. 534; Pittsburg, etc., R. Co. v. Benwood Iron Works, 31 W. Va. 710, 8 S. E. Rep. 453; Mason v. Harper's Ferry Bridge Co., 17 W. Va. 396; B. & O. R. Co. v. Pittsburg, etc., R. Co., 17 W. Va. 812; Chesapeake, etc., R. Co. v. Washington, etc., R. Co., 99 Va. 715. For a full discussion, see monographic note on "Eminent Domain."

b. OBLIGATION OF CONTRACT PROTECTED.

(1) *In General.*

Who May Raise Question.—The question that a law impairs the obligation of contract can only be raised by one directly interested. Courts will not pro-

nounce a statute unconstitutional because it may impair the rights of persons not complaining of its unconstitutionality. *Antoni v. Wright*, 22 Gratt. 833.

Congress Cannot Authorize a State to Impair Contracts.—Congress has no power to authorize a state to pass laws impairing the obligation of a contract. *Homestead Cases*, 22 Gratt. 266, 12 Am. Rep. 507.

(2) *What Is a Contract within Constitution.*

Franchises.—Municipal corporations have power to confer franchises on individuals or corporations to use their streets for the purpose of conveying electricity for the public use; and such franchises constitute valid contracts which cannot be destroyed or impaired by subsequent legislation. But, in the absence of express statutory authority, they have no power to confer an exclusive franchise, and if they attempt to do so, such franchise does not constitute a contract within the meaning of the constitutional inhibition against the impairment of the obligation of contracts. *Clarksburg Electric Light Co. v. City of Clarksburg (W. Va.)*, 35 S. E. Rep. 994.

On the other hand, municipal charters are not contracts, but are granted for public purposes and may be amended or repealed at the discretion of the legislature. *Probasco v. Town of Moundsville*, 11 W. Va. 501.

Privilege of Conducting a Lottery.—The privilege of conducting a lottery is not a contract. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people in their sovereign capacity, and through their properly constituted agencies, may repeal it at any time when the public good shall require, whether it be paid for or not. *Justice v. Com.*, 81 Va. 209; *Dismal Swamp Canal Co. v. Com.*, 81 Va. 220; *Phalen's Case*, 1 Rob. 713.

Judgments.—A judgment founded on contract is a contract and constitutes a vested right of property the value of which the legislature cannot destroy or diminish by retroactive legislation. *Merchants' Bank v. Ballou*, 98 Va. 112, 33 S. E. Rep. 481.

Judgment Founded on Tort.—But a judgment founded on a tort is in no sense a contract; therefore the section of the constitution of West Virginia, which provides, that "No citizen of this state, who aided or participated in the late war between the government of the United States and a part of the people thereof on either side, shall be liable in any proceedings civil or criminal, nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered or otherwise because of any act done according to the usages of civilized warfare in the prosecution of said war by either of the parties thereto," is not inhibited by section 10 of article 1 of the constitution of the United States, as it does not impair the obligation of a contract. *Peerce v. Kitzmiller*, 19 W. Va. 564; *White v. Crump*, 19 W. Va. 583.

Statute Authorizing City to Subscribe to Stock Creates No Contract.—And where a city is authorized by a statute to subscribe to corporate stock upon a majority vote of the residents in favor of such subscription, an ordinance submitting the question of such subscription to the vote of the inhabitants, and the mere vote of the subscribed number of the voters in favor of the subscription, does not itself create a contract with the railroad company. Until the subscription is made the contract remains unexecuted. *List v. City of Wheeling*, 7 W. Va. 501.

Authority to County to Construct a Bridge.—And

where a county is authorized to build a bridge this does not constitute such a contract as is protected against a subsequent repealing act. *Supervisors v. Luck*, 80 Va. 223.

Obligation to Pay Interest.—The legal obligation to pay interest or money due by contract, implied from the presumed intention of the parties, is a part of the obligation of the contract which state laws cannot impair. Hence, a statute authorizing the abatement of interest upon such contracts beyond what was allowable by the laws in force when the contracts were made, is unconstitutional. *Roberts v. Cocke*, 28 Gratt. 207; *Cecil v. Deyerle*, 28 Gratt. 775; *Kent v. Kent*, 28 Gratt. 840; *Pretlow v. Bailey*, 29 Gratt. 212.

Services Rendered by Judge.—But services rendered by a judge do not partake of the nature of a contract so as to prevent the state auditor from refusing to audit a claim for salary on the ground that it should be paid by a city, rather than the state, after such salary had been paid by the state for several years. *Holladay v. The Auditor*, 77 Va. 425. See also, *Foster v. Jones*, 79 Va. 642.

Privilege of Suing States.—The privilege of suing a state may be extended or withheld at the pleasure of the state, and once granted it may be recalled at pleasure, unless during its existence rights have vested under or by virtue of it which the state has no constitutional right to defeat or impair by its subsequent recall. Further, if an act merely authorizes a judicial inquiry into the rights of the parties, but does not confer the power to enforce the results of such inquiry, its repeal is not prohibited by the state or federal constitution. *Maury v. Com.*, 92 Va. 310, 23 S. E. Rep. 757.

(3) *What Amounts to Impairment.*

(a) **Laws Affecting Substantial Rights.**

Creation and Increase of Exemptions.—The rule governing the creation and increase of homestead exemptions is as follows: If the effect of the statute is to withdraw from execution the property of the debtor liable to execution when the debt was contracted, leaving property insufficient for the payment of his prior debts, the statute is in violation of the constitution. It impairs the effectiveness of the creditor's remedy to the extent of the property attempted to be withdrawn, and to that extent impairs the legal obligation of the debtor's contract. *Homestead Cases*, 22 Gratt. 266, 12 Am. Rep. 507; *Speidel v. Schlosser*, 13 W. Va. 686; *Russell v. Randolph*, 26 Gratt. 713.

Dispensing with Demand and Notice in Case of Dishonor of Negotiable Instruments.—A statute providing that certain parties to negotiable notes shall remain bound after the maturity of the notes without demand, protest and notice of dishonor, is unconstitutional as to notes made and discounted before its passage. *Farmers' Bank v. Gunnell*, 26 Gratt. 181. See also, *Bank of Old Dominion v. McVeigh*, 20 Gratt. 457.

Statutes Changing Beneficiaries under Public Trusts.—And an act providing that in the contingency of a division of any religious society the majority may determine to which branch such congregation shall thereafter belong, which determination shall conclude questions as to the property held in trust for such congregation, is void as a violation of a contract, so far as it attempts to give the benefit of the trust property to others than those to whom it was exclusively limited by the one creating the trust. *Finley v. Brent*, 87 Va. 103, 12 S. E. Rep. 228, 11 L. R. A. 214.

Statutes Postponing Time of Sale under Deeds of Trust.—So in a deed of trust to secure a debt, a provision for the time and terms of sale, upon the failure of the grantor to pay the debt, is of the obligation of the contract, and a law forbidding sales under such deeds for a limited time is therefore unconstitutional. *Taylor v. Stearns*, 18 Gratt. 244.

Statutes Changing Means of Enforcing Contract.—Nothing can be more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which are guaranteed by the constitution against invasion. The laws which subsist at the time of making the contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to and incorporated in this term. It is competent for the states to change the form of the remedy, or to otherwise modify it as they may see fit, provided that no substantial right secured by the contract is thereby impaired. But any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution. *Homestead Cases*, 22 Gratt. 288; *Merchants' Bank v. Ballou*, 98 Va. 112, 82 S. E. Rep. 481; *Taylor v. Stearns*, 18 Gratt. 244. See *post*, "Laws Affecting Remedy."

Reducing Territory and Salary of a Judge.—Under a constitutional provision that "all judges shall receive such salaries and allowances as may be determined by law, the amount of which shall not be diminished during their term," the legislature may curtail the territory of a judge's jurisdiction down to the constitutional minimum, although it diminishes his compensation. *Foster v. Jones*, 79 Va. 642, 52 Am. Rep. 687. See also, *Holladay v. Auditor*, 77 Va. 425.

Reducing Territory of a County.—And an act taking territory from the county giving it to a city does not impair the obligation of the creditors of the county. *Wade v. City of Richmond*, 18 Gratt. 588.

Providing for Sales under Execution to Be on Credit.—An act to prevent the sacrifice of property at a forced sale under an execution, which provides that the property shall be sold on a credit of twelve months, does not impair the obligation of the creditor's contract. *Garland v. Brown*, 23 Gratt. 178.

Statutes Providing That Judgment Shall Include Interest.—And a statute providing that a judgment for the payment of money shall be rendered for the aggregate of the principal and interest due at its date, with interest thereon from that date, is not an impairment of the obligation of contract. *Fleming v. Holt*, 12 W. Va. 143; *Ruffner v. Hewitt*, 14 W. Va. 787.

Statutes Denying Interest to Parties Engaged in Rebellion.—A statute denying to persons who were engaged in the rebellion the right to recover interest for the time during which they were enemies of the government is constitutional. *Hutchinson v. Landcraft*, 4 W. Va. 813.

Coupon Cases—Laws Providing That They Shall Not Be Receivable for Taxes.—Where at the time of the issuance of bonds, by the state, it is provided that the coupons cut from such bonds shall be receivable in payment of taxes, a subsequent act providing that taxes shall only be paid in currency impairs the obligation of the contract between the state and the purchaser and is void. *Antoni v. Wright*,

22 Gratt. 833; *Wise v. Rogers*, 24 Gratt. 171; *Greenhow v. Vashon*, 81 Va. 340; *Com. v. Maury*, 83 Va. 886, 1 S. E. Rep. 186; *Com. v. Jones*, 82 Va. 795, 1 S. E. Rep. 84. See also, *Board of Public Works v. Gannt*, 76 Va. 463.

Same—Law Requiring a Special License for Sale of Coupons.—But a statute requiring a special license for the privilege of selling coupons detached from state bonds is not within the constitutional inhibition against laws impairing the obligation of contracts. *Com. v. Lucas*, 84 Va. 303, 4 S. E. Rep. 695; *Com. v. Larkin*, 84 Va. 517, 5 S. E. Rep. 526; *Com. v. Plunkett*, 84 Va. 519, 9 S. E. Rep. 1120; *Com. v. Kriee*, 84 Va. 521, 9 S. E. Rep. 1121; *Cuthbut v. Com.*, 85 Va. 809, 9 S. E. Rep. 16; *Com. v. Maury*, 82 Va. 883, 1 S. E. Rep. 185.

Same—Taxation of Coupons and Bonds.—The state is entitled to tax all persons, property and business within its jurisdiction, unless restrained by contract, expressed or implied. This includes the right to tax the bonds and the coupons attached thereto, which the state has issued, the funding act and the bonds and coupons issued under it constituting no contract that they shall be non-taxable. *Com. v. Maury*, 82 Va. 883, 1 S. E. Rep. 185. See monographic *note* on "Municipal, County and State Bonds" appended to *De Voss v. City of Richmond*, 18 Gratt. 338.

(b) **Laws Affecting Remedies.**

General Rule in Regard to Change of Remedy.—Litigants have no vested rights in the particular remedy existing at the time the contract is entered into. It is entirely competent for the legislature to change either the remedy itself, or the court in which it is to be asserted; provided that adequate and sufficient means of enforcing the contract is provided by law. *Shickel v. Berryville, etc., Co.*, 90 Va. 88, 87 S. E. Rep. 813; *Polindexter v. Greenhow*, 84 Va. 441, 4 S. E. Rep. 742. But a statute purporting to affect the remedy only, but which in effect denies or obstructs rights accruing by contract, is directly obnoxious to the prohibition of the constitution. *Homestead Cases*, 22 Gratt. 288; *Merchants' Bank v. Ballou*, 98 Va. 112, 82 S. E. Rep. 481.

Statutes Regulating Questions of Evidence.—The legislature may prescribe rules of evidence to govern the procedure of the state courts and the constitution of the United States has no application in such case. Hence, a statute requiring, in a suit to test the genuineness of coupons cut from state bonds, the production of the bonds with proof that the coupons were actually cut therefrom, is not repugnant to the constitution. *Cornwall v. Com.*, 82 Va. 644; *Newton v. Com.*, 82 Va. 647; *Com. v. Weller*, 82 Va. 721, 1 S. E. Rep. 102; *Com. v. Booker*, 82 Va. 964, 7 S. E. Rep. 381; *McGahey v. Com.*, 85 Va. 519, 8 S. E. Rep. 244; *Bryan v. Com.*, 85 Va. 526, 8 S. E. Rep. 246; *Cooper v. Com.*, 85 Va. 528, 8 S. E. Rep. 247; *Laube v. Com.*, 85 Va. 530, 8 S. E. Rep. 246; *Com. v. Larkin*, 83 Va. 422, 18 S. E. Rep. 901; *Ex parte Ayers*, 123 U. S. 443, 8 Sup. Ct. Rep. 164. See also, *Com. v. Jones*, 82 Va. 789, 1 S. E. Rep. 84; *Maury v. Com.*, 92 Va. 310, 23 S. E. Rep. 757.

But where coupons cut from state bonds are made receivable for taxes, an act providing that expert evidence shall not be received as to the genuineness of such coupons, violates the obligation of the contract; and where coupons are receivable for taxes, and judgment has been recovered against a taxpayer for his taxes and costs, the taxpayer is entitled to pay the whole judgment with such coupons. *McGahey v. State*, 135 U. S. 602, 10 Sup. Ct.

Rep. 972, overruling *Com. v. Weller*, 83 Va. 721, 1 S. E. Rep. 102; *Com. v. Booker*, 83 Va. 964, 7 S. E. Rep. 381.

An act of congress laying a tax on stamps and prohibiting a party from giving an unstamped bond in evidence is no violation of the constitution. *Woodson v. Randolph*, 1 Va. Cas. 128.

Statutes Regulating Procedure.—But a statute providing that when coupons from state bonds are tendered in payment of taxes, together with money for the payment of the same, the coupons shall be delivered to the judge of the circuit court, who shall, upon petition of the taxpayer, impanel a jury to try whether the coupons tendered are genuine, and, if they are, the court is to certify them to the treasurer, who is to refund the money paid for taxes out of the money in the treasury, in preference to other demands, does not create a vested right in the taxpayer which cannot be taken away by subsequent legislature. *Maury v. Com.*, 92 Va. 310, 23 S. E. Rep. 757. See also, *Com. v. Jones*, 82 Va. 789, 1 S. E. Rep. 84.

Changing Statutes of Limitation.—A distinction is taken in favor of an act of the legislature which revives a remedy, which is lost by reason of a statute of limitation, and the case of a remedy cut off or destroyed by the same authority. The former does not violate the obligation of a contract; the latter does. The former is a privilege which may be conferred by the same power by which it was divested; the latter affects the vested rights of a party. *Caperton v. Martin*, 4 W. Va. 188; *Wyatt v. Morris*, 2 W. Va. 575; *Huffman v. Alderson*, 9 W. Va. 616; *Keller v. McHuffman*, 15 W. Va. 64; *Industrial Co. v. Schultz*, 43 W. Va. 470, 27 S. E. Rep. 255; *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. Rep. 239; *State v. Mines*, 88 W. Va. 125, 18 S. E. Rep. 470; *State v. Brookover*, 88 W. Va. 141, 18 S. E. Rep. 476; *Bank of Virginia v. Hays*, 87 W. Va. 475, 16 S. E. Rep. 561.

Same—Reviving Remedy in Cases Where Property Has Vested.—While the remedy upon an express contract, which has become barred by the statute, may be revived at the will of the legislature, yet, where the action is to recover the possession of either real or personal property, and especially in cases of ejectment and detinue, the rule is very different. In such cases it is settled that, when the statutory bar attaches, not only the remedy for the recovery of the property is gone, but that the absolute title thereto is at once transferred to and thereby vested in the possession of the property. A subsequent repeal of the limitation law could not be given a retrospective effect, so as to disturb this title. It is vested as completely and perfectly, and is as safe from legislative interference as it would have been if it had been perfected in the owner by grant, or any species of assurance. *Hall v. Webb*, 21 W. Va. 318; *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. Rep. 239; *Keller v. McHuffman*, 15 W. Va. 64; *Industrial Co. v. Schultz*, 43 W. Va. 470, 27 S. E. Rep. 255.

Changing Mode of Enforcing Contracts against Joint Debtors.—And legislation providing that a creditor may compound or compromise with a joint contractor or co-obligor without releasing the others, and that the right of contribution shall not be affected thereby does not impair the obligation of existing contracts. *Yuille v. Wimbish*, 77 Va. 308.

Regulating Manner of Adjusting Confederate Contracts.—And a statute providing a mode of adjusting confederate contracts by reducing the nominal amount contracted to be paid to its gold value does not change the contract of the parties, but only

provides a mode of ascertaining the value of the confederate money contracted to be paid. *Pharis v. Dice*, 21 Gratt. 308.

(c) Alteration or Repeal of Corporate Charters.

Where Power Is Reserved to Alter or Amend.—Where the legislature reserves the power to alter or amend corporate charters, an alteration made by them does not impair the obligation of the contract within the meaning of the constitution. *Robinson v. Gardiner*, 18 Gratt. 509.

Under the power reserved in the charter of a private corporation, to repeal, alter or modify the charter, the legislature may repeal the charter, but cannot modify it without the consent of the corporation. But if the corporation refuses to consent to the modification it must discontinue its business as a corporate body. *Yeaton v. Bank of Old Dominion*, 21 Gratt. 593.

Under Police Power.—The rights given to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the state with the view to the public protection, health, and safety, and in order to guard properly the rights of all other individuals and corporations. Hence, a railroad company, although no power is reserved to amend or repeal its charter, is nevertheless subject like individuals, to such police laws as the legislature may from time to time enact for the protection and safety of citizens and the general convenience and good order. These laws although imposing liabilities and duties on the company other than those contained in its charter or existing when it was granted, do not impair the obligations of the contract implied therein. *Richmond, etc., R. Co. v. City of Richmond*, 26 Gratt. 83; *Va. Dev. Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. Rep. 806.

Thus, where the right to propel engines by steam through the streets of a city, is not given to the railroad company in its charter, either by express words or necessary implication, the city council may prohibit the railroad company from so doing, and no contract is thereby violated. *Richmond, etc., R. Co. v. City of Richmond*, 26 Gratt. 83. See *post*, "The Police Power."

Corporations Take Charter Subject to General Law.—Corporations, chartered by the state, take their charters subject to the general law of the state, and subject to such changes as may be thereafter made, and it is competent for the state to pass laws giving parties who furnish materials and supplies to certain corporations prior liens and the charter rights of such corporation are not impaired thereby. *Va. Dev. Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. Rep. 806.

Public Corporation—Charitable Trusts.—Where a fund has been dedicated for a public use, and a society chartered by the legislature to administer the trust, the society is a *quasi* public corporation over which the legislature has exclusive control, and it may repeal its charter at will. *Wambersie v. Orange Humane Soc.*, 84 Va. 446, 5 S. E. Rep. 25.

C. AGAINST TAKING FOR PUBLIC USE.—The constitution of the United States, as well as those of the several states, provides that private property shall not be taken for public use without just compensation. Under these provisions the courts all agree that where the property is actually invaded for public purposes, compensation must be made to the owner. Some of the state constitutions provide that if property is taken or *damaged* for public use just compensation must be made to the owner for the

damage as well as for the property actually taken. This last is true of the constitution of West Virginia, so in that state the cases hold that the owner must be compensated for damage done his property, as well as for that actually taken for public use. *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 306; *Varner v. Martin*, 21 W. Va. 534; *B. & O. R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812; *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780, 40 Am. Rep. 743. For a full discussion of this subject, see monographic *note* on "Eminent Domain."

VII. THE POLICE POWER.

1. NATURE AND EXTENT OF POWER.—The police power of a state, in a comprehensive sense, embraces its whole system of internal regulation by which the state may subject persons and property to all kinds of reasonable restraints and burdens in order to secure the general comfort, health and prosperity of the state, to preserve public order, prevent offences, and to establish for the intercourse of citizens with citizens those rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as it is reasonably consistent with a like enjoyment of rights by others. It is, however, subject to constitutional limitations, both state and federal. *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S. E. Rep. 1000.

2. SUBJECTS FOR ITS EXERCISE.

Preservation of Public Morals—Sunday Laws.—The right to enact laws to protect the lives, health and property of the citizens of the state, and to preserve good order and the public morals, is a part of the police power reserved to the states, and though such laws may to some extent affect commerce and persons engaged in it, yet, if they are enacted in good faith, for police purposes, without discriminating against interstate or foreign commerce, and congress has not acted on the subject, they do not constitute a regulation of commerce within the inhibition of the "commerce clause" of the constitution of the United States. For example, a statute prohibiting the running or transportation, on Sunday, of locomotives and cars is a proper exercise of the police power, as its object is to promote the physical and moral well-being of society. *N. & W. R. Co. v. Com.*, 98 Va. 749, 24 S. E. Rep. 837, overruling *N. & W. R. Co. v. Com.*, 88 Va. 95, 13 S. E. Rep. 340.

Same—Laws against Gambling.—And under this power a state has authority to forbid its citizens to bet on horse racing in another state; and this right is not affected by the fact that the money is to be placed in a third state. The act forbidden is a wager, and over it and the actors in it, the state has complete jurisdiction, and it is immaterial where the race is to take place. *Lacey v. Palmer*, 98 Va. 159, 24 S. E. Rep. 930.

Preservation of Health and Safety of Public—Regulating Storage of Gunpowder.—Regulations and restrictions to promote and secure the public health and safety are also within the police power of the state and may extend to the protection both of person and property. In cities, and other places of dense population, the right to store gunpowder and other explosive and dangerous materials may be confined to certain limits, where the harm which may be produced by them will be reduced to the minimum. *Davenport v. Richmond*, 81 Va. 636.

Same—Regulating the Practice of Medicine.—Statutes regulating the practice of dentistry and medi-

cine, providing means of securing the competency of persons engaged therein, and excluding all other persons from such practice, are defensible, both on the ground that they are in the interest of the public health and are designed and well calculated to protect the public from imposition and fraud. They will not be pronounced invalid unless they make arbitrary discriminations between persons equally well qualified to engage in the profession to which such statute applies. *State v. Dent*, 25 W. Va. 1; *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. Rep. 231.

Same—Prevention of Riots, etc.—A municipal corporation clothed with general powers is authorized to order the destruction of private property within its boundaries when necessary for the public safety and good order. Hence the ordinance of the city of Richmond, providing for the destruction of all liquors in the city, in anticipation of the evacuation of the city by Confederate forces and its occupation by Union forces, was within this rule, and valid. *Jones v. City of Richmond*, 18 Gratt. 517.

Promotion of Health—Abatement of Nuisances.—The abatement of nuisances so clearly concerns the life, health and comfort of citizens, that it is one of the implied police powers of a municipal corporation, and need not be specifically granted in its charter. But such power cannot be taken to authorize the extra-judicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such. *Bristol, etc., Co. v. City of Bristol*, 97 Va. 304, 33 S. E. Rep. 588, 5 Va. Law Reg. 242, and *note*.

Same—Regulating the Sale of Oleomargarine.—The legislature, by virtue of its police power, has a right to prohibit and forbid the manufacturing and sale as an article of food, of any article designed to take the place of butter or cheese; and having the power to prohibit the sale or manufacture of such an article, it follows that they have the power to require that some distinguishing mark be placed upon it to prevent deception or imposition in the sale of the same, even though it should have the effect of injuring the sale of the article in question. Hence, a statute prohibiting and making criminal the sale of oleomargarine unless it has been colored pink is constitutional, though applicable to that manufactured without as well as that manufactured within the state. *State v. Myers*, 42 W. Va. 822, 26 S. E. Rep. 539.

General Welfare.—A statute enacted in the *bona fide* exercise of the police power of a state for the suppression of a recognized vice, the prohibition of the sale or manufacture of adulterated or impure food, or the prevention of the spread of disease among men or beasts, will not be held invalid as repugnant to the commerce clause. *Lacey v. Palmer*, 98 Va. 159, 24 S. E. Rep. 930.

A statute making it unlawful for hogs to run at large and imposing a fine upon the owner, and in addition giving the party injured by such hogs, when trespassing, a lien for double the amount of his damages, is a proper exercise of the police power and does not contravene any provision of the state or United States constitution. *Haigh v. Bell*, 41 W. Va. 19, 23 S. E. Rep. 666.

And a statute prohibiting the mining for coal within five feet of the boundary line of another's land, without his consent, and imposing a penalty for so doing, is a valid exercise of the police power of the state. *Mapel v. John*, 43 W. Va. 30, 24 S. E. Rep. 608.

Regulation of Manner of Exercising Corporate Franchises.—Perhaps the most striking illustration of the exercise of the police power will be found among the judicial decisions which have held that the rights insured to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the state with a view to the public protection, health and safety, and in order to guard properly the rights of other individuals and corporations. Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter contract, removed from the sphere of state regulation, and that the charter implies an undertaking, on the part of the state, that in the same way in which their exercise is permissible at first, and under the regulations then existing, and those only, may the corporators continue to exercise their rights while the artificial existence continues. The obligation of the contract by no means extends so far; but, on the contrary, the rights and privileges which come into existence under it are placed upon the same footing with other legal rights and privileges of the citizen, and subject in like manner to proper rules for their due regulation, protection and enjoyment. *Va. Devel. Co. v. Crozer I. Co.*, 90 Va. 126, 17 S. E. Rep. 806; *Richmond, etc., R. Co. v. City of Richmond*, 26 Gratt. 83. See "Alteration or Repeal of Corporate Charters."

Prohibiting Sale of Liquors.—So, upon this ground, statutes prohibiting the sale of intoxicating liquors are not repugnant to the constitution of the United States, either on the ground that they impair the obligation of contracts, or deprive a person of his liberty or property without due process of law, or that they violate the privileges and immunities of citizens of the United States. Such statutes have been invariably held valid by the supreme court of the United States as police regulations, looking to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals, where they do not conflict with the paramount authority of congress to regulate commerce with foreign nations and among the several states. *Savage v. Com.*, 84 Va. 619, 5 S. E. Rep. 565.

3. LIMITATIONS UPON ITS EXERCISE.

Limited by Constitution.—The police power, however broad and extensive, is not above the constitution, and must be exercised in subordination thereto. *State v. Goodwill*, 83 W. Va. 179, 10 S. E. Rep. 285.

Acts Done under Color of Power Must Not Be Arbitrary.—A statute which inhibits a person to "keep in his possession, for another, spirituous liquors," is in conflict with both the federal and state constitutions as it is not a reasonable exercise of the police power, because it has no reference to the prohibition of the sale of liquor. It is simply an attempt to make the possession of liquor for any purpose a crime. *State v. Gilman*, 33 W. Va. 146, 10 S. E. Rep. 283.

Validity of Its Exercise a Judicial Question.—Generally, it is for the legislature to determine what laws and regulations are proper in the exercise of the police power; but if it passes an act ostensibly for the public health and safety, and thereby destroys or takes away the property of a citizen, or interferes with the rights or personal liberty, then it is for the courts to determine whether it is a

proper and reasonable exercise of the power, and if it is not to declare it void. *State v. Goodwill*, 83 W. Va. 179, 10 S. E. Rep. 285; *State v. Gilman*, 33 W. Va. 146, 10 S. E. Rep. 283.

VIII. INTERSTATE COMMERCE.

1. WHAT CONSTITUTES.

Telegraph Companies as Instruments of Commerce.—The telegraph is an instrument of commerce, and telegraph companies are subject to the regulating power of congress in respect to their foreign and interstate business. A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable for those engaged to any considerable extent in commercial pursuits. *Postal Tel. Co. v. Richmond*, 99 Va. 102, 87 S. E. Rep. 789.

Empty Freight Cars Not within the Rule.—A train of empty cars which have been used in the past, and are intended to be used in the future exclusively in carrying articles of interstate commerce, is nevertheless not to be considered as engaged in interstate commerce until loaded with articles committed to the carrier to be transported to another state. *Norfolk & Western R. Co. v. Com.*, 98 Va. 749, 24 S. E. Rep. 837.

2. POWER TO REGULATE VESTED IN CONGRESS.

What the Power to Regulate Interstate Commerce Embraces.—Under the constitution of the United States congress has power to regulate commerce among the states, and this power embraces the power to regulate all the various agencies by which that commerce is conducted. State laws which undertake, in any form to enforce a tax on such commerce, or to impose a burden or hindrance thereon, or to embarrass commercial intercourse and transactions, or to give citizens of one state any advantage over citizens of another state engaged in interstate commerce, are regulations of commerce among the states, and therefore void. *Richmond, etc., R. Co. v. Patterson Tobacco Co.*, 92 Va. 670, 24 S. E. Rep. 261, *affirmed* in 169 U. S. 311; *Adkins v. City of Richmond*, 98 Va. 91, 24 S. E. Rep. 967.

Power, When Exercised by Congress, Is Exclusive.—The power to regulate commerce between the several states, when exercised by congress, is exclusive in its character, and the omission to exercise it is equivalent to a declaration of the will of congress that it shall remain free and uncontrolled in those respects in which the subject is capable of being dealt with by general regulations. *Richmond, etc., R. Co. v. Patterson Tobacco Co.*, 92 Va. 670, 24 S. E. Rep. 261, *affirmed* in 169 U. S. 311; *Adkins v. City of Richmond*, 98 Va. 91, 24 S. E. Rep. 967.

3. TO WHAT EXTENT STATES MAY REGULATE.—The power to regulate commerce between the states covers a wide field and embraces a great variety of subjects some of which will call for uniform rules and national legislation, while others can be best regulated by rules and provisions suggested by the varying circumstances of differing places and limited in their operation to such places respectively. And to the extent required by these last cases, the power to regulate commerce between the states may be exercised by the states, so far as

such legislation is not in conflict with some act of congress passed either before or after such state legislation regulating commerce in this particular case and manner. *State v. Railroad Co.*, 24 W. Va. 788.

Applying this rule a state statute making it a misdemeanor to run freight trains on Sunday is not unconstitutional, where it contains nothing in its provision suggestive of a purpose to interfere with the interstate traffic, or indicative of any other intent than to prescribe a rule of civil conduct for people within the state, although it may affect interstate commerce to some extent, so far as running freight trains from one state to another is concerned. *Norfolk, etc., R. Co. v. Com.*, 98 Va. 749, 24 S. E. Rep. 837, *overruling* *Norfolk, etc., R. Co. v. Com.*, 88 Va. 95, 18 S. E. Rep. 340. See *ante*, "The Police Power."

Taxing Vessels Engaged in Interstate Commerce.—A state has power to tax vessels engaged in interstate commerce if they are owned and have their home port within the state. *Wheeling, etc., Transportation Co. v. City of Wheeling*, 9 W. Va. 170, 27 Am. Rep. 552.

Regulating Its Own Waters.—The navigable waters and the soil under them within the territorial limits of the state are the property of the state, to be controlled by the state at its own discretion for the benefit of its citizens, only so as not to interfere with the authority of the government of the United States to regulate commerce and navigation. *McCready v. Com.*, 27 Gratt. 985; *Morgan v. Com.*, 98 Va. 812, 35 S. E. Rep. 448; *McCready v. Com.*, 94 U. S. 391.

4. WHAT AMOUNTS TO AN INTERFERENCE WITH INTERSTATE COMMERCE.

Regulating Delivery of Telegraph Messages.—A statute making it the duty of every telegraph or telephone company to deliver with promptness every message received to the person to whom it is addressed, if the regulations of the company require such delivery, or to forward promptly as directed, and providing a penalty for every failure to deliver or forward such message as promptly as practical, such penalty to be paid by the person sending the message or to the person to whom it is addressed, is not void, as imposing a burden upon, or as a regulation of interstate commerce, when applied to the failure of an interstate telegraph company to deliver a message sent from another state. *Western Union Telegraph Co. v. Tyler*, 90 Va. 297, 18 S. E. Rep. 280; *Western Union Telegraph Co. v. Bright*, 90 Va. 778, 20 S. E. Rep. 146; *Western Union Telegraph Co. v. Powell*, 94 Va. 268, 26 S. E. Rep. 828.

License Tax for Sale of Cigarettes Imported in Original Packages.—Cigarettes manufactured in one state and imported into another in the original package may be sold in such original package, and a state statute requiring the payment of a license fee for the privilege of selling cigarettes at retail, so far as it applies to cigarettes imported and sold by the importer in the original package, is a regulation of interstate commerce, and therefore void. *State v. Goetze*, 43 W. Va. 495, 27 S. E. Rep. 225.

Same—What Are Original Packages of Cigarettes.—Where cigarettes are manufactured in a sister state, and placed in paper boxes for convenience of transportation and sale, and such boxes are provided with the proper label, giving the name of the cigarettes, caution notice, the number of the factory, the number of the revenue district, the name of the state in which they are manufactured, and the

proper internal revenue stamp, duly cancelled, is pasted across the end of such package so as to seal the same, in accordance with the requirements of the act of congress and internal revenue laws governing the packing, shipment, and sale of cigarettes, such paper box must be regarded as an original package; and its character is not changed by its being placed, with other boxes of the same kind, in a wooden box for shipment. *State v. Goetze*, 43 W. Va. 495, 27 S. E. Rep. 225.

Interstate Commerce Cannot Be Taxed.—While the property of a telegraph company, situated within a state, may be taxed by the state as all other property is taxed, yet its business of an interstate character cannot be thus taxed. A general license tax on a telegraph company affects its whole business, interstate as well as domestic, and is unconstitutional. *Postal Tel. Co. v. Richmond*, 99 Va. 102, 37 S. E. Rep. 789.

But a city may impose a license fee upon every telegraph company or agency doing business in the city, for business done exclusively in the city, not including business done to and from points without the state, or business done for the government, but, if engaged in interstate commerce, the license tax cannot be in excess of what would be the tax on its property within the city limits under the ordinary modes of taxation; and the payment of such license tax cannot be made a prerequisite to the right of the company to transact business. *Postal Tel. Co. v. Richmond*, 99 Va. 102, 37 S. E. Rep. 789.

Taxing Citizens of Another State Selling Goods by Sample.—It is competent for states to require a license to be obtained by every person selling goods by sample, who are not "resident merchants," as a man may be a resident citizen and not a resident merchant, and the reverse; hence a statute requiring a license in such case is not unconstitutional as being a discrimination in favor of citizens of the state. *Speer v. Com.*, 23 Gratt. 935, 14 Am. Rep. 164.

Taxation of Brokers Engaged in Interstate Commerce.—A resident of a state who solicits orders for the sale of goods by sample, solely for nonresident owners, and who forwards such orders and receives a commission for the sales negotiated by him, is a broker engaged in interstate commerce, and neither the state nor any municipal corporation can impose a license tax on him for such business. *Adkins v. City of Richmond*, 98 Va. 91, 34 S. E. Rep. 967.

Taxation of Peddlers.—A state has the right to impose a tax on peddlers, where it operates uniformly upon all citizens and does not discriminate in favor of its citizens and against citizens of other states, or where the tax imposed is in the exercise of police powers, and not a regulation of commerce under cover of the power, although incidentally it may have that effect. But where any injurious discrimination is made in favor of the resident against the nonresident, or with respect to the sales of articles manufactured in that state over similar articles manufactured abroad, the law is repugnant to the constitution of the United States, and therefore void. *Com. v. Myer*, 92 Va. 809, 23 S. E. Rep. 915.

Sunday Laws.—A law imposing a fine upon any person who labors on Sunday, or employs his servants in so doing, except in works of necessity and charity, though it incidentally affects interstate commerce, is not to be regarded as an interference with interstate commerce but is purely a law in reference to the internal policy of the state, and may be enforced against a railroad company engaged in interstate commerce. *State v. Railroad Co.*, 24 W. Va. 783.

Making Carrier Liable beyond its Own Line.—A statute providing that a common carrier accepting anything for transportation directed to a destination beyond its own line shall be deemed to assume obligation for its safe carriage to such destination, unless, at the time of such acceptance, it be released from such liability by a contract in writing, signed by the owner, is not a regulation of interstate commerce. *Richmond, etc., R. Co. v. Patterson Tobacco Co.*, 92 Va. 670, 24 S. E. Rep. 261, *affirmed* in 169 U. S. 311.

Discrimination against Publication of a Sister State.—A state statute discriminating against publishers of books of another state is unconstitutional, as it violates the commerce clause of the federal constitution. *Ex parte Rollins*, 80 Va. 314.

5. THE INTERSTATE COMMERCE ACT.

Contracts Made under Interstate Commerce Act.—The general rule that a contract made in violation of law is void, and that no recovery can be had upon it, applies to contracts made in violation of the Interstate Commerce Law. *Southern Railway Co. v. Wilcox*, 99 Va. 394, 39 S. E. Rep. 144.

Lowering a freight rate in the manner required by the Interstate Commerce Act, after a contract has been made in violation of that act, does not render the contract valid and binding on the carrier, and, if under no legal obligation to lower them, the carrier may restore the rate so lowered. *Southern Railway Co. v. Wilcox*, 99 Va. 394, 39 S. E. Rep. 144.

IX. TAXATION.

1. WHO MAY EXERCISE TAXING POWER.

Power Inherent in the Legislature.—That taxation is a legislative power, has never been questioned in this country. The power to tax rests upon necessity, and is inherent in every sovereignty. The legislature of every free state will possess it, under the general grant of legislative power, whether particularly specified in the constitution among the powers to be exercised by it or not. *Com. v. Moore*, 25 Gratt. 951; *Eyre v. Jacob*, 14 Gratt. 426.

The legislature possesses the full, absolute, supreme power of taxation, except so far as it may have been surrendered to the general government or may be interdicted by the restrictions and mandates of the state constitution, which is not to be consulted as to the powers given, but only as to the limitations imposed. *Helfrick's Case*, 29 Gratt. 848; *Com. v. Moore*, 25 Gratt. 955; *Peters v. Lynchburg*, 76 Va. 932; *Eyre v. Jacob*, 14 Gratt. 422.

And an act requiring the county court to lay a levy upon the titheables of the county for the purpose of improving the navigation of a stream lying within it, though passed without the assent of the people, is valid. *Harrison v. Holland*, 3 Gratt. 247. See also, *Goddin v. Crump*, 8 Leigh 120; *Bull v. Read*, 13 Gratt. 78; *Wade v. City of Richmond*, 18 Gratt. 588; *Dinwiddie County v. Stuart*, 28 Gratt. 526.

Delegation to Counties or Municipalities.—And the legislature has full power to authorize counties and municipal corporations to levy taxes within their bounds for their peculiar purposes. And the mode, subjects, and extent of such taxation is not limited or regulated by the constitutional provisions in relation to taxation and finance, as these provisions relate to taxation for the purpose of state revenue only. *Gilkeson v. Frederick Justices*, 13 Gratt. 577.

And in the absence of constitutional restrictions, the legislature may impose upon a taxing district, such as a town, the duty of keeping in repair the streets within, and relieve it from taxation for roads without its limits. The legislature is the final judge

of this question; and the legislature of Virginia is not restrained in this respect by the constitution of the state, and it may exempt land lying within a town from the payment of a county road tax. *Supervisors of Washington County v. Saltville Land Co.*, 99 Va. 640, 39 S. E. Rep. 704.

But county authorities are not authorized by the constitution, independent of the action of legislature, to assess railroad or other property for taxation and county levies upon it. *Balt., etc., R. Co. v. Koontz*, 77 Va. 699.

County Cannot Tax unless Authorized to Do So.—Under the constitution of the state a county cannot exercise the powers of taxation, unless authorized to do so by the legislature. *Va., etc., R. Co. v. Washington County*, 80 Gratt. 484; *Shenandoah, etc., R. Co. v. Supervisors*, 78 Va. 269.

But in Virginia the right of a county to impose a county school tax is conferred by the constitution, to which the legislature has given effect by appropriate legislation, and this right cannot be taken away by the legislature. The people and the property of a town are subject to the county government for county purposes, and the legislature cannot exempt them from the payment of a school tax. *Supervisors of Washington County v. Saltville Land Co.*, 99 Va. 640, 39 S. E. Rep. 704.

Power Delegated Cannot Be Taken Away.—But where the constitution confers upon each county the right to levy a tax upon property for the public free schools the legislature cannot deprive the county of such power. *Robertson v. Preston*, 97 Va. 296, 33 S. E. Rep. 618; *Supervisors v. Saltville Land Co.*, 99 Va. 640, 39 S. E. Rep. 704.

Towns and Counties Cannot Levy Capitation Tax.—The Virginia constitution limits the amount of the capitation tax which may be levied annually by the state to one dollar, and by counties and corporations to fifty cents, for all purposes. Hence, the legislature has no power to authorize towns and subdivisions of counties and cities to levy a capitation tax. The only corporations authorized to levy such a tax are cities which have separate governments, and which are not taxed for county purposes. *Robertson v. Preston*, 97 Va. 296, 33 S. E. Rep. 618.

2. WHAT MAY BE TAXED.

Intoxicating Liquors.—Licenses for the sale of intoxicating liquors are not only imposed for the purpose of raising revenue, but also for the purpose of regulating the traffic and consumption of these articles, and hence the state may impose such conditions for conducting said traffic as it may deem most for the public good. *Jelly v. Dils*, 27 W. Va. 267; *Moundsville v. Fountain*, 27 W. Va. 182; *Beasley v. Town of Beckley*, 28 W. Va. 81.

Newspapers.—And it is competent for a city to impose a tax upon the business of publishing a newspaper as the constitutional provision guaranteeing freedom of the press was not intended to prevent taxation of the business of publishing. *Norfolk v. Norfolk Landmark Co.*, 95 Va. 564, 28 S. E. Rep. 959.

Merchant Dealing in Second Hand Goods.—The legislature may require a regular merchant who has a license to transact a general merchandising business, to take out the license required of dealers in second hand articles before allowing him to deal in such articles. *Hirsch v. Com.*, 21 Gratt. 785. See also, *Morgan v. Com.*, 98 Va. 814, 35 S. E. Rep. 448; *Com. v. Moore*, 25 Gratt. 960; *Lewellen v. Lockharts*, 21 Gratt. 570, and *foot-note*.

Fishing.—It is competent for the state to impose a license tax upon persons engaged in fishing in the

public waters of the state, and in addition, to tax the tackle used to catch the fish. Such taxation is not double. *Morgan v. Com.*, 98 Va. 812, 85 S. E. Rep. 448.

Lawyers.—And an ordinance providing for taxing lawyers is not an income tax, and is constitutional. *Ould v. City of Richmond*, 23 Gratt. 464.

Billiard Saloon.—And the keepers of a billiard saloon may be required to take out a license, and pay a tax thereon. *Lewellen v. Lockharts*, 21 Gratt. 570.

Officers of Sheriff or Sergeant.—And assessments in certain cases on the office of sheriff and sergeant is not in violation of the constitution. *Gilkeson v. Frederick Justices*, 18 Gratt. 577.

Taxing Business.—A tax on the business of selling property is a tax on the property itself. If the property be nontaxable, there can be no tax on the business of selling it. Otherwise, where the property is taxable. *Com. v. Maury*, 82 Va. 888, 1 S. E. Rep. 185.

Under the provisions of the constitution of Virginia, the legislature has no power to levy a license tax upon any employment or business other than those named in the fourth section, except in cases where such business cannot be reached by the *ad valorem* system. Whether a business can or cannot be reached by the *ad valorem* system is a question primarily for the legislature, and its determination of the question cannot be held to be erroneous unless it is manifestly so. *Morgan's Case*, 98 Va. 812, 85 S. E. Rep. 448; *Com. v. Moore*, 25 Gratt. 957; *Thomas v. Snead*, 99 Va. 618, 39 S. E. Rep. 586.

Tonnage Duty Cannot Be Imposed by State.—The states have no power to impose a tonnage duty. *Johnson v. Drummond*, 20 Gratt. 419.

3. ESSENTIALS OF A VALID TAX.

Must Be Equal and Uniform.—The constitution expressly provides, that all taxes must be equal and uniform. A tax upon fishermen in proportion to the depth of the water from which they take fish is an equal and uniform tax within the meaning of the constitution. *Morgan v. Com.*, 98 Va. 812, 85 S. E. Rep. 448.

And although the Virginia constitution provides that taxes shall be equal and uniform, it is within the constitutional power of the legislature to impose a tax upon the transmission of estates by devise or descent, and prescribe the rate of same. *Eyre v. Jacob*, 14 Gratt. 422, and *foot-note*; *Miller v. Com.*, 27 Gratt. 110; *Schoolfield v. City of Lynchburg*, 78 Va. 871; *Peters v. City of Lynchburg*, 76 Va. 927; *Ould v. City of Richmond*, 23 Gratt. 464; *Slaughter's Case*, 13 Gratt. 767, and *foot-note*; *Gilkeson v. Frederick Justices*, 18 Gratt. 577, and *foot-note*.

And the adoption of a constitutional provision requiring taxation to be equal and uniform throughout the state, and that all property both real and personal shall be taxed in proportion to its value, does not operate to repeal a law imposing a tax in force at the time of its adoption; and such a provision does not apply to taxation by municipalities. *Douglass v. Harrisville*, 9 W. Va. 162.

Taxes on Licenses Need Not Be Equal and Uniform.—But taxes on licenses are not required by the constitution of Virginia to be equal and uniform. *Slaughter v. Com.*, 13 Gratt. 767; *Ould v. City of Rich.*, 23 Gratt. 473; *Com. v. Moore*, 25 Gratt. 958; *Danville v. Shelton*, 76 Va. 829; *Eyre v. Jacob*, 14 Gratt. 422; *Gilkeson v. Frederick Justices*, 18 Gratt. 577; *West Union Tel. Co. v. City of Rich.*, 26 Gratt. 1.

Taxing Oyster Industry—Uniformity of Tax.—A statute which requires persons taking oysters from the public water to make a return of sale of the oysters

made by him during the week preceding, and which imposes a tax on such sales equal to the amount of tax levied by the state on any other species of property, and which prescribes penalties for failure to make such returns, but which allows the party, if he prefers, to pay a certain sum in lieu of the tax, is constitutional. The uniformity of the tax is not affected by the manner in which the value of the property is ascertained; nor is the tax a license or income tax. *Com. v. Brown*, 91 Va. 702, 21 S. E. Rep. 357.

Exact Justice Often Not Attainable.—Exact justice and equality are not attainable in matters of taxation, and consequently, are not required; the most that can be done being to approximate them as near as possible. *Ould v. Richmond*, 23 Gratt. 473; *Helfrick's Case*, 29 Gratt. 850; *Com. v. Moore*, 25 Gratt. 958; *Eyre v. Jacob*, 14 Gratt. 422.

Tax Must Not Exceed Constitutional Amount.—Under the provision limiting the capitation tax which may be imposed by the legislature, an act requiring all male persons between certain ages to work on the public roads, or in default thereof to pay a fine assessed by the legislature, is unconstitutional and void, as such a statute, in effect, imposes an additional tax. *Proffit v. Anderson*, 1 Va. Dec. 908, 20 S. E. Rep. 887.

Must Conform to the Constitution.—A levy by a board of supervisors for district school purposes on the property of a railroad company, as a whole, within a county, without reference to what part thereof is located in the several districts, and which does not show the amount levied for each district, is void, because in violation of sec. 8, art. 8 of the Virginia Constitution. *New York, etc., R. Co. v. Supervisors*, 92 Va. 661, 24 S. E. Rep. 221.

An act authorizing commissioners to levy a capitation tax upon the white male inhabitants, and an *ad valorem* tax upon the property of the district sufficient to raise the amount necessary to defray the expenses of the free schools of the district is to be construed in accordance with the constitution; and the capitation tax is properly levied upon the white male inhabitants above twenty-one years of age only, and the *ad valorem* tax upon slaves is properly levied upon slaves over twelve years of age valued at three hundred dollars each. And the ratio of the capitation to the *ad valorem* tax may be greater than that prescribed in the constitution. *Bull v. Read*, 13 Gratt. 78.

4. EXEMPTION FROM TAXATION.

Power to Exempt an Essential Attribute of Sovereignty.—The principle is well settled that the power of exemption, as well as the power of taxation, is an essential attribute of sovereignty, and can only be surrendered or diminished in plain and explicit terms. But the general rule and policy of the state is to tax all property. Exemption from taxation is the exception. *City of Richmond v. Richmond, etc., R. Co.*, 21 Gratt. 604; *Com. v. Richmond, etc., R. Co.*, 81 Va. 855; *Probasco v. Town of Moundsville*, 11 W. Va. 501.

Virginia Legislature Is Empowered to Exempt Certain Property.—The constitution of Virginia empowers the legislature to exempt all property from taxation which is used exclusively for state, county, municipal, benevolent, charitable, educational and religious purposes, and this grant of power to exempt all property used for the purposes enumerated, carries with it the power to exempt property, the proceeds of which are devoted to any of those purposes. Hence Code 1873, ch. 33, sec. 14

and acts amendatory thereof (see Va. Code 1887, sec. 457, 488), exempting from taxation property owned by benevolent associations, is constitutional and valid. *City of Petersburg v. Petersburg Ben. Mech. Asso.*, 78 Va. 481; *City of Staunton v. Mary Baldwin Seminary*, 99 Va. 653, 39 S. E. Rep. 596.

Exemption from Taxation Constitutes a Contract.—It is well settled that an exemption from taxation granted in a charter of a railroad company, constitutes a contract which is protected by a federal constitution, and is irrepealable unless the power of repeal has been reserved by the legislature, or is subsequently acquired. *Com. v. Richmond, etc., R. Co.*, 81 Va. 355.

Exemption Must Be Made According to Constitution.—Under article 8, sec. 1 of the West Virginia Constitution of 1863, all property both real and personal must be taxed, except such as the legislature may exempt under the exception contained in this section. Therefore, an act of legislature exempting the property of a railroad corporation from taxes is unconstitutional and void as such property is not within the exception. *C. & O. Ry. Co. v. Miller*, 19 W. Va. 408.

5. LOCAL ASSESSMENTS.

General Principles Governing Local Assessments.—The legislature may delegate to municipalities the power to levy local assessments upon property specially benefited by public improvements within their borders. And if provision is made for giving notice to the owners of the property, and each proprietor has an opportunity to be heard as to what proportion of the tax shall be assessed upon his land, there is no taking of property without due process of law. Nor are such assessments obnoxious to constitutional provisions that taxation shall be uniform and equal, and assessed upon property in proportion to its money value, as such provisions only apply where the taxpayer has received no special benefit. *Norfolk City v. Ellis*, 26 Gratt. 227; *Davis v. City of Lynchburg*, 84 Va. 861, 6 S. E. Rep. 230; *Richmond, etc., R. Co. v. Lynchburg*, 81 Va. 473; *Sands v. City of Richmond*, 81 Gratt. 571; *Violett v. Alexandria*, 92 Va. 561, 23 S. E. Rep. 909. See also, *City of Norfolk v. Chamberlain*, 89 Va. 196, 16 S. E. Rep. 730; *McCrowell v. City of Bristol*, 89 Va. 652, 16 S. E. Rep. 887.

Thus, the legislature may authorize the council of a city or town, where the owner of property adjacent to a sidewalk falls or refuses to pave such sidewalk, to cause the same to be done at the expense of the city, town or village, and to assess the amount of such expense upon such owner, to be collected in the manner provided for the collection of taxes. *Wilson v. Town of Philippi*, 39 W. Va. 75, 19 S. E. Rep. 553.

Local Assessments Founded upon Idea of Benefits.—These assessments are not founded upon any idea of revenue, but upon the theory of benefits conferred by such improvements upon the adjacent lots. It is regarded as a system of equivalents. It imposes the tax according to the maxim, that he who receives the benefit ought to bear the burden, and it aims to exact from the party assessed no more than his just share of that burden, according to an equitable rule of apportionment. *Norfolk City v. Ellis*, 26 Gratt. 227; *Davis v. City of Lynchburg*, 84 Va. 861, 6 S. E. Rep. 230; *Richmond, etc., R. Co. v. Lynchburg*, 81 Va. 473; *Violett v. Alexandria*, 92 Va. 561, 23 S. E. Rep. 909; *Sands v. City of Richmond*, 81 Gratt. 571.

Taxpayer Must Have Notice and Opportunity to Contest.—A law authorizing local assessments without

giving to the person of whom such assessment is exacted reasonable notice, and a reasonable opportunity to appear and contest the legality, justice, and correctness of such assessment before an impartial tribunal, before it is finally determined upon, deprives such person of his property without due process of law, and is therefore void. *Norfolk v. Young*, 97 Va. 728, 34 S. E. Rep. 886; *Heth v. Radford*, 96 Va. 272, 31 S. E. Rep. 8; *Violett v. Alexandria*, 92 Va. 561, 23 S. E. Rep. 909.

But if the law providing for the assessment provides for a mode of confirming or contesting the charge thus imposed in the ordinary course of justice, with such notice to the person of such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property without due process of law. *Davis v. Lynchburg*, 84 Va. 861, 6 S. E. Rep. 230; *Violett v. Alexandria*, 92 Va. 561, 23 S. E. Rep. 909.

Assessment for Waterworks—Exemption.—The provisions of a municipal charter empowering the council, when water mains are laid in the streets, to levy an annual special assessment on the real estate on both sides of the street to meet the expenses of the waterworks, and which further authorize it to exempt from such assessment any property to which water is supplied and water rates charged, are not repugnant to the constitution. *Richmond, etc., R. Co. v. City of Lynchburg*, 81 Va. 473.

Power to Levy Strictly Construed.—While the legislature may grant to municipal corporations the power to levy local assessments for street improvements, yet the statute making the grant must be strictly construed, and the municipality must keep strictly within its provisions. *Violett v. Alexandria*, 92 Va. 561, 23 S. E. Rep. 909, 31 L. R. A. 382; *Orange, etc., R. Co. v. Alexandria*, 17 Gratt. 176; *Richmond v. Daniel*, 14 Gratt. 387; *Schoolfield v. Lynchburg*, 78 Va. 366; *Green v. Ward*, 82 Va. 324; *Kirkham v. Russell*, 76 Va. 956; *Peters v. Lynchburg*, 76 Va. 927. See monographic *note* on "Municipal Corporations" appended to *Danville v. Pace*, 25 Gratt. 1.

6. REMEDY AGAINST ILLEGAL TAX.—Proceeding by injunction is the proper mode by which to test the legality of a levy made by an officer under the supposed authority of a law, the constitutionality of which is denied. *Eyre v. Jacob*, 14 Gratt. 422, and *foot-note*; *City of Richmond v. Crenshaw*, 76 Va. 940; *Blanton v. So. Fertilizing Co.*, 77 Va. 335; *S. V. R. Co. v. Supervisors*, 78 Va. 276; *Lynchburg, etc., Co. v. Dameron*, 95 Va. 546, 23 S. E. Rep. 951; *Kuhn v. Board of Education*, 4 W. Va. 499; *City of Staunton v. Mary Baldwin Seminary*, 99 Va. 653, 39 S. E. Rep. 596.

But it has been held that injunction will not lie to prevent the collection of an illegal tax, unless the case presents some peculiar ground for equity jurisdiction, as the prevention of a multiplicity of suits, or the removal of a cloud from the title, or where an action at law cannot afford an adequate remedy. *Douglass v. Town of Harrisville*, 9 W. Va. 162.

7. ENFORCEMENT OF TAX.

Imprisonment of Delinquent.—The bill of rights of Virginia, which declares that no man shall "be deprived of his liberty except by the law of the land or the judgment of his peers," does not forbid the state to enforce the collection of the tax on licenses, by imprisonment of the delinquent, when no personal property can be found by the officer out of

which to make the tax. *Com. v. Byrne*, 20 Gratt. 165.

Statutes Forfeiting Land.—Statutes forfeiting land for nonpayment of taxes are constitutional, and, in order to consummate a forfeiture in such case, no judgment or decree or other matter of record is necessary; the statute itself divests the title out of the defaulting owner and vests it in the commonwealth. *Lennig v. White*, 1 Va. Dec. 878, 20 S. E. Rep. 831; *State v. Swann*, 46 W. Va. 128, 33 S. E. Rep. 89; *Wild v. Serpell*, 10 Gratt. 405; *Staats v. Board*, 10 Gratt. 400; *Hale v. Branscum*, 10 Gratt. 418; *Levasser v. Washburn*, 11 Gratt. 572; *Yokum v. Fickey*, 37 W. Va. 762, 17 S. E. Rep. 318; *King v. Mullins*, 171 U. S. 404, 18 Sup. Ct. Rep. 925.

But an act of congress providing for the forfeiture of land for the nonpayment of taxes, as a penalty upon persons who were engaged in the rebellion against the United States, is a legislative conviction and punishment without trial, and is a bill of attainder and void. *Martin v. Snowden*, 18 Gratt. 100.

Selling Land for Taxes—Amount of Land Which Should Be Sold.—The power of congress to provide for the sale of land for payment of taxes is limited to that object, and a law which requires that the whole land be sold in all cases, without regard to the fact that it may be divided without injury and the tax paid by a sale of a part only, is unconstitutional. *Martin v. Snowden*, 18 Gratt. 100.

JUNE TERM 1852.

JUDGES PRESENT.

<i>Field,</i>	<i>Leigh,</i>
<i>Lomax,</i>	<i>Thompson,</i>

Mull's Case.

June Term, 1852.

1. **Continuances—Absence of Material Witness.***—A motion for the continuance of a cause on the ground of the absence of a material witness, properly overruled under the circumstances, though the prisoner swears to the materiality of the witness.
2. **Same—Same.**—Under the circumstances the prisoner required to state who is the witness absent and what he is expected to prove.

William Mull was indicted in the Circuit court of Henrico county for grand larceny in stealing a gold watch and cloak the property of George B. Goddin. When his case was called for trial he moved the Court for a continuance until the next term, on the ground of the absence of James Mull deemed by him a material witness. This motion for a continuance was made on the 27th of April 1852; and it appears that the cause had been called on the 17th of April, that being the first 696 *day of the term, and the Commonwealth was then ready for a trial, but the prisoner asked for delay upon the ground that James Mull his witness for whom process had not been issued until the 16th of April, had gone to New York in the steamer City of Norfolk on that day, and would return in her on Monday the 26th of April. Whereupon the Court, although the process had not been executed, and although it appeared the witness was a brother of the prisoner and lived in his neighbourhood in the city of Richmond, and had been here for the preceding three months continuously, and had not been summoned or examined either before the mayor who committed the prisoner, or the examining Court, consented to delay the case until the 27th of April. And now the prisoner being in Court and the Commonwealth ready for trial, and it appearing to the Court that the steamer City of Norfolk on which James Mull went away, being employed as it is reported, as a hand on said steamer, returned to the city on the 26th, but that said James Mull did not return in her, the Court required the prisoner to be sworn, and upon his examination he stated that he thought he had other witnesses, some two or three present, who would prove the same facts he expected to establish by James

Mull. That he expected to prove by said Mull that the articles charged in the indictment to have been stolen from Goddin, he said James had often heard prisoner say, but never in the presence of Goddin, were not the prisoner's property, but were Goddin's; and had been pawned by Goddin to the prisoner. And the prisoner further said that he then had a witness in Court, who would prove (having been then and there present), that Goddin had pawned the articles alleged in the indictment to have been stolen.

The Court overruled the motion and the prisoner excepted. And upon his trial 697 he was convicted and sentenced *to three years imprisonment in the penitentiary. Whereupon he applied to this Court for a writ of error.

Scott, for the petitioner.

By the Court. The writ of error is refused.

Commonwealth v. Taggart.

June Term, 1852.

**Criminal Law—Sale of Ardent Spirits—Allegata et Pro-
bata.**—An indictment for unlawfully selling ardent spirits to W will not authorize proof of selling to C.

At the March term 1848 of the Circuit court of Wood county Edward M. Taggart was indicted for unlawfully selling to Edward Welling ardent spirits, without a license, to be drank where sold. On the trial the jury found a special verdict as follows: "We the jury find the defendant guilty, provided proof of the selling of ardent spirits to Robert Campbell will sustain the indictment: And if it does not sustain the indictment then we find him not guilty.

With the consent of the defendant the Circuit court adjourned to this Court the question: What judgment ought this Court to give upon the verdict of the jury?

By the Court. Judgment should be entered for the defendant.

698 *Commonwealth v. Hamor & Wife.

June Term, 1852.

1. **Criminal Law—Sale of Ardent Spirits—Joint Indictment.***—Husband and wife may be jointly indicted

*See monographic note on "Continuances" appended to Harman v. Howe, 27 Gratt. 676.

*See foot-note to Com. v. Harris, 7 Gratt. 600.

for a single act of retailing ardent spirits.

2. **Same — Same — Same — Separate Judgments.***—In such a case if they are convicted, a fine must be assessed, and a judgment rendered against each separately.

Seth Hamor and Tasa his wife were jointly indicted in the Circuit court of Wood county for unlawfully retailing ardent spirits. The indictment contained but one count, and a general charge that Seth Hamor and Tasa Hamor his wife had unlawfully without having a license therefor, at their dwelling house &c. sold by retail ardent spirits.

The defendants appeared and demurred to the indictment; and the Circuit court with their consent adjourned to this Court the following questions:

1st. Can a husband and wife be jointly indicted for a single act of retailing ardent spirits?

2d. Can the fine be jointly assessed, and a joint judgment rendered against both the defendants for the same act of retailing?

3d. What judgment ought the Court to give on the demurrer to the indictment?

By the court. In answer to the questions adjourned the Court is of opinion and decides:

As to the first question, that a husband and wife may be jointly indicted for a single act of retailing spirituous liquors.

As to the second question, that the fine cannot be assessed jointly, and a joint judgment rendered against both defendants for the same act of retailing; but the fine should be assessed separately, and judgment rendered *against each defendant. See 699 Commonwealth v. Roy, 1 Va. Cas. 262.

As to the third question, the demurrer to the indictment should be overruled and judgment rendered against each of the defendants for 30 dollars; unless they plead.

But the Court deems it proper to say that whether the wife should be convicted upon the indictment, must depend upon the facts proved upon the trial, if defence shall be made.

Commonwealth v. Nutter.

June Term, 1852.

1. **Indictment—Finding—Entry on Record.**†—What a sufficient entry on the record of the finding an indictment for a misdemeanor by a grand jury.
2. **Same—Attempt at Felony.**†—What a good indictment for attempting to commit a felony.

At the April term 1851 of the Circuit court of Ritchie, the record states that the grand jury "returned into Court, and among other things, presented an indictment against Thomas Nutter for felonious assault and battery." "A true bill."

The indictment contained five counts:

The first charged that Thomas Nutter on

†See the principal case cited in Cunningham v. Cunningham, 88 Va. 40, 18 S. E. Rep. 309; monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

the 22d day of February 1851 in the county aforesaid with malice aforethought, in and upon one David Kuner then and there being, feloniously, unlawfully and wilfully did make an assault and with a certain knife which he the said Thomas Nutter in his hand then and there held, and had drawn and open, feloniously, wilfully and unlawfully did attempt to stab, strike at and cut with said knife, with intent in so doing, wilfully and of his malice aforethought to kill and murder the said David Kuner, contrary to the form of the statute &c.

700 *The second count charged an assault with a knife with intent feloniously, wilfully and unlawfully and of his malice aforethought to kill and murder the said Kuner.

The third count charged the assault with a club as in the first count; and the fourth count charged the assault with a club as in the second count.

The fifth count charged that the said Thomas Nutter with malice aforethought in and upon David Kuner then and there being, feloniously, wilfully, and unlawfully did make an assault, and with a certain knife which he the said Thomas Nutter in his left hand then and there had and held, being drawn and open, feloniously, wilfully and unlawfully did attempt to stab, strike at and cut with said knife, with intent then and there feloniously and unlawfully to commit the crime of murder upon the body of the said David Kuner, had he not been prevented and arrested from so doing, contrary to the form of the statute &c.

The prisoner upon being arraigned moved the Court to quash the indictment; but the Court overruled the motion, with liberty to the prisoner to renew it at the next term of the Court. The prisoner thereupon pleaded "not guilty;" and the case was continued.

At the next term of the Court the prisoner moved for leave to withdraw his plea of "not guilty," which was granted. And thereupon he moved the Court to strike the cause from the docket, because the finding of the indictment was not recorded. The ground of this motion was that in the order book of the Court the four words, "presented an indictment against," had been erased. It appears from the statement of the clerk that after he had written the words he had erased them by drawing his pen repeatedly across each of the said words, and had then rubbed his fingers over them causing a blot for their whole length; he intending to have interlined them, but the interlineation had never been made by

701 *him or any other person. The four words were however legible, and the erasing marks of the pen over them were plain, and a large black mark or blot extended over the words apparently made by drawing a finger over them, whilst the ink of the erasing mark, or the words, or perhaps both was undried. The prisoner further insisted that the law knew no such offence as a felonious assault and battery, and that the indictment produced was not such as was described in the order book.

The Court waived the decision of the ques-

tion for the time; and thereupon the prisoner demurred generally to the indictment and to each count thereof; and the attorney for the Commonwealth joined in the demurrer. Wherefore as in the opinion of the Court some of the questions arising on the demurrer were new and difficult, and involved the true meaning and interpretation of § 10 of ch. 199 of the Code of Va. p. 750-51, the Court with the consent of the prisoner adjourned to this Court the following questions:

1st. What judgment ought the Court to give upon the prisoner's motion to strike the case from the docket in consequence of the non-recording of the finding of the indictment as alleged by the prisoner under the circumstances aforesaid?

2d. Do the first and fifth counts, or either of them, set forth such an attempt to murder as to make the attempt to murder set forth in either of them a felony?

3d. If either of them does set forth such an attempt to murder as to make the attempt a felony, are the matters therein contained set forth in such legal and orderly manner as that the demurrer to the first and fifth counts ought to be overruled?

4th. What judgment ought to be rendered on the demurrer to each count of the indictment, and on the demurrer to the whole indictment?

Fisher, for the prisoner.

702 *FIELD, J., delivered the resolution of the Court.

The Court is of opinion and doth decide in relation to the first question adjourned, that the Court ought to overrule the motion to strike the case from the docket.

In relation to the fourth question adjourned, that the demurrer to each count and to the whole indictment ought to be overruled.

And in relation to the other two questions adjourned, the Court declines to express any opinion; as these questions are in the opinion of the Court prematurely adjourned.

Commonwealth v. Webster.

June Term, 1852.

1. **Criminal Law—Capias Pro Fine.***—The common law writ of *capias pro fine* is unrepealed, and may be used by the Commonwealth.

2. **Same—Same—When Proper—Case at Bar.**—Where there is a judgment in favour of the Commonwealth for a fine and costs of prosecution, the writ may issue for the fine and the costs; but where the judgment is for costs without a fine, the writ is not a proper process to enforce the judgment.

3. **Same—Same—Imprisonment—How Defendant May Be Discharged.**†—Where a party is imprisoned

***Capias Pro Fine.**—For the distinction between a *capias pro fine* and a *capias ad satisfaciendum*, see *Wilkerson v. Allan*, 23 Gratt. 16, where the principal case is cited.

†**Same—Imprisonment—How Defendant Discharged.**—In *Com v. Fields*, 33 Gratt. 202, it is said: "Where a *capias pro fine* is issued, as in this case, for the fine

upon a *capias pro fine* for a fine and costs, he can only obtain his discharge from imprisonment by paying the fine and costs. But the term of his imprisonment under such *capias* is limited by the provision in the Code of 1849, ch. 209, § 17, p. 781.‡

At a special term of the Circuit court of Jackson county, held in January 1852, 703 Samuel S. Webster applied *to the

Court for a writ of habeas corpus ad subjiciendum, to be delivered from imprisonment in the jail of the county. The writ was issued; and the sheriff made a return thereon that Webster was in his custody by virtue of a commitment on four several writs of *capias ad satisfaciendum* issued from the clerk's office of the Circuit court of Jackson for fines and costs in cases of the Commonwealth against him: And he made the writs and the returns thereon a part of his return to the writ of habeas corpus. Two of these writs were for fines imposed upon Webster in prosecutions for misdemeanor, and the costs of the prosecutions: The other two writs were for the costs of other like prosecutions where no fine had been imposed.

Upon the return to the writ the Court with the consent of the parties, adjourned to this Court the following questions:

1st. Whether a *capias ad satisfaciendum* can issue in behalf of the Commonwealth against a person convicted of a misdemeanor, on a judgment against him for a fine and costs.

2d. If such *capias* can issue, is there any means by which he may discharge himself without paying the fine and costs.

LOMAX, J., delivered the opinion of the Court.

At common law the crown for the recovery of its debts, could issue executions against the persons, and the goods and profits of the lands, and the goods and chattels, and the lands, of its debtors. That is it might issue an execution of *capias ad satisfaciendum*, or of *levari facias*, or of *feri facias*, or of *extendi facias*: And it might in one combine all these writs. In the case of a subject, whilst the writs of *feri facias* and *levari facias* were the process of execution by which in all cases the judgments might be enforced, yet the subject also might

and costs adjudged against the accused, and he is taken under that process, there is no means by which he can discharge himself except by paying both fine and costs. He must discharge himself by paying *the whole judgment*; of which the amount adjudged against him *as costs*, is as much a part of the judgment as the fine assessed against him. See *Webster's Case*, 8 Gratt. 702."

‡This act provides, "If a person who is sentenced to be confined in jail a certain term, and afterwards, until he pay a fine and the costs of prosecution, fail to pay such fine and costs before the end of said term, he shall continue in confinement until the same be paid or his discharge be ordered by the Court. But the additional confinement shall in no case exceed six months from the end of said term."

have the execution of *capias ad satisfaciendum* *in all recoveries for wrongs committed with force; and the *extendi facias* for recoveries against an heir for the debt of his ancestor. These executions, all of them, existed at common law; and however the statute may have enlarged the number of cases to which some of them were made applicable, they were common law, not statutory, process: The writ of *elegit* was purely statutory. For the recovery of fines to the king, the usual process was against the person of the offender by *capias pro fine*, if he did not pay the fine which had been assessed, and against the goods and profits of the lands by *levari facias*. 2 Gab. 606; 1 Chit. Cr. L. 660. It is stated in the latter of these authorities that the imprisonment under the *capias pro fine* was, in respect of such fine, not as a debt but a punishment for the crime, until the fine was paid. It is true that a *capias pro fine* is an execution to compel the payment of the fine, as the *capias ad satisfaciendum* is to compel the payment of the debt. Notwithstanding that point of resemblance, these two species of process were never confounded in practice; and were kept signally distinct in the views of the legislature, in many provisions made relating to the operation and the incidents of a *capias ad satisfaciendum*. In the original structure of the two writs the levy of the *ca. sa.* was made a direct satisfaction of the debt; but in the frame of the writ of *capias pro fine* the imprisonment did not purport to be a satisfaction of the fine; it was a part of the punishment; and the fine still remained in full force and could only be redeemed by satisfaction of the fine whenever it might be made. The frame of the writs of *ca. sa.* in its teste and return and the interval between them was also distinguished from the other writ. The levy of the *ca. sa.* was attended with consequences that do not seem ever to have attended the imprisonment under the *capias pro fine*—such as the effect of a voluntary enlargement of the prisoner to discharge *the debt—the effect and the liabilities arising out of an escape—the provisions enacted for the maintenance of the prisoner whilst in custody—the privilege of the prisoner to avail himself of the proceedings of insolvency under a *ca. sa.* which he did not have under the *capias pro fine*, (*Chapman's Case*, 1 Va. Cas. 138,) and which required an express statute to entitle him to these proceedings, (Acts 1803, ch. 21, § 1; 1 Rev. Code 1819, p. 541,)—and the privilege of the prisoner in Virginia to discharge his person from custody under the *ca. sa.* by making a surrender of property, thereby in effect converting the *ca. sa.* into a *fi. fa.* In all of these particulars a distinction is observable between the *capias ad satisfaciendum* and the *capias pro fine*; and which never were wholly obliterated.

In some instances it will be seen in the books that a *capias pro fine* is a part of the judicial sentence pronounced by the

Court; as in the old precedents of judgments in trespass, or wherever the action was properly commenced by *capias ad respondendum*. In this and in other instances the judgment, in addition to the damages adjudged to the plaintiff, awarded a *capias pro fine* to the king. In none of the authorities does it seem to be stated that there is any difference whether the award of the writ is expressly a part of the judgment, or is silently a consequence of the judgment—whether it be judicially awarded or ministerially issued.

The Commonwealth has always occupied the place of the crown, with its prerogatives as to all the legal remedies, not expressly taken away by statute. The co-existence of both these species of process was distinctly recognized and established by the case of *Chapman*, above referred to, and by the act of 1803; which was the consequence of that decision. The remedy by *capias pro fine* was not abolished by that act, because it destroyed one feature of distinction which existed between the two remedies. There is, therefore, no

706 *ground for pronouncing that the two remedies did not exist in full force and all their distinctness when the Code of 1849 took effect. In that Code the mere omission, from whatever cause, to reenact the provision contained in the act of 1803, continuing to the prisoner the privilege of insolvency, cannot upon any principle of statutory construction, take away the remedy to which that privilege had been made an incident. Nor does it seem to be taken away merely because the severity of that process, as it existed at common law, may not seem entirely reconcilable with the spirit of many provisions of the Code which relieve the persons of our citizens from process of imprisonment. This remedy cannot be considered as abolished because the legislature has enacted that on a judgment for money there may be issued a writ of *fieri facias* or *elegit*; and that certain other process of execution, not including the *capias*, shall not issue. Code, p. 711. Nor will it, if existing before in full force, as has been shewn, any more be considered as abolished, because the other distinct process of *capias ad satisfaciendum* shall not, as enacted, p. 716, be issued or executed after that Code took effect. In none of these provisions of the new Code, therefore, does there seem a sufficient warrant for the Court to pronounce that the *capias pro fine* has ceased to exist, with all the effects which attended the levy of that process.

In the present case, two of the writs of *capias* under which the petitioner was charged in custody, were merely for certain costs in prosecutions, how, or when, or under what circumstances, does not appear. They are distinct from any prosecution in which there was a fine assessed and remained unpaid; and the writs command that he shall be taken, &c., until he pay those costs. A *capias pro fine* in such a case, clearly cannot be proper process. In the

other two writs which were issued, it was commanded that he be taken, &c., until *he pay the fines and the costs awarded in the prosecutions respectively against the petitioner. If originally any question could be raised, whether upon a judgment for fine and costs, the costs could be included in the *capias pro fine*, that question seems to be settled by the provision in the Code, p. 783, which authorizes the clerk to include the costs in the execution which may be issued for the fine.

The Court is therefore of opinion, and doth decide, in answer to the question adjourned, 1st. That a *capias ad satisfaciendum* on behalf of the Commonwealth against a person convicted of a misdemeanor, upon a judgment against him for a fine and costs, cannot be issued; but that for such fine and costs, though not for costs alone without the fine, there may be issued a *capias pro fine*, which, and not the *capias ad satisfaciendum*, appears by the record to have been the species of process that was issued in two of the cases. 2dly. That where a *capias pro fine* is issued for the fine and costs adjudged against the accused, and he is taken under that process, there is no means by which he can discharge himself without paying such fine and costs. Nevertheless, the term of his imprisonment under such *capias* is limited by the provision in the Code of 1849, chapter 209, sect. 17, p. 781.

Which is ordered to be certified to the Circuit court of Jackson county.

LEIGH, J., dissented.

708 *Henderson v. The Commonwealth.

[56 Am. Dec. 160.]

June Term, 1852.

1. **Criminal Law—Trespass Quare Clausum Fregit—When Indictable.**—Though the mere breaking and entering the close of another, is not a misdemeanor, yet if that entry is attended by circumstances constituting a breach of the peace, it will become a misdemeanor for which an indictment will lie.

2. **Same—Same—Same—Case at Bar.**—The going upon the porch of another man's house armed, and from thence shooting and killing a dog of the owner of the house, lying in the yard, in the absence of the male members of the family, and to the terror and alarm of females in the house, is a misdemeanor, for which an indictment will lie.

At the April term 1850 of the Circuit court of Wood county, the grand jury found an indictment against George W. Henderson, for that he did break and enter the close of one Enos Pugh, situate in the county aforesaid, and at the house of said Enos Pugh did then and there wickedly, mischievously and maliciously, and to the terror and dismay of one Nancy Pugh, wife of said Enos Pugh, fire a gun in the porch of said house, and then and there did shoot

and kill a dog belonging to said house, without any legal authority, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the Commonwealth. On the trial the jury found the defendant guilty, and assessed his fine at one hundred dollars: whereupon he moved the Court for a new trial, which motion was overruled; and he excepted.

The facts proved upon the trial were as follows: That some time about the 1st of March 1850, in the county of Wood the defendant came to the house of Enos Pugh about eight or nine o'clock in the morning, and then and there went upon the porch of the dwelling house, having his gun on his shoulder and his shotpouch about his neck: A part of the family of Enos Pugh was then

in the house. The defendant told *Nancy Pugh wife of Enos, that he suspected her dogs for worrying and killing his sheep, and he had come to kill the said dogs. She told him that she did not believe the said dogs were guilty, and refused to have them killed, and forbade his doing so; but he disregarding what she said, took his gun from his shoulder, still standing on the porch, and shot and killed one of the dogs; and then and there loaded his gun and shot another of said dogs and wounded him; the said dogs then lying in the yard near the said porch: One of the dogs being a large one and the other a small one, the large one being killed. That the smoke of the gun when fired passed into the dwelling house by the door. Nancy Pugh was much alarmed by the firing of the gun in the manner in which it was done; and two of her daughters, members of the family, were also greatly alarmed, and one of them who was dyspeptic, so much so that she became sick in consequence of it, and had to call in medical assistance. At the time the above transaction took place there was none of the male portion of said Pugh's family at home; they being confined in the jail of Wood county, having been convicted upon accusations made against them by the defendant.

The other facts proved related to the question whether the dogs shot by the defendant were the same that had worried his sheep. They were not seen by any one to do it; or to be near the place where it was done; and the facts relied upon to shew their guilt were certainly not very conclusive against them; but it is not a question of much importance in this case.

After the Court had overruled the motion for a new trial the defendant filed errors in arrest of judgment.

1st. That the facts stated in the indictment did not constitute a penal offence under any statute in force at the time the act was done.

*2d. That they did not constitute an offence at common law.

But the Court overruled the motion to arrest the judgment; and rendered a judgment upon the verdict for the Common-

*See note appended to this case as reported in 56 Am. Dec. 160, 162.

wealth. Whereupon the defendant applied to this Court for a writ of error, which was allowed.

LOMAX, J., delivered the opinion of the Court.

It is abundantly clear that the mere breaking and entering the close of another, though in contemplation of law a trespass committed *vi et armis*, is only a civil injury to be redressed by action; and cannot be treated as a misdemeanor to be vindicated by indictment or public prosecution. But when it is attended by circumstances constituting a breach of the peace, such as entering the dwelling house with offensive weapons, in a manner to cause terror and alarm to the family and inmates of the house, the trespass is heightened into a public offence, and becomes the subject of a criminal prosecution. The case of *Rex v. Storr*, 3 Burr. R. 1698, and *Rex v. Bathurst*, which was cited in that case, establish and illustrate both of these principles. Three of the indictments in that case were quashed, because they amounted merely to trespass *vi et armis*. But as to the fourth indictment, which was for entering a dwelling house *vi et armis*, and with strong hand, the objection to that indictment was given up by the counsel for the defendant, and the prosecution for that offence was sustained, whilst the first three indictments were ordered by the Court to be quashed. From what was said in those cases, the circumstance that the place where the entry is made is a dwelling house, as reason would suggest, and the peace of those abiding under the sanctity of their home and the security of their castle, would strongly require, is a most important circumstance to be taken into

consideration in the aggravation
711 *of trespass *quare clausum fregit* into a misdemeanor; as is also the circumstance that the entry was made with fire arms or other offensive or dangerous weapons. The facts, as disclosed in this record for the purpose of sustaining the motion for a new trial, shew a trespass most aggravated in both of these circumstances; as also in the destruction of animals within the personal and domestic protection of the owners of the dwelling house, and the alarm and dismay and other evils which the violence occasioned to the unprotected females of the family. No trespass could be aggravated beyond the wrongs of a private injury and swell into the magnitude of a crime against the public peace, if the facts stated in the record do not amount to a misdemeanor. Therefore the motion for a new trial was properly overruled. It is hardly less clear, that the frame of the indictment, in its charges of the circumstances accompanying the trespass, is sufficient to maintain the prosecution. Wherefore the errors in arrest of judgment were also properly overruled. The judgment of the Circuit court should be affirmed.

712 *Commonwealth v. Wormley.

June Term, 1852.

[56 Am. Dec. 102.]

(Absent LOMAX, J.)

Criminal Law—New Trial—Separation of Jury*—Case at Bar.—A sheriff to whom a jury is committed in the progress of a criminal trial, walks with them to a neighbouring house, and whilst there withdraws from the room where they are, leaving them in the company of three other persons. Although these other persons swear that there was no allusion by them to the trial during such absence of the sheriff, yet the verdict of the jury against the prisoner is to be set aside, and a new trial directed.

At the October term 1851, of the Circuit court of Chesterfield county, John S. Wormley was indicted for the murder of Anthony T. Robiou. He was tried at the March term 1852, and was found guilty of murder in the first degree. Whereupon he moved the Court for a new trial; first, upon the ground that the verdict was contrary to the evidence; and second, on the ground of misbehaviour on the part of the deputy sheriff and the jury. The motion on the first ground was overruled. On the second ground, it appeared that the jury, after several days in completing the panel, were sworn on Saturday, and the witnesses for the Commonwealth and the prisoner were also sworn; but before any evidence was given in, the Court adjourned: That the jury were committed to the charge of George W. Snellings, one of the deputy sheriffs of the county; and on the evening of the next day, Sunday the 28th of March, by the invitation of Silas Cheatam, Esq., the clerk of the County court of Chesterfield, who resided about a half mile from the courthouse, the deputy sheriff, accompanied by all of the jury, visited Mr. Cheatam at his residence. On getting there, the deputy sheriff and jury went into the parlour, and Mr.

Cheatam, Wm. Amber the son-in-law
713 of Cheatam, and *Augustus L. Winfree, who was employed in guarding the jail, were all in the parlour with the sheriff and jury. Shortly after getting to Cheatam's, the sheriff went out of the parlour, and into another room between which and the parlour there was no connecting door; and when in the room to which he went, the jury were out of his sight. The sheriff remained about five minutes absent from the jury; and during that time the jury remained in the parlour, and the three gentlemen mentioned remained with them, except that Mr. Amber went out for a minute or two, and brought back with him a decanter of spirits, of which most of the jurors drank once, and some of them twice, though no one of them drank to any excess.

*Separation of Jury.—The principal case is cited in *Trim v. Com.*, 18 Gratt. 988; *Phillips v. Com.*, 19 Gratt. 540; *State v. Robinson*, 20 W. Va. 755; *foot-note* to *Thompson v. Com.*, 8 Gratt. 637; monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 733.

The sheriff left the jury in the same way more than once, going into the same room, and leaving the same persons with them; but he was never absent at one time more than from five to ten minutes. When the sheriff left the jury, he left no one in charge of them, nor did he admonish them or the other persons present to abstain from having any conversation upon the subject of the trial. He was the son-in-law of Cheatam, and his wife was there at the time. The jury staid at Cheatam's about an hour. The above was the statement, substantially, of the deputy sheriff. The three persons stated by him to have been with the jury in the parlour were also examined. They concur in their statements with the deputy sheriff; and they all say that whilst the deputy sheriff was absent, there was no conversation between either of them and any of the jurors in relation to the trial. They and the jury conversed freely together in the absence of the deputy sheriff, passing jokes and telling anecdotes, but there was no allusion to the trial.

The deputy sheriff further stated that on the next Sunday he again had charge of the jury, and then permitted several of the jury to drink ardent spirits, without any permission or authority from the
714 Court. But *on both these Sundays neither of the jurors drank enough to affect him.

The Court, with the assent of the pris-

oner, adjourned to this Court the following questions:

1st. Was there such misbehaviour on the part of either the jury or the sheriff as to vitiate the verdict, and entitle the prisoner to a new trial?

2d. What judgment ought the Court to render on the prisoner's motion?

The Attorney General, for the Commonwealth.

Robert G. Scott, for the prisoner.

FIELD. J., delivered the opinion of the Court.

The Court is of opinion, in answer to the first and second questions adjourned, that the conduct of the sheriff in withdrawing from the jury at the house of Mr. Cheatam, and leaving them in the parlour in company with three other gentlemen, as is set forth in the record, was sufficient to vitiate the verdict of the jury; and that upon that ground a new trial should be awarded to the prisoner.

The Court deems it proper to add, that the conduct of the sheriff in conducting the jury to the house of Mr. Cheatam and withdrawing from them under the circumstances disclosed by the evidence, was such misbehaviour on the part of that officer as to deserve the animadversion and censure of the Court. The act should be condemned, because its tendency is to impair the purity of the trial by jury in criminal cases.

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2. There having been a prior incumbrance on the whole tract, the assignee is entitled, both against the obligee and an attaching creditor subsequent to the assignment, to have the one third not covered by the last deed of trust applied to pay the first incumbrance.

Idem, 533

3. The obligors having paid off the two first bonds, and having paid on account both before and after the assignment, but without notice of it, more than enough to discharge the 3d and 4th bonds, though they might be entitled to insist that the amount over paying these should be applied to the 5th bond, yet neither the obligee nor his attaching creditor is so entitled: And in the first case the assignee would be entitled, on the principle of marshalling assets, to be substituted on the other bonds not assigned, as against the obligee and attaching creditor.

Idem, 533

4. All the land being sold together, the one third and so much of the two thirds of the purchase money as is necessary, will be applied to discharge the first incumbrance, and the balance will be applied to pay the assignee.

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717 *3. A wife's interest as legatee in her father's estate in the hands of the executor, may be subjected by the creditor of the husband, by a proceeding by foreign attachment, when the husband resides out of the state.

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7. Though a home defendant claims the land in his possession as a purchaser, and shews a receipt for the purchase money, yet as he does not pretend that he paid in money, and as his account against the absent debtor is not proved to the satisfaction of the Court, the land will be held liable.

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8. In such case, upon an appeal from an interlocutory decree for the sale of the land, the appellate Court will not reverse the decree because the Court did decree against the absent debtor, or direct the giving security as provided by law in behalf of absent defendants. That may be done in the final decree.

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1. In an action on an award, if upon the face of the submission it does not clearly appear that the award does not cover the

whole matter submitted, a demurrer to the declaration will not be sustained; but the defendant will be left to his plea of "no award," to which the plaintiff may reply and shew that the award does cover the whole matter submitted.

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2. So if the parties may have waived a decision on one branch of the matters submitted, and requested the arbitrators to decide the other matters, though this is not stated in the declaration, a demurrer will not be sustained; but the plaintiff will be allowed to reply the facts to the plea of "no award." Idem, 79

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2. Where a defendant relies on a specific payment or set off by way of discount against a debt, an account stating distinctly the nature of such payment or set off and the several items thereof, must be filed with the plea, though the defendant may rely upon the parol admissions of the plaintiff to prove such payment. But this is not necessary where no specific payment is relied on, but the defendant offers proof of the admissions of the plaintiff that but a part of the debt is due.

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7. A bond binding the heirs, given to an endorser to protect him from loss on account of his endorsements, will, on the death of the obligor, be an available security for simple contract creditors of the obligor to the extent that the notes endorsed by said endorser is paid out of the personal assets.

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Idem, 442

CO-DEFENDANTS.

In a bill by a creditor against an administrator and his sureties, charging a devastavit by the administrator and the liability of the sureties for it, though some of the sureties insist in their answer that under the circumstances one of the sureties is liable to the others, if they are liable to the plaintiff, though there is a decree for the plaintiff, and though it appear from the proofs that the devastavit was occasioned by the payment of a debt of inferior dignity to the surety sought to be charged, yet it is not a proper case for a decree between co-defendants.

Allen & Ervine *v.* Morgan's adm'r & als., 60

COMMISSIONER.

Under a decree for the sale of lands, in a suit by heirs, the administrator of their ancestor's estate is appointed a commissioner to collect the proceeds of the sale.

In a suit by a creditor of the administrator's intestate, to subject the proceeds of the *land, the commissioner should be made a party as such; and if he is only a party as administrator, and without actual notice of the object of the suit he pays over the money to the heirs, he will not be liable to the creditor.

Carrington & als. v. Didier, Norvell & Co., 260

CONDITIONS.

For the construction of the condition of a bond of indemnity. See Marshalling assets, No. 4, and

Cralle & als. v. Meem & als., 496

CONTINUANCE.

1. A motion for a continuance of a criminal trial, on the ground of the absence of a material witness, properly overruled under the circumstances, though the prisoner swears to the materiality of the witness.

Mull's Case, 695

2. Under the circumstances the prisoner required to state who is the witness absent, and what he is expected to prove.

Idem, 695

CONVEYANCES—Fraudulent.

1. A deed executed bona fide to secure a loan of money not to be enforced for ten years, is a valid deed as against creditors of the grantor

Lewis & als. v. Caperton's ex'or & als., 148

2. A deed which conveys without a schedule household furniture, the various kinds of stock upon a farm, bacon and lard, to secure a bona fide debt, but not to be enforced for eighteen months after its execution, is valid against creditors, though made without the knowledge of the creditor, and the grantor was indebted to insolvency at the time. By two Judges.

Idem, 148

3. A deed which conveys land to secure a bona fide debt, which is not to be enforced for two years, and only then or afterwards, upon a notice of the sale for one hundred and twenty days, is valid against creditors.

Idem, 148

4. Such a deed is valid though the execution of the deed is postponed for five years from the date of the conveyance; and the rents and profits of the property in the meantime are reserved to the grantor.

Idem, 148

5. A deed which conveys future rents and profits of property conveyed in other deeds, which were reserved to the grantor in the previous deeds, for the purpose of paying a bona fide debt, is valid against creditors of the grantor.

Idem, 148

6. A postnuptial settlement made by a husband on his wife, of her personal property derived from her father's estate, but of which he retains possession, not having been properly recorded, is void as against the creditors of the husband.

Idem, 148

7. A deed made by a husband embarrassed at the time, by which he conveys the proceeds of his wife's land, which had been sold and the note for the purchase money made to him, in trust for himself and wife for their lives and the life of the survivor, and during his life to be under his control and management, is voluntary and fraudulent as to creditors.

Idem, 148

8. A deed which conveys land to secure a bona fide debt due to the grantee, and also a debt to the grantor's wife, which is voluntary and fraudulent as to his creditors, and the nature of which debt is known to the grantee, is null and void, as a security for the first, as well as the last mentioned debt, as against subsequent incumbrancers, and creditors of the grantor. By two Judges.

Idem, 148

9. A deed which conveys all the property of the grantor in trust for the payment of his debts, is valid, though it contains a provision that no creditor shall take any benefit under the deed, who does not within thirty days from its date, signify his acceptance of its terms and conditions; and further agree to release and acquit the grantor from all further claim for the debt acknowledged therein.

Phippen v. Durham & als., 457

COVENANTS.

1. There is a devise to J with a limitation over upon his dying without issue at his death, to his brother R if he should survive him, or his representatives, and R dies in the lifetime of J. J sells and conveys the *land to A; and R, though he does not convey the land, is a party to the deed, and J and R covenant as follows: That the said J, for himself and his heirs, and the said R as contingent devisee under the will of Col. J., (by whom the said land was devised to J,) do hereby covenant and agree to and with the said A, that they will warrant and defend the fee simple estate to said land, to him and his heirs forever, against the claim of themselves and their heirs, and the claim of any person claiming under them by virtue of the will aforesaid, and do relinquish and fully confirm to said A all the right they or their heirs now have or may hereafter have to said land, or any part thereof, to him and his heirs, free from the claim of the said J and R and their heirs, and of all other persons in the whole world., Held: 1. That this covenant of R extends to the claim of his children to the land, though they claim not as his heirs, but as devisees under the will of Col. J. 2. That the covenant of R is a covenant running with the land, and a purchaser claiming under A a part thereof, by a regular chain of conveyances, is entitled to the benefit of said covenant for his indemnity against the said claim of the heirs of R.

Dickinson v. Hoomes' adm'r & als., 353

2. In an action of covenant for the failure to deliver to the plaintiff possession of a mill which he had rented of the

defendant, the plaintiff not having sustained any special damage, he is only entitled to recover the difference between the rent which he contracted to pay and a fair rent for the property, at the time when it should have been delivered. A conjectural estimate of the profits which might have been made is no legitimate basis on which to fix the damages.

Newbrough v. Walker, 16

CREDITORS.

See Assignor and Assignee, Attachments, Marshalling Assets and Trusts and Trustees.

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. An indictment for a wilful trespass was against J: It was endorsed by the grand jury an indictment against T, "a true bill;" and so it was noted on the record of the Court. A writ having issued on the indictment against T, it should, on his motion, be quashed.

McKinney's Case, 589

2. In such case the Court cannot amend the record so as to conform to the indictment.

Idem, 589

3. What a sufficient entry on the record of the finding an indictment for a misdemeanor by the grand jury.

Nutter's Case, 699

4. If a prisoner has been tried by an examining Court and sent on for further trial before the Circuit court, and an indictment has been found against him, it is too late to plead in abatement that, or to move to quash the indictment, because there were irregularities in his examination before the committing magistrate.

Clore's Case, 606

5. If it may be fairly understood from the record of the examining Court, that the crime for which the prisoner is indicted is the offence for which he was examined, that is sufficient.

Idem, 606

6. Quære: If the setting aside a person called upon the venire on the motion of the Commonwealth, is a ground of exception by the prisoner.

Idem, 606

7. A prisoner being sent on for further trial by an examining Court which sat during the session of the Circuit court to which he is sent for further trial, that term of the Circuit court is not one of the two at which the statute directs that he shall be indicted or that he shall be discharged from imprisonment.

Bell's Case, 600

8. A prisoner is sent on by the examining Court to be tried for embezzling the goods of W, he may thereupon be indicted for embezzling the goods of A, the embezzlement being of the same goods for which he was tried by the examining Court.

Adcock's Case, 661

9. A prisoner is indicted for embezzling the goods of W, and is tried and convicted at the fifth term of the Court after his trial

before the examining Court; but the verdict is set aside for a variance as to the ownership of the goods. There is then a nolle prosequi entered and a new indictment to suit the proofs.

The prisoner is not entitled to be discharged from the crime because three terms had elapsed between his examination and the last indictment.

Idem, 661

10. The excuses for failure to try the prisoner enumerated in the statute, are not intended to exclude others of a similar nature; but only that if the Commonwealth was in default for three terms without any of the excuses fairly implicable by the Courts from the reason and spirit of the law, the prisoner should be entitled to his discharge.

Idem, 661

11. Though an offence committed before the Code of 1849 went into operation must, so far as the question of guilt, degree of crime, quantum of punishment and rules of evidence are concerned, be governed by the law in force at the time the offence was committed, yet upon the question of the prisoner's right to be discharged, from the failure to try him, arising after the Code went into operation, it must be governed by the law in the Code.

Idem, 661

12. In such case, upon the prisoner's motion for a discharge, the record of the Circuit court is competent, and the only competent evidence, for the Commonwealth, to prove that he had been indicted, tried and convicted within the time prescribed by law.

Idem, 661

13. In prosecutions for felonies and other serious offences, the Court will not, on motion of the prisoner, quash the indictment, unless where the Court has no jurisdiction; where no indictable offence is charged; or where there is some other substantial or material defect. In other cases he will be left to his demurrer, motion in arrest of judgment or writ of error.

Bell's Case, 600

14. What is not a sufficient ground for a new trial. See New Trials, No. 2, 3, 4, 5, 6, 7, and

Thompson's Case, 637

15. What is a ground for a new trial. See New Trials, No. 8, and

Wormley's Case, 712

DAMAGES.

1. In an action of covenant for the failure to deliver to the plaintiff possession of a mill which he had rented from the defendant, the plaintiff not having sustained any special damage, he is entitled to recover only the difference between the rent contracted to be paid and a fair rent for the property at the time when it should have been delivered. A conjectural estimate of the profits which might have been made, is no legitimate basis on which to fix the damages.

Newbrough v. Walker, 16

2. See Mills, No. 1, 3, 5, and Calhoun v. Palmer,

88

DEBT.

1. An instrument binding the parties thereto to pay a sum of money, purports to be under their hands and seals, but it is signed by one of the parties without a seal, and by the other parties with seals to their names. One action of debt may be brought against all the parties.

Rankin v. Roler & als., 63

2. In an action of debt, under the plea of payment without a bill of particulars, the defendant may give in evidence the parol admissions of the plaintiff that but a certain part of the debt is due.

Rice's ex'or v. Annatt's adm'r, 557

3. When and what bill of particulars necessary. See Bill of Particulars, No. 2, and

Idem, 557

DECREES.

1. When there should not be a decree between co-defendants. See Co-defendants, No. 1, and

Allen & Ervine v. Morgan's adm'r & als., 60

2. When a decree concludes a judgment creditor. See Judgments, No. 6, and

Jones &c. v. Myrick's ex'ors & als., 179

Myrick's ex'ors & als. v. Epes & als., 179

3. A decree which passes upon the whole subject in issue, so as to be final in its nature, is not converted into an interlocutory decree, by the addition thereto of an order suspending the decree as to the amount of one item of the account involved in the cause, until the decision of another suit brought by another party, against both plaintiffs and defendants in the first

722 suit, in which *the amount of this item is claimed by the plaintiff.

Fleming & als. v. Bolling & als., 292

4. Upon an appeal by one party from a joint decree, the appellate Court will reverse the decree as to both.

Lenows v. Lenow, 349

DEEDS.

1. A party offering in evidence a deed purporting to be executed by a commissioner under the decree of a Court, and conveying land, must offer with the deed so much of the record of the cause in which the decree was made, as will shew the authority of the commissioner to convey the land described in the deed.

Cales v. Miller & als., 6

2. A deed by a commissioner under a decree directing a conveyance of land to or of which none of the parties to the suit had either title or possession, passes nothing.

Idem, 6

3. A deed executed in 1799, which shews upon its face that the parties to it resided out of Virginia, was properly admitted to record upon the certificate of acknowledgment by the mayor of a city in another State, describing himself as such, and purporting to be under the seal of the city.

Idem, 6

4. The certificate is sufficient evidence that the grantor for the time resided in the said city, though the deed described him as being a citizen of another State.

Idem, 6

5. It seems that a residence however temporary, is sufficient to authorize the acknowledgment of a deed there by a non-resident of Virginia, under the act of 1792, ch. 90, § 5.

Idem, 6

6. A deed executed under a power of attorney, commences in the name of the grantor by the attorney, and is signed in the name of the attorney for the grantor: It is valid.

Bryan v. Stump, &c., 241

7. See Conveyances—Fraudulent, passim, and

Lewis & als. v. Caperton's ex'or & als., 148

DEMURRER.

When a demurrer to a declaration upon an award will not be sustained. See Awards, No. 1, 2, and

Price v. Via's heirs, 79

DEPOSITIONS.

1. The caption of a deposition describing it as taken in a proceeding of forcible entry and detainer, is sufficiently accurate to authorize the reading of the deposition, though the proceeding is for an unlawful detainer.

Cales v. Miller & als., 6

2. In a case of probat the deposition of an aged witness taken de bene esse, allowed to be read upon proof, either by witnesses or his own affidavit, of his inability to attend the Court.

Nuckol's adm'r v. Jones, 267

DETINUE.

1. Where a defendant in detinue dies, and the action is revived against his administrator with the will annexed, the plaintiff is entitled to demand from the administrator, not only the property sued for, but damages for its detention, and the costs incurred in prosecuting the action against the testator in his lifetime.

Hunt's adm'r v. Martin's adm'r, 578

2. The scire facias to revive the action of detinue against an administrator, should suggest the coming of the property into the possession of the administrator, since the death of his intestate: And the scire facias not being in the record, nor in the clerk's office of the Court below, and no objection appearing to have been taken to it in that Court, the Court of appeals will presume that it was in all respects regular.

Idem, 578

3. Where an action of detinue is revived against an administrator, and a judgment is recovered, the judgment for the damages for detention of the property and the costs, should not be against the administrator personally, but against him as administra-

tor, to be levied of the goods, &c., of his intestate in his hands to be administered.
Idem, 578

DOWER.

1. Husband during the coverture, sells and conveys land with general warranty; but his wife does not join in the conveyance. By his will he gives his whole estate, real and personal, to his wife for her life, remainder to her children. She is entitled to take under the will, and
723 also *to have her dower in the land sold.

Higginbotham v. Cornwell, 83

2. That a provision for a wife in the will of her husband, shall be held to be in lieu of dower, the will must so declare in terms, or the conclusion from the provisions of the will ought to be as clear and satisfactory as if it was expressed. Idem, 83

EMBEZZLEMENT.

A prisoner sent on by the examining Court to be tried for embezzling the goods of W, may thereupon be indicted for embezzling the goods of A; the embezzlement being of the same goods for which he was tried by the examining Court.

Adcock's Case, 661

ENDORSERS.

Several accommodation endorsers of negotiable paper are responsible in the order of their endorsements, unless there has been an agreement among them to be jointly and equally bound; and the burden of proving such an agreement is upon the prior endorser who seeks the benefit of it.

Hogue v. Davis & als., 4

ESTOPPEL.

See Mills, No. 2, and
Calhoun v. Palmer, 89

ESTATES.

See Limitation of estates, No. 1, and
Nowlin & wife v. Winfree, 346

EQUITABLE JURISDICTION AND RELIEF.

1. A Court of equity in Virginia may subject heirs living here, upon the covenants of the ancestor binding the heirs, to the extent of the value of land descended to them in another State.

Dickinson v. Hoomes's adm'r & als., 353

2. Under the circumstances of the case the heirs held bound to account for only so much of the lands out of the State, as they have actually gotten, or may get, possession of, with the rents and profits derived therefrom, after deducting the costs and expense of recovering the lands. Idem, 353

3. When a Court of equity will not entertain a creditor seeking to enforce a deed of trust in which he has fraudulently obtained

an advantage over other creditors. See Fraud, No. 3, and

Phippen v. Durham & als., 457

4. A principal executes a bond binding his heirs, to his surety as endorser, with condition that he will, when required by the bank or the surety, pay off the notes, and so indemnify and save the surety harmless; and he dies leaving the notes not yet due, and they are protested, and afterwards paid by his administrator. The surety being entitled to resort to both the real and personal estate, and the notes having been paid out of the latter, the simple contract creditors are entitled to have the assets marshalled to the extent of the notes so paid, if they do not exceed the penalty of the bond.

Cralle & als. v. Meem & als., 496

5. Upon a bill by simple contract creditors to marshal assets, it is competent for the Court, in its discretion, to decree a sale of the real estate in the hands of the heirs, some of whom are infants, for the payment of the debts. But it is premature to decree a sale before adjudicating the claims of the creditors, and so ascertaining the amount of indebtedness chargeable upon the lands of the decedent. Idem, 496

6. Though such a decree for a sale of land has been prematurely made, yet if the sale is made and confirmed, the court will not set aside the sale on the petition of the purchasers, if upon the hearing it appears that the sale is beneficial to the infants. Idem, 496

7. The Court having made a decree for a sale of real estate on the petition of the adult heirs, and with the assent of the creditors, it is erroneous to proceed to sequester the rents of the other real estate in the hands of the heirs, for the payment of the debts, before deciding upon the claim of the purchasers to have the sale set aside. Idem, 496

8. What relief will be given in equity upon an usurious contract. See Usury, No. 2, and

Bell & als. v. Calhoun, 22

724

***EVIDENCE.**

1. A party offering in evidence a deed purporting to be executed by a commissioner, under the decree of a Court, and conveying land, must offer with it so much of the record of the cause in which the decree was made, as will shew the authority of the commissioner to convey the land described in the deed.

Cales v. Miller & als., 6

2. What a sufficiently accurate description of the cause in the caption of a deposition to authorize it to be read. See Depositions, No. 1, and Idem, 6

3. A record to which neither the demandants or tenants were parties, is not even prima facie evidence against the tenant, that the grantor in the deed to the demandants was heir at law of the grantee in the

patent under which the demandants claim title.

Duncan *v.* Helms & als., 68

4. Upon a writ of unlawful detainer defendant sets up title in himself. Plaintiff may prove that defendant entered on the premises under a parol lease from himself, though the lease proved was to continue more than a year.

Adams *v.* Martin, 107

5. A witness called to prove the handwriting of a paper offered for probat, may be impeached by proof of what she has said about that paper at another time. But neither her capacity to judge of the handwriting or her credit, is to be impeached by what she may have said about some other paper.

Nuckol's adm'r *v.* Jones, 267

6. In an action of debt, under the plea of payment, without a bill of particulars, the defendant may give in evidence the parol admissions of the plaintiff, that but a certain part of the debt is due.

Rice's ex'or *v.* Annatt's adm'r, 557

7. Upon a motion by a prisoner to be discharged, for the failure to try him within three terms, the Commonwealth relies on the fact that he was tried and convicted, and the verdict set aside for a variance; the record of the Court is competent, and the only competent evidence of these facts.

Adcock's Case, 661

8. See Wills, No. 4, and

Nuckols' adm'r *v.* Jones, 267

EXCEPTIONS—Bill of.

1. In an action by an executor upon a re-funding bond, after offering in evidence the record of the decree against him, he offers the execution which issued upon it and the return thereon, which is objected to but admitted. The defendant excepts and does not insert the execution in the exception. The relevancy of the evidence being obvious without an inspection of the execution, it is not essential that it should have been inserted in the bill of exceptions.

Archer *v.* Archer's adm'r, 539

2. Quære: If the setting aside a person called upon the venire, on the motion of the Commonwealth, is a ground of exception by the prisoner.

Clore's Case, 606

EXECUTIONS.

1. The common law writ of *capias pro fine* is unrepealed, and may be used by the Commonwealth.

Webster's Case, 702

2. Where there is a judgment in favour of the Commonwealth for a fine, and costs of prosecution, the writ may issue for the fine and costs; but where the judgment is for costs only, the writ is not a proper process to enforce the judgment.

Idem, 702

3. Where a party is imprisoned upon a *capias pro fine*, for a fine and costs, he can only obtain his discharge from imprison-

ment by paying the fine and costs. But the term of imprisonment under such *capias* is limited by the provisions of the Code, ch. 209, § 17, p. 781.

EXECUTORS AND ADMINISTRATORS.

1. The official bond of an executor contains in the penal part the names of the executor and several sureties, and there is no blank for the name of another, but it is signed and sealed by all those whose names are in the penal part, and also by another person. It is the bond of all, including the last mentioned person.

Luster *v.* Middlecoff & als., 54

2. The official bond of an executrix only binding the obligors for the due administration of the personal assets, the sureties are to no extent responsible for the rents and profits of the real estate.

Hutcherson, &c. *v.* Pigg, 220

3. In assumpsit by an administrator for a debt due his intestate in his lifetime, the defendant cannot set off a debt due him for money paid as the surety of the intestate since his death.

Minor *v.* Minor's adm'r, 1

4. The count in assumpsit by the administrator, is for money had and received, and the bill of particulars merely states an account in which the defendant is debtor for money received, stating a sum certain. This will not admit proof of an admission by the defendant, that he had received from a third person a certain sum belonging to the intestate's estate.

Idem, 1

5. All the sureties of an executrix should be parties to a suit by legatees for distribution, or a sufficient reason should be shewn for failing to make them parties, before a decree is made against one of them.

Hutcheson, &c. *v.* Pigg, 220

6. A personal representative of a deceased insolvent co-obligor in a bond, is not a necessary party to a suit in equity, by the executrix of the obligee against the administratrix of one of the obligors.

Montague's ex'x *v.* Turpin's adm'x & als., 453

7. Where a defendant in detinue dies, and the action is revived against his administrator, the plaintiff is entitled to demand from the administrator, not only the property sued for, but damages for its detention by the intestate, and the costs incurred in prosecuting the action against his intestate.

Hunt's adm'r *v.* Martin's adm'r, 578

8. Where an action of detinue is revived against an administrator, and a judgment is recovered, the judgment for the damages for detention of the property and the costs, should not be against the administrator personally, but against him as administrator, to be levied of the goods of his intestate in his hands to be administered.

Idem, 578

9. Judgment against an administratrix upon the bond of her intestate, is conclusive

of the validity of the debt against the administratrix.

Montague's ex'x v. Turpin's adm'r, 435

10. A sale of bonds of the estate by an executor, at a discount of eighteen per cent., when the circumstances of the estate does not require it, is a devastavit.

Pinckard v. Woods, &c., 140

11. Land in which a widow is entitled to dower, being sold by the executor under a charge for payment of debts, he should be credited in his account of the proceeds, for the amount he has paid the widow for her dower interest.

Meek's adm'r, &c. v. Thompson & als., 134

EX POST FACTO LAWS.

See Criminal Jurisdiction and Proceedings, No. 11, and

Adcock's Case, 661

FELONY.

1. The malicious burning by the owner of a house on his own land, the house being in the legal occupancy of another, is a violation of the act of 1847-8, ch. 4, § 7, p. 99.

Erskine's Case, 624

2. The malicious burning of wheat threshed from the straw, is not a violation of the 6th section of the same act.

Idem, 624

FINES.

1. How judgments for fines on prosecutions by the Commonwealth, may be enforced. See Executions, No. 1, 2, 3, and

Webster's Case, 702

2. Upon a joint indictment against husband and wife for selling ardent spirits, if they are convicted, there must be a separate fine against each.

Hamor & wife's Case, 698

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

1. In a proceeding of forcible entry and detainer, the Court failing to meet on the day to which it is adjourned, the cause is not discontinued, but stands adjourned by operation of law, to the next County court.

Mann v. Gwinn & als., 58

2. Upon a writ of unlawful detainer, the defendant sets up title in himself; the plaintiff may prove that the defendant entered on the premises *under a parol lease from himself, though the lease proved was to continue more than a year.

Adams v. Martin, 107

3. In a writ of unlawful detainer, the defendant claiming title under a deed to himself and another, as joint tenants, that other person is not a competent witness for him to sustain his right of possession.

Idem, 107

4. The caption of a deposition describing it as taken in a proceeding of forcible entry and detainer, is sufficiently accurate

to authorize the reading of the deposition, though the proceeding is for an unlawful detainer.

Cales v. Miller & als., 6

FORTHCOMING BONDS.

1. A forthcoming bond has the force of a judgment so as to create a lien upon the lands of the obligor, only from the time the bond is returned to the clerk's office.

Jones &c. v. Myrick's ex'ors, 179

Myrick's ex'ors v. Eppes & als., 179

2. There being no evidence that the bond was returned to the clerk's office before the day on which there was an award of execution thereon by the Court, it will be regarded as having been returned to the office on that day.

Idem, 179

3. A forfeited forthcoming bond not returned to the clerk's office until some day in the term after the first, when there is an award of execution thereon, does not relate back to the first day of the term.

Idem, 179

4. Though a forthcoming bond is forfeited and not quashed, yet in equity the lien of the original judgment still exists; and if the obligors in the bond prove insolvent, so that the debt is not paid, a Court of law will quash the bond, and thus revive the lien of the original judgment; and a Court of equity having jurisdiction of the subject, will treat the bond as a nullity, and proceed to give such relief as the creditor is entitled to under his original judgment.

Idem, 179

5. A forthcoming bond is signed by the debtor, a third person and the creditor in the execution: The bond is valid to bind the debtor and the first surety; but the first surety is only a co-surety with the creditor, and entitled to contribution from him.

Booth v. Kinsey, 560

6. If debtor proves insolvent, the surety may be relieved to the extent of one moiety of the debt, either by bill in equity, or by motion under the statute for relief of sureties.

Idem, 560

7. In such case the notice on the forthcoming body is not defective for failing to name the obligee as a co-obligor.

Idem, 560

FRAUD.

1. A purchase of bonds from an executor at a discount of eighteen per cent., with knowledge that the condition of the estate does not require the sale, is a fraud in the purchaser, though he may know that they do not amount to more than the executor's interest in the estate, and the executor not having paid to the other legatees their portion of the estate, the purchaser will be compelled to repay the money to them.

Pinckard v. Woods, &c., 140

2. If the sureties of the executor have been compelled to pay the amount to the legatees, they may recover from the purchaser.

Idem, 140

3. A deed of trust to secure creditors requires them to signify their acceptance of it by signing it within thirty days, and to release the debtor. The creditors being dissatisfied with its provisions, it is agreed between them and the debtor that they will not sign it; but two of them who had entered into this agreement, sign the deed the day before the thirty days expire, with the avowed purpose that it is for the benefit of all. Afterwards one of these comes into equity to enforce the deed for the benefit of himself and the other who signed. A Court of equity will not entertain him.

Phippen v. Durham & als., 457

GAMBLING.

1. Betting on a horse race is not gaming within the meaning of the 10th section of the act of the 14th of March 1848, concerning crimes and punishments, and proceedings in criminal cases.

Shelton's Case, 592

2. A storehouse in a village, late at night, after persons cease to come to *the store to purchase goods, and the door is locked, is not a public place, within the meaning of the statute against gaming.

Feazle's Case, 585

GUARANTOR AND GUARANTEE.

1. A letter of credit addressed to W & W, may be proved to have been intended for W, W & Co. so as to hold the writer bound to the latter upon it.

Wadsworth & als. v. Allen, &c., 174

2. A guarantor may specify in the letter of credit which he gives, the terms on which he will be bound; and if the terms are complied with he is bound, though the law, in the absence of all prescription of terms in the letter of credit, would have prescribed the performance of other acts by the party seeking to subject him upon his guarantee.

Idem, 174

3. A guarantor undertaking to pay upon receiving reasonable notice of the failure of the principal debtor to pay the debt when due, dispenses with notice of the acceptance of the guarantee by the party to whom it is addressed; even if the law would have required such notice.

Idem, 174

4. What is reasonable notice of the failure of the principal debtor to pay, is a question for the jury.

Idem, 174

5. The fact that the principal debtor gave his bond for the goods he purchased did not release the guarantor.

Idem, 174

HEIRS.

1. Heirs will be held liable in Virginia upon the debts and covenants of their ancestor binding the heirs, to the extent of real assets descended in another state, if by the laws of that state they would be liable on such debts and covenants: And a Court of equity in Virginia may enforce the liability.

Dickinson v. Hoomes's adm'r & als., 353

2. Under the circumstances of this case, the heirs held bound to account for only so much of the lands out of the state as they have actually gotten, or may get, possession of, with the rents and profits derived therefrom, deducting the costs and expenses of recovering the lands.

Idem, 353

3. A creditor of a deceased debtor may proceed by foreign attachment against the heirs residing abroad, to subject land or its proceeds in the state, descended to them from the debtor.

Carrington & als. v. Didier, Norvell & Co., 260

4. So he may proceed against them as absent defendants in equity, to marshal the assets, and thus subject the land descended to them.

Idem, 260

5. See Practice in Chancery, No. 4, and Idem, 260

HUSBAND AND WIFE.

1. When wife entitled to dower though claiming under the will of her husband. See Dower, No. 1, 2, and

Higginbotham v. Cornwell, 83

2. A postnuptial settlement made by a husband on his wife, of personal property derived from her father's estate, but of which he retains possession, not having been properly recorded, is void as against the creditors of the husband.

Lewis & als. v. Caperton's ex'or & als., 148

3. A deed made by a husband embarrassed at the time, by which he conveys the proceeds of his wife's land which had been sold, and the note for the purchase money made to him, in trust for himself and wife for their lives, and the life of the survivor, and during his life to be under his control and management, is voluntary and fraudulent as to his creditors.

Idem, 148

4. The declaration of a wife at the time she executes a deed, or at other times, that she has executed or does execute the deed because her husband had promised he would settle, or because he had settled upon her certain property derived from her father's estate, is not sufficient evidence of a contract between them for such a settlement in consideration of her relinquishment of her right of dower in her husband's lands, and thus to support such a settlement if made, against creditors and incumbrancers, even to the extent of a reasonable compensation for the right of dower which she relinquished.

Idem, 148

5. Quære: If the wife's relinquishment *of her contingent right of dower in land, where there is no complete alienation of the estate by the husband, but a mere incumbrance for the security of a debt, constitutes a sufficient consideration for a settlement on the wife.

Idem, 148

6. Quære: If the certificate of the privy examination of a feme covert, made under the act of 1792, which purports in the body of the certificate to be under the seals of

the justices, but in fact no seals or scrolls are affixed to their names, is valid to bar the feme.

Bryan *v.* Stump, &c., 241

7. A wife's interest in her father's estate in the hands of the executor may be subjected by a creditor of the husband, by a proceeding by foreign attachment, where the husband resides out of the State.

Vance *v.* McLaughlin's adm'r, 289

8. Though the service of the process upon the executor creates a lien upon the wife's interest, in favour of the creditor, yet if the husband dies pending the proceedings, leaving his wife surviving him, the lien of the creditor is defeated, and the property belongs to the wife.

Idem, 289

9. The rights of a husband to the property of his intended wife may be intercepted by his agreement to that effect: And where by express contract before and in contemplation of marriage, for which the marriage is a sufficient consideration, he agrees to surrender his right to the enjoyment of the property during the coverture, and his right to take as survivor, there remains nothing to which his marital rights can attach during the coverture or after the death of the wife. In such case the wife is to be regarded to all intents as a feme sole in respect to such property, and there is no necessity that the marriage contract or settlement should limit the property to her next of kin upon her failure to appoint; but it will pass as if the wife died sole and intestate.

Charles *v.* Charles, 486

10. If the husband has relinquished his marital rights to his wife's property he is not entitled to administration upon her estate.

Idem, 486

11. Upon a joint indictment against husband and wife for selling ardent spirits, if they are convicted, there must be judgment for a separate fine against each.

Hamor & wife's Case, 698

12. When a postnuptial settlement valid though not properly recorded. See Settlements, No. 2, and

Glazebrook's adm'r *v.* Ragland's adm'r, 332

INDICTMENTS.

1. Quære: If the statement in the commencement of an indictment, of the name of the Court, and the term at which the indictment is found, is not surplusage. If it is not surplusage it is useless.

Bell's Case, 600

2. When the indictment in the caption names one county, and in the body speaks of the prisoner as of another county, the charging the offence to have been committed in the county aforesaid is error; it not being alleged with sufficient certainty that the offence was committed in the county in which the indictment was found.

Idem, 600

3. An indictment for perjury must shew

that the evidence which the defendant gave was material; and therefore if the evidence which the defendant gave before the grand jury is not shewn clearly on the face of the indictment, to relate to an offence committed within the county, the indictment is defective.

Pickering's Case, 628

4. What a good indictment for an attempt to commit a felony.

Nutter's Case, 699

ISSUE OUT OF CHANCERY.

Where the subject matter in controversy is of the nature of unliquidated damages, and the accuracy and credit of the witnesses is impeached, an issue should be directed.

Isler & wife *v.* Grove & wife, 257

JUDGMENTS.

1. When a forthcoming bond has the force of a judgment. See Forthcoming 729 *Bonds, No. 1, 2, 3, and

Jones &c. *v.* Myrick's ex'ors, 179

Myrick's ex'ors *v.* Epes & als., 179

2. A judgment confessed in Court in a pending suit, and the oath of insolvency taken thereon by the debtor upon his surrender by his bail, has relation to the first moment of the first day of the term: And therefore the assignment by operation of law has preference to the lien of a forthcoming bond returned to the clerk's office after the first day of the term.

Idem, 179

3. Though a forthcoming bond is forfeited and not quashed, the lien of the original judgment continues.

Idem, 179

4. Lands subject to a judgment lien, which have been sold or encumbered by the debtor, are to be subjected to the satisfaction of the judgment in the inverse order in point of time of the alienations and incumbrances; the land last sold or incumbered being first subjected.

Idem, 179

5. A judgment creditor having by his conduct waived or lost his right to subject the land first liable to satisfy his judgment, is not entitled to subject the lands next liable for the whole amount of his judgment, but only for the balance after crediting thereon the value of the land first liable.

Idem, 179

6. A judgment creditor concluded by a decree in a cause in which he is a defendant, though he has at the same time a suit depending against the same parties to enforce his prior lien.

Idem, 179

7. A judgment against an administratrix upon the bond of her intestate is conclusive of the validity of the debt against the administratrix.

Montague's ex'x *v.* Turpin's adm'r & als., 453

JURORS.

1. On a trial for murder it is a ground of challenge to a juror for cause, by the Commonwealth, that he says he has conscien-

tious scruples about the propriety of capital punishment, and is opposed to it, and if the proofs shew the prisoner guilty of murder in the first degree, he does not know that he will convict him.

Clore's Case, 606

2. An opinion formed alone from rumor, but existing on the mind at the time, and to which opinion he will stick unless the evidence turns out different from what rumor had reported it to be, is not good cause of challenge by the prisoner, where the juror says he has no prejudice or partiality for or against the prisoner, and he believes he can give him a fair and impartial trial according to the evidence.

Idem, 606

3. An objection to a venireman that he is not qualified according to law comes too late after he is sworn to try the issue.

Thompson's Case, 637

4. What is not misbehaviour in a juror for which a new trial will be granted to a prisoner. See New Trials, No. 6, 8, and

Idem, 637

LANDLORD AND TENANT.

Upon a writ of unlawful detainer, the defendant sets up title in himself. The plaintiff may prove that the defendant entered on the premises under a parol lease from himself, though the lease was to continue more than a year.

Mann v. Gwinn & als., 58

LEGATEES.

1. A legatee being dead a decree for the distribution of the estate should be in favour of his personal representative, and not of his distributee.

Luster v. Middlecoff & als., 54

2. Testator devises a tract of land for payment of a particular debt, and the land is sold, but the creditor receives only the first payment of the purchase money, and the balance is applied to the payment of other debts of the testator. Whether or not the land was the primary fund for payment of the particular debt, the debt was in fact the debt of the testator's estate, for which a legatee is responsible on his refunding bond.

Archer v. Archer's adm'r, 539

3. In a bill by persons claiming as legatees or assignees of legatees against defendants as legatees or assignees of legatees under the same will, for distribution of the slaves bequeathed to the legatees jointly, the presumption *is, in the absence of all pleadings and proofs to the contrary, that the persons made parties to the suit as legatees are not fictitious persons or mere pretenders to the characters assumed in the proceedings.

Ball & als. v. Johnson's ex'or & als., 281

LIENS.

1. A vendor of lands retains the title in accordance with the contract: He has

a lien on the land for the purchase money as against creditors and incumbrancers of the vendee; and this though the vendee has subsequently executed a deed by which he conveys other property to secure the purchase money.

Lewis & als. v. Caperton's ex'or & als., 148

2. What is a valid lien by deed of trust. See Conveyances—Fraudulent, passim, and Idem, 148

3. There being several deeds conveying in succession the same property, and not merely the equity of redemption therein, every successive incumbrance binds all the property not absorbed in satisfaction of previous valid incumbrances. And if some of the incumbrances are declared void at the suit of a creditor of the grantor, such creditor is not entitled to have his debt substituted in the place of such void incumbrance to the extent thereof; but the subsequent valid incumbrances have preference.

Idem, 148

4. Where there are several deeds of trust on the same property, how the trust fund shall be appropriated.

See Trusts and Trustees, No. 2, and Idem, 148

5. From what time a forthcoming bond forfeited is a lien.

See Forthcoming Bonds, No. 1, and Jones, &c. v. Myrick's ex'ors, 179

Mryick's ex'ors v. Epes & als., 179

6. The lien of a forfeited forthcoming bond returned to the clerk's office during the term and on which execution is awarded does not relate to the first day of the term.

Idem, 179

7. Though a forthcoming bond is forfeited and not quashed, yet the lien of the original judgment continues.

Idem, 179

8. In what order and to what extent lands are subject to satisfy a judgment lien.

See Judgments, No. 4, and Idem, 179

9. A debtor contracts to give a lien on two adjoining tenements to secure a debt, and the creditor is in possession of one of the tenements under an agreement by which the rent of the tenement is to be taken in satisfaction of the interest of the debt. Afterwards the debtor becoming embarrassed, conveys all his property in trust to pay his debts. The creditor is entitled to enforce his equitable lien not only against the debtor but his creditors.

Ott's ex'x v. King & als., 224

10. The lien of an attachment levied upon the interest of a wife in her father's estate in the hands of the executor, is terminated by the death of the husband pending the proceedings, his wife surviving him.

Vance v. McLaughlin's adm'r, 289

LIMITATION OF ESTATES.

1. Prior to 1819 a testator devises to his three daughters by name, his estate, both real and personal, to them and their heirs lawfully begotten of their bodies. And in

case either of my daughters should die without heir or heirs as above mentioned, the surviving ones to enjoy their equal part. This is an estate tail, which by the statute is converted into a fee: and the limitation over is after an indefinite failure of issue and void.

Nowlin & wife *v.* Winfree, 346

LIMITATIONS—Statute of.

1. A promise which will remove the bar of the statute of limitations, must be a promise to pay a particular debt. A promise to settle with the claimant is not enough.

Bell *v.* Crawford, 110

2. If a part payment will take a case out of the statute, it must be a payment upon the specific debt, and not a payment upon account. *Idem*, 110

3. The statute of limitations does not commence to run against the owners of the remainder in slaves, in favour of a purchaser of the life estate, until the death of the life tenant.

Ball & als. *v.* Johnson's ex'or & als., 281

LIS PENDENS.

A creditor of a deceased debtor sues 731 *heirs residing abroad, to marshal the assets, and subject lands or their proceeds in the State, descended to them. The land has been sold under a decree at the suit of the heirs, and is in the hands of a commissioner of the Court who is also administrator of the deceased debtor. Though this person is a party as administrator, to the creditor's suit, yet not being a party as commissioner, if he has no knowledge of the object of the suit, and pays over the money to the heirs under the order of the Court whose commissioner he is, he will not be affected by the lis pendens of the creditor's suit, so as to be held liable to pay it over again to the creditor.

Carrington & als. *v.* Didier, Norvell & Co., 260

MALICIOUS BURNING.

See Arson, No. 1, 2, and Erskine's Case, 624

MARSHALLING ASSETS.

1. The creditor of a deceased debtor may proceed in equity against his heirs residing abroad, as absent defendants, to marshal the assets, and thus subject the land or its proceeds, in the State, descended to them from the debtor.

Carrington & als. *v.* Didier, Norvell & Co., 260

2. If the land has been sold under a decree in a suit by the heirs, and the proceeds are in the hands of a commissioner of the Court, he should be a party as such, and be restrained by injunction from paying away the money in his hands. *Idem*, 260

3. Though the commissioner is a party as administrator of the deceased debtor, if he

has in fact no knowledge of the object of the suit, and pays over the money to the heirs under an order of the Court whose commissioner he is, he will not be liable to pay it again to the creditor. *Idem*, 260

4. A principal executes a bond binding his heirs, to his surety as endorser, with condition, that he will, when requested by the bank or the surety, pay off the notes, and so indemnify and save the surety harmless: and he dies leaving the notes not yet due, which are protested as they fall due, and are afterwards paid by his administrator. The surety being entitled to resort to both the real and personal estate, and the notes having been paid out of the latter, the simple contract creditors are entitled to have the assets marshalled, to the extent of the notes so paid, if they do not exceed the penalty of the bond.

Cralle & als. *v.* Meem & als., 496

5. Upon a bill by simple contract creditors to marshal the assets, it is competent for the Court in its discretion to decree a sale of real estate in the hands of the heirs, though some of them are infants, for the payment of the debts. But it is premature to decree a sale before adjudicating the claims of the creditors, and so ascertaining the amount of the debts chargeable upon the lands of the decedent. *Idem*, 496

MILLS.

1. A jury of inquest in a mill case, are induced by the opinions expressed and facts stated by the father of the applicant, to report that no person will sustain damage from the dam allowed to be built; and the inquisition is confirmed by the Court. This inquest and judgment is no bar to an action for damages sustained by the father against a vendee of the mill, which were not actually foreseen and estimated by the inquest.

Calhoun *v.* Palmer, 88

2. The defendant relies on the inquisition and judgment authorizing the dam, as the grounds of his defence; he cannot therefore deny the ownership of the land by the applicant for the mill. *Idem*, 88

3. The conduct of the father does not defeat his right to recover damages for the injury he has sustained. *Idem*, 88

4. Where a mill owner does not raise his dam at first, as high as he is authorized to do, that will not preclude him from raising it to the full height authorized by the inquest, provided he does not thereby occasion injury to others. *Idem*, 88

5. The father having united in the conveyance of the mill to the vendee, he cannot recover damages for any 732 *injury done to him by the erection of the dam, to the extent the injury existed at the time of the conveyance. *Idem*, 88

MISBEHAVIOUR.

See New Trials, No. 5, 6, 7, 8, 9, and Thompson's Case, 637
Wormley's Case, 712

MISDEMEANOUR.

1. Though the mere breaking and entering the close of another, is not a misdemeanour, yet if that entry is attended by circumstances constituting a breach of the peace, it will become a misdemeanour for which an indictment will lie.

Henderson's Case, 708

2. The going upon the porch of another man's house armed, and from thence shooting and killing a dog of the owner of the house, lying in the yard, in the absence of the male members of the family, and to the terror and alarm of females in the house, is a misdemeanour for which an indictment will lie.

Idem, 708

MISTAKE.

When a Court of equity will restrict the assignment of a security to the purpose of fully satisfying the assignee for the purposes of the assignment; the assignment having been made by the assignor under a misapprehension of the amount of the security.

Jennings v. Palmer, 70

NEW TRIALS.

1. A new trial will not be granted on the ground of after discovered evidence, upon the affidavit of a party, that he has been informed and believes, that certain witnesses will give important testimony, without proof by affidavit of the persons or others who have heard them, of what they will state: and especially if their evidence is merely cumulative, and the cause has been pending for a length of time, and these newly discovered witnesses live in the county and within a few miles of the party who makes the application.

Nuckols's adm'r v. Jones, 267

2. After discovered evidence in order to afford a proper ground for a new trial, must be such as reasonable diligence on the part of the party offering it, could not have secured at the former trial; must be material in its object, and not merely cumulative and corroborative or collateral; and must be such as ought to be decisive, and productive on another trial, of an opposite result on the merits.

Thompson's Case, 637

3. Where the sole object and purpose of the new evidence is to discredit a witness on the opposite side, the general rule is, subject to few exceptions, to refuse a new trial.

Idem, 37

4. What separation of a jury on a trial for felony is not sufficient to entitle the prisoner to a new trial.

Idem, 637

5. Jurors concurring in the guilt of the prisoner, each sets down the time for which he thinks he should be confined in the penitentiary, and the aggregate is divided by twelve; and after the result is ascertained they all concur in it as their verdict. This is not misbehaviour in the jury which will entitle the prisoner to a new trial.

Idem, 637

6. It is not misbehaviour in a juror, between the adjournment of the Court in the evening and its meeting next morning, to drink spirituous liquors in moderation.

Idem, 637

7. And it is not misbehaviour for which a new trial will be granted, though they drink upon the invitation of a witness for the Commonwealth, if it is done in the presence of the sheriff, and obviously where the invitation to do so is merely intended as an act of courtesy.

Idem, 637

8. In walking out for exercise the jury with the sheriff pass beyond the limits of the county in which the prosecution is pending. This is no ground for a new trial.

Idem, 637

9. A sheriff to whom a jury is committed in the progress of a criminal trial, walks out with them to a neighbouring house, and whilst there withdraws from the room where they are, leaving them in the company of three other persons. Although these other persons swear that there was no

allusion by them to the trial during

733 such absence of the sheriff, yet *the verdict of the jury is to be set aside and a new trial awarded.

Wormley's Case, 712

NON DAMNIFICATUS.

1. The plea of non damnificatus is a good plea only when the condition is to indemnify and save harmless. The plea should go to the right of action, and not to the question of damages.

Archer v. Archer's adm'r, 539

2. Wherever the plea of non damnificatus is a good plea it is equivalent to the plea of "conditions performed." And if this last plea has been pleaded it is no error to refuse to admit the other at a subsequent term.

Idem, 539

NOTICE.

1. A notice on a forthcoming bond is not defective because it only mentions those obligors in the bond to whom the notice is intended to be given.

Booth v. Kinsey, 560

2. What notice to guarantor necessary. See Guarantor & Guarantee, No. 2, 3, and Wadsworth & als. v. Allen, &c., 174

3. Whether the notice to a guarantor is sufficient is a question for the jury.

Idem, 174

PARTIES.

1. In a creditor's suit either by foreign attachment, or to marshal assets, against heirs residing abroad, the lands descended having been sold under a decree at the suit of the heirs, and the proceeds being in the hands of a commissioner, he should be a party as such; and his being a party as administrator of the deceased debtor is not enough.

Carrington & als. v. Didier, Norvell & Co., 260

2. In a bill by persons claiming to be legatees or assignees of legatees, against defendants as legatees or assignees of legatees, under the same will, for distribution of the slaves bequeathed to the legatees jointly, the presumption is, in the absence of all pleadings and proofs to the contrary, that the persons made parties to the suit as legatees are not fictitious persons or mere pretenders to the characters assumed in the proceedings.

Ball & als. v. Johnson's ex'or & als., 281

3. In such case, the case being a proper one upon its merits for distribution of the subject amongst those entitled thereto, the bill should not be dismissed for want of parties, or of proof that the parties were what they professed to be; but the Court should direct the plaintiffs to amend their bill and make the proper parties.

Idem, 281

4. A personal representative of a deceased insolvent co-obligor is not a necessary party to a suit in equity by the executrix of the obligee against the administratrix of one of the obligors, to enforce payment of the bond, so as to require the plaintiff to have one appointed and make him a party.

Montague's ex'x v. Turpin's adm'x, 453

5. All the sureties of an executrix should be parties to a suit by legatees for distribution, or a sufficient excuse should be shewn for failing to make them parties, before a decree is made against one of them.

Hutcherson &c. v. Pigg, 220

PARTITION.

A brother and sister, both of whom are married, own a tract of land jointly. In 1802 the brother and his wife and the sister and her husband unite in a deed of partition of the land, and from thence to the present time the land is held in severalty by the parties respectively and those claiming under them. The partition is valid and binding on the parties, though no certificate of the privy examination of the wives is annexed to the deed.

Bryan v. Stump, &c., 241

PARTNERS.

A partnership for the manufacture of iron is composed of four persons, the names of two of whom do not appear, and they live at a distance. The acting partners buy land in their own name, for the purpose of obtaining from it wood to be used in the manufacture of iron; and so far as it is paid for, it is paid for out of the partnership effects. The land is partnership property; and the partnership having failed, the two dormant partners are liable to the vendor for the balance of the purchase money.

Brooke v. Washington, 248

PAYMENTS.

How payments are to be applied as between an assignee and attaching creditor

of the obligee. See Assignor and Assignee, No. 2, 3, 4, and

Schofield v. Cox & als., 533

PERJURY.

An indictment for perjury must shew that the evidence which the defendant gave was material; and therefore if the evidence which the defendant gave before the grand jury is not shewn clearly on the face of the indictment to an offence committed within the county, the indictment is defective.

Pickering's Case, 628

PLEADINGS.

1. An instrument binding the parties thereto to pay a sum of money purports to be under their hands and seals, but it is signed by one of the parties without a seal, and by the other parties with seals to their names. It may be sued upon against all the parties in one action as on a joint promise.

Rankin v. Roler & als., 63

2. The plea of non damnificatus is a good plea only where the condition is to indemnify and save harmless. The plea should go to the right of the action, and not to the question of damages.

Archer v. Archer's adm'r, 539

3. Wherever the plea of non damnificatus is a good plea it is equivalent to the plea of "conditions performed." And if this last plea has been pleaded it is not error to refuse to admit the first at a subsequent term.

Idem, 539

4. A plea which professes to go to the whole action, but answers only a part of it, is defective and demurrable.

Hunt's adm'r v. Martin's adm'r, 578

5. In case for the breach of an express warranty of soundness of a personal chattel, it is not necessary to allege the defendant's knowledge of the unsoundness: And if it is alleged it is not necessary to prove it.

Trice v. Cockran, 442

PRACTICE AT COMMON LAW.

1. In a proceeding of forcible entry and detainer, the Court is constituted, and then adjourns to a day certain. The Court failing to meet on the day to which it is adjourned, the cause is not discontinued, but stands adjourned by operation of law to the next term of the County court.

Mann v. Gwinn & als., 58

2. When a demurrer to a declaration upon an award will be overruled, and the defendant put to his plea of "no award." See Awards, No. 1, 2, and

Price v. Via's heirs, 79

3. In assumpsit, defendant pleads "non assumpsit," and with it files an affidavit of set off, and the set off, which is a note. Though there is no plea of set off or bill of particulars the evidence in relation to the set off is properly admitted.

Bell v. Crawford, 110

4. Where the plea of "conditions performed" has been pleaded, it is not error for the Court to refuse at a subsequent term to admit the equivalent plea of "non damnificatus."

Archer *v.* Archer's adm'r, 539

5. When a bill of particulars is, and when it is not necessary, to be filed with the plea of payment to let in the evidence. See Bill of Particulars, No. 2, and

Price's ex'or *v.* Annatt's adm'r, 557

PRACTICE IN CRIMINAL CASES.

See Criminal Jurisdiction and Proceedings.

PRACTICE IN CHANCERY.

1. A legatee being dead a decree for the distribution of the estate of his testator should be in favour of the personal representative of the legatee, and not of his distributee.

Luster *v.* Middlecoff & als., 54

2. The obligors in a forfeited forthcoming bond being insolvent, a Court of equity having jurisdiction of the subject, will treat the bond as a nullity, though it has not been *quashed, and proceed to give the proper relief.

Jones &c. *v.* Myrick's ex'ors, 179

Myrick's ex'ors *v.* Epes & als., 179

3. Where the matter in controversy is of the nature of unliquidated damages, and the accuracy and credit of the witnesses is impeached, an issue should be directed.

Isler & wife *v.* Grove & wife, 257

4. Heirs residing out of the State having instituted a suit for the sale of land descended to them, and the same having been sold, and the proceeds being in the hands of a commissioner directed by the Court to collect them, a creditor of the ancestor seeking to subject these proceeds to the payment of his debt, should apply by petition to the Court to be made a party in the cause and to have the fund applied by proceedings in that cause to the payment of his debt.

Or if he proceeds by foreign attachment the commissioner should be a party, and be restrained by endorsement on the process from disposing of the proceeds.

Or if the creditor proceeds against the heirs to marshal the assets, there should be an injunction to restrain the commissioner from paying away the money in his hands. And the commissioner, though a party as administrator of the debtor to the creditor's suit, but having in fact no knowledge of the object of it, paying over the money to the heirs under the order of the Court whose commissioner he is, will not be affected by the *lis pendens* of the creditor's suit so as to be liable to pay it over again to the creditor.

Carrington & als. *v.* Didier, Norvell & Co., 260

5. When parties will be presumed to be what they profess to be. See Parties, No. 2, and

Ball & als. *v.* Johnson's ex'or & als., 281

6. When there is a proper case upon the merits for relief, the bill should not be dismissed for want of parties, or of proof that the parties are what they profess to be; but the Court should direct the plaintiffs to amend their bill and make the proper parties, and direct a commissioner to ascertain and report the persons entitled to the property. *Idem*, 281

7. Creditors at whose suit the debtor has taken the insolvent debtor's oath, come into equity to set aside a deed for fraud on its face, and because the beneficiary in the deed had committed a fraud on them in professing to sign it for the benefit of all, and yet claiming the exclusive benefit of it. Though the Court thinks the deed valid, yet being satisfied that the signing creditor signed for all, the Court will give all the benefit of the deed, and distribute the fund in the creditors' suit.

Phippen *v.* Durham & als., 457

8. In a suit to marshal assets, the Court may, in its discretion, decree a sale of lands in the hands of the heirs, though some of them are infants: But it is premature to decree a sale before adjudicating the claims of the creditors, and so ascertaining the amount of indebtedness chargeable upon the lands of the decedent.

Cralle & als. *v.* Meem & als., 496

9. Though such a decree for a sale of land has been prematurely made, yet if the sale has been made and confirmed, the Court will not set it aside on the application of the purchasers, if upon the hearing it appears that the sale is beneficial to the infants.

Idem, 496

10. The application of the purchasers in such a case to have the sale set aside, should be by petition in the cause. And if they proceed by bill to enjoin the collection of the purchase money and have the sale set aside, the bill should be treated as a petition in the cause and be brought to a hearing with it. *Idem*, 496

11. The Court having made a decree for a sale of real estate on the petition of the adult heirs, and with the assent of the creditors, it is erroneous to proceed to sequester the rents of the other real estate, in the hands of the heirs, for the payment of the debts, before deciding upon the claims of the purchasers to have the sale set aside. *Idem*, 496

PRIVY EXAMINATION.

Quære: If the certificate of the privy examination of a feme covert, made under the act of 1792, which purports, in the body of the certificate, to be under the seals of the justices, but in fact no seals or scrolls *are affixed to their names, is valid to bar the feme.

Bryan *v.* Stump, &c., 241

PUBLIC PLACE.

A storehouse in a village, late at night, after persons cease to come to the store to purchase goods, and the door is locked, is

not a public place, within the meaning of the statute against gaming.

Feazle's Case, 585

RECORDS.

1. The official bond of a committee of a lunatic, given in obedience to the order of the Court, and its execution certified on the record, is a part of the record, and may be looked to to ascertain what kind of bond the Court required to be executed.

Beery v. Homan's committee, 48

2. When a record is evidence. See Criminal Jurisdiction and Proceedings, No. 12, and

Adcock's Case, 661

3. When a record is not evidence. See Evidence, No. 3, and

Duncan v. Helms & als., 68

REGISTRY OF DEEDS.

1. A deed executed in 1799 which shews upon its face that the parties to it resided out of Virginia, was properly admitted to record, upon the certificate of acknowledgment by the mayor of a city in another State, describing himself as such, and purporting to be under the seal of the city.

Cales v. Miller & als., 6

2. The certificate is sufficient evidence that the grantor for the time resided in said city, though the deed described him as being a citizen of another State. Idem, 6

3. It seems that a residence, however temporary, is sufficient to authorize the acknowledgment of a deed there, by a non-resident of Virginia, under the act of 1792, chap. 90, § 5. Idem, 6

RELATION.

1. To what time a judgment confessed in a cause relates. See Judgments, No. 2, and

Jones &c. v. Myrick's ex'ors, 179

Myrick's ex'ors v. Epes & als., 179

2. A forfeited forthcoming bond being deposited in the clerk's office during the term of a Court, and execution awarded upon it, does not relate back to the first day of the term. Idem, 179

REMAINDERMEN.

The statute of limitations does not commence to run against the owners of a remainder in slaves, in favour of a purchaser of the life estate, until the death of the life tenant.

Ball & als. v. Johnson's ex'or & als., 281

ROADS.

1. The mere user of a road by the public, for whatever length of time, will not constitute it a public road.

Kelly's Case, 632

2. A mere permission to the public by the owner of land, to pass over a road upon it, is without more, to be regarded as a license, and revocable at the pleasure of the owner. Idem, 32

3. A road dedicated to the public must be accepted by the County court upon its records before it can be a public road.

Idem, 632

4. If a County court lays off a road before used into precincts, and appoints an overseer or surveyor for it, thereby claiming the road as a public road; and if after notice of such claim, the owner of the soil permits the road to be passed over for a long time, the road may be well inferred to be a public road. Idem, 632

SECURITIES.

1. A debtor assigns certain securities to his creditor, in satisfaction of his debt, being at the time under a misapprehension as to their amount; and they prove to be largely more than is necessary to discharge the debt. A court of equity will restrict the effect of the assignment to the full satisfaction of the debt.

Jennings v. Palmer, 70

*2. What will be binding as a guarantee.

See Guarantor and Guarantee, No. 1, 2, 3, and

Wadsworth & als. v. Allen, &c., 174

3. A deed of trust is given to secure several bonds, some of which are afterwards assigned, the benefit of the deed of trust will pass with the assignment.

Schofield v. Cox & als., 533

SET OFF.

1. In assumpsit by an administrator, for a debt due to his intestate in his lifetime, the defendant cannot set off a debt due to him for money paid as the surety of his intestate since his death.

Minor v. Minor's adm'r, 1

2. In assumpsit, defendant pleads non assumpsit, and with it files an affidavit of set off, and the set off, which is a note. Though there is no plea of set off or bill of particulars, the evidence in relation to the set off is properly admitted.

Bell v. Crawford, 110

3. A joint interest in husband and wife cannot be set off by a debt due from the husband.

Glazebrook's adm'r v. Ragland's adm'r, 332

SETTLEMENTS.

1. An unrecorded postnuptial settlement by a husband on his wife, of personal property derived from her father's estate, of which he retains possession, is void as to his creditors.

Lewis & als. v. Caperton's ex'or & als., 148

2. Property conveyed in trust by a husband for himself and wife, by deed not duly recorded, is sold under a decree at their suit against the trustees, and conveyed by deed duly recorded. It is valid against a subsequent creditor of the husband.

Glazebrook's adm'r v. Ragland's adm'r, 332

3. Where by express contract before marriage, the husband releases all his marital rights to the wife's property, both during marriage and if he survives her, the wife is to be regarded to all intents as a feme sole as to such property, and there is no necessity that the marriage contract or settlement should limit the property to her next of kin upon her failure to appoint; but it will pass as if the wife died sole and intestate.

Charles v. Charles, 486

SLANDER.

1. It is no defence in an action of slander even in mitigation of damages, that previous to the speaking of the slanderous words charged in the declaration, the plaintiff had used equally offensive and insulting words towards the defendant.

Bourland v. Eidson, 27

2. In an action of slander, under the plea of not guilty the defendant may, in mitigation of damages, prove any facts as to the conduct of the plaintiff in relation to the transaction which was the occasion of the slanderous language complained of, which tends to excuse him for uttering the words, provided the facts do not prove or tend to prove the truth of the charge complained of, but in fact to relieve the plaintiff from the imputation involved in it.

Idem, 27

STATUTES.

1. The act of 1792, ch. 90, § 5, 1 Stat. at large, N. S. p. 85, regulating conveyances, construed in

Cales v. Miller & als., 6

2. The act of 1847-8, ch. 4, § 7, p. 99, in relation to the malicious burning of a house, construed in

Erskine's Case, 624

3. The same statute, § 6, in relation to the malicious burning of stacks of wheat &c. construed in

Idem, 624

4. The act, Code of 1849, ch. 207, § 13, p. 770, as to a prisoner's right to be discharged if not indicted within two terms after his examination, construed in

Bell's Case, 661

5. The act, Code of 1849, ch. 208, § 36, p. 778, as to a prisoner's right to be discharged from the prosecution if not tried within three terms, construed in

Adcock's Case, 661

6. The act, Code of 1849, ch. 199, § 16, p. 751, as to proceedings if a prisoner is acquitted for a variance, construed in

Idem, 661

7. The act, Code of 1849, ch. 209, § 17, p. 781, limiting imprisonment in cases of fines, construed in

Webster's Case, 702

*8. The act, Code of 1849, ch. 182, § 2, p. 687, regulating the jurisdiction of the Court of appeals, construed in

Clark v. Brown, 549

SUBSTITUTION.

1. When sureties of an executor entitled

to be substituted to the rights of legatees to recover money from purchasers of bonds from the executor. See Fraud, No. 1, 2, and

Pinckard v. Woods, &c., 140

2. When an assignee of a bond entitled to be substituted to the rights of the assignor, to a security for that and other bonds. See Assignor and Assignee, No. 3, and

Schofield v. Cox & als., 533

3. When simple contract creditors entitled to be substituted to the rights of the obligee in a bond of indemnity. See Marshalling Assets, No. 3, and

Cralle & als. v. Meem & als., 496

SURETIES.

1. When sureties of an executor are entitled to recover from the purchaser of bonds from the executor, the amount of the bonds. See Fraud, No. 1, 2, and

Pinckard v. Woods, &c., 140

2. When a guarantor is bound on his guarantee. See Guarantor & Guarantee, No. 1, 2, 3, 4, 5, and

Wadsworth & als. v. Allen, &c., 174

3. The official bond of an executrix only binding the obligors for the due administration of the personal estate, the sureties are to no extent responsible for the rents and profits of the real estate.

Hutcherson &c. v. Pigg, 220

4. All the sureties of an executrix should be parties to a suit by legatees for the distribution of the estate, or a sufficient excuse shewn for not making them parties, before a decree is made against one of them.

Idem, 220

TRESPASS.

1. Though the mere breaking and entering the close of another is not a misdemeanour, yet if that entry is attended by circumstances constituting a breach of the peace, it will become a misdemeanour for which an indictment will lie.

Henderson's Case, 708

2. The going upon the porch of another man's house armed, and from thence shooting and killing a dog of the owner of the house lying in the yard, in the absence of the male members of the family, and to the terror and alarm of females in the house, is a misdemeanour for which an indictment will lie.

Idem, 708

TRUSTS AND TRUSTEES.

1. See Conveyances—Fraudulent, passim, and

Lewis & als. v. Caperton's ex'or & als., 148

2. Property covered by various deeds of trust which may be enforced at different periods, having been sequestrated at the suit of a judgment creditor of the grantor, when the Court disposes of the trust subjects, and the rents and profits thereof, the judgment creditor will only be entitled to

the rents and profits of the different trust subjects up to the earliest period when either of the valid incumbrances covering the subject, was authorized to be enforced. And the different incumbrancers will each be entitled to the rents and profits of the subject covered by his deed, from the time he was authorized by the terms of the deed to enforce it. *Idem*, 148

3. The wife of the grantor not having joined in the first deed conveying land to secure a debt, but uniting in the second deed conveying the same land to secure another creditor, the second incumbrancer is entitled to the value of the wife's contingent right of dower in the land, to be paid out of the proceeds, in preference to the first incumbrancer. *Idem*, 148

4. The trusts of a deed having been satisfied, it may be released by the trustee to a subsequent purchaser from the grantor. *Bryan v. Stump, &c.*, 241

5. There being no seals or scrolls affixed to the names of the justices taking the privy examination of a feme covert, under the act of 1792, though in the body of the certificate it purports to be under their seals, whether the certificate is valid is at least so doubtful as to cast a doubt upon the title; and the husband being
739 *dead and the interest of the wife having been the fee, and her title not being barred by lapse of time, a sale of the land under a trust deed should not be made until the cloud upon the title is removed, though neither the feme during her life nor her heirs since, have set up any claim to the land. *Idem*, 241

6. Property conveyed by husband in trust for himself and wife, by deed not duly recorded, is sold under a decree at their suit against the trustee, and conveyed by deed which is duly recorded. Neither the land nor its proceeds are liable to a subsequent creditor of the husband.

Glazebrook's adm'r v. Ragland's adm'r, 332

7. A deed of trust is given to secure several bonds some of which are afterwards assigned by the obligee: The assignee is entitled to the benefit of the deed of trust. *Schofield v. Cox & als.*, 533

USURY.

1. An assignment of a bond at a large discount, with a deed of trust by the assignor to secure the whole amount of the bond if the obligor should fail to pay it by a time certain, is usurious.

Bell & als. v. Calhoun, 22

2. A party coming into equity to enjoin a sale under a usurious deed of trust, though he does not ask a discovery, is only entitled to relief to the extent of the usurious premium. *Idem*, 22

VENDOR AND PURCHASER.

1. Though a vendee of land has abandoned possession for a technical defect of the title, yet upon a bill to enjoin the collection

of the purchase money, if the vendor can make a good title at the time of the decree the vendee is bound to take it.

Mays v. Swope, 46

2. Where the charge upon land for the payment of debts is general, the purchaser from the executor is not bound to see to the application of the purchase money.

Meeks' adm'r, &c. v. Thompson & als., 134

3. In such case if the sale was necessary at the time it was made, and it was fairly made, and the purchase money was paid, the failure of the executor to account for and pay the proceeds to the creditors of the estate, will not impair the title of the vendee. *Idem*, 134

4. A vendor of land retains the title in accordance with the contract. He has a lien on the land for the purchase money, as against creditors and incumbrancers of the purchaser: and this though the purchaser has subsequently executed a deed on other property to secure the purchase money.

Lewis & als. v. Caperton's ex'or & als., 148

WARRANTY.

1. Case is a proper remedy for the breach of an express warranty of soundness of a slave, or other personal chattel.

Trice v. Cockran, 442

2. In case for the breach of a warranty of soundness of a personal chattel, it is not necessary to allege the defendant's knowledge of the unsoundness: and if it is alleged it is not necessary to prove it. *Idem*, 442

3. For a covenant of warranty binding the heirs of the warrantor. See Covenants, No. 1, and

Dickinson v. Hoomes's adm'r & als., 353

WILLS.

1. In a case of probat the deposition of an aged witness taken de bene esse, allowed to be read upon proof either by witnesses or his own affidavit, of his inability to attend the Court.

Nuckols' adm'r v. Jones, 267

2. What tests may be employed to impeach a witness in a case of probat. See Witness, No. 2, and *Idem*, 267

3. Quære: Whether an attestation of a will out of the room in which the testator is lying, and out of his sight, but in a case in which the testator was able and might have placed himself in a position to see the witnesses when they signed the paper, is a valid attestation: A Court of four Judges equally divided upon the question. *Moore v. Moore's ex'or & als.*, 307

4. In a case of probat, a witness unable to attend the Court, is examined as to the handwriting of a testamentary
740 *paper which had been shewn to him by the propounder of the will, but which was not before him when he gave his deposition. The testimony is admis-

sible, its weight depending upon the certainty of the proof that the paper propounded for probat is the paper that was shewn to the witness.
Nuckols' adm'r v. Jones, 267

WITNESS.

1. In a writ of unlawful detainer, the defendant claiming title under a deed made to himself and another as joint tenants, that other person is not a competent witness

for him to sustain his right of possession.
Adams v. Martin, 107
2. A witness called to prove the handwriting of a paper offered for probat, may be impeached by proof of what she has said about that paper at another time. But neither her capacity to judge of the handwriting, or her credit, is to be impeached by what she may have said about some other paper.
Nuckols' adm'r v. Jones, 267

